JUDGE KRAFT: What exception is there to the failure to produce the original records where they are in existence and available?

MR. STEIN: Only because those records are of some length, Your Honor. Miss Andre can produce them, if that is required, but at least in the past it has not been a necessity to bring these lengthy records down with her.

MR. WORK: Your Honor, with all due respect to the Court, and certainly being as willing as anyone to save the Court's time, as I have previously in this same case stipulated, we recognize that if you are in this position and you do not have an income, there is undue hardship.

JUDGE WOOD: I don't know what more you want.

JUDGE ADAMS: What more can you get?

JUDGE WOOD: They have agreed to that from the beginning.

MR. STEIN: We would be willing to stipulate, if counsel for the Commonwealth would stipulate, to the accuracy of the facts of these records, of the (38) summaries, and it may not be necessary—

JUDGE KRAFT: I don't think he is willing to stipulate to the accuracy of facts when he knows nothing about them. He said he is perfectly willing to stipulate that persons who have no other source of income who are deprived are necessarily in want, and I have no doubt he would be perfectly willing to stipulate, if you

asked him, that the normal human reaction in that condition is just like the animals who move with the seasons, that when the fodder is gone they move to an area where the fodder is available.

MR. STEIN: Well, we then would be prepared to enter into that type of stipulation. I think it might be of value, though, to have the concrete factual situations of individuals who have come into the State for better job opportunities and then have left the State to go to New Jersey or to New York as a result of this requirement. We would be happy to make available to Mr. Work the original records, these case summaries, and then enter into a stipulation about the concrete facts of these records.

MR. ADAMS: I think the three judges here are prepared to sustain the objection. If you want to work out something with Mr. Work on the specific case (39) histories, and you want to stipulate it, of course we will receive any stipulation.

I would suggest that you follow Judge Kraft's suggestion, particularly in view of Mr. Work's previous objection, that he is willing to say when these folks apply for public assistance, general assistance, and are denied that because of the citizenship requirement that Miss Davis was talking about, that they are in want and in need. He is conceding that.

Now, you might ask him if he is also willing to concede that frequently they then leave

Pennsylvania to go into another state to satisfy this need. If you had those two things, I must say I can't see offhand how you can get very much more out of the testimony.

MR. STEIN: Right.

JUDGE ADAMS: That is up to you two. We can't stipulate for counsel.

MR. STEIN: Right. We are prepared to enter into negotiations to a stipulation to that effect, and that would preclude the necessity of Miss Andre testifying to these cases today.

JUDGE ADAMS: Well, she has testified. Do you wish to examine on anything she has testified to, (40) Mr. Work?

MR. WORK: No, Your Honor, I do not.

MR. STEIN: That will be all, Miss Andre. Thank you.

JUDGE ADAMS: Thank you very much.

MR. STEIN: Your Honor, we do have before the Court today a renewal of our application for a temporary restraining order for Mrs. Beryl Jervis.

JUDGE ADAMS: Why don't we hold that up until we complete this testimony and the stipulation.

Are there any other witnesses that you wish to present?

MR. STEIN: We have no further witnesses.

JUDGE ADAMS: You have no witnesses, Mr. Work?

MR. WORK: We have no witnesses, Your Honor.

JUDGE ADAMS: So we are going to close the record as far as testimony is concerned, except for any stipulation that the two of you can agree to along the lines that Judge Kraft indicated.

MR. STEIN: Yes, Your Honor.

JUDGE ADAMS: Is that understood? Is there any objection to that?

MR. WORK: No, Your Honor.

(41) (Discussion off the record.)

JUDGE ADAMS: All of us feel that you might as well proceed with the argument on the entire matter. We have read the documents that you have prepared. We have read the documents that the Commonwealth has filed. We have a pretty good understanding of what is in them and it probably would expedite the entire matter for you to present full argument, and we assume that you are prepared to do that because you were requested to do that. Is that agreeable?

MR. WORK: We are prepared, Your Honor.

JUDGE ADAMS: Is that all right with you, Mr. Stein?

MR. STEIN: Yes, Your Honor.

JUDGE ADAMS: Why don't you just proceed.

MR. STEIN: The claims which plaintiffs put before the Court are three in number. The first is directed, as we have noted earlier, to this right of interstate travel of aliens in this country.

The right of travel itself was spoken to in Shapiro v. Thompson and in United States v. Guest, as being a right which is basic to this Federal Union, although not explicitly mentioned in the Constitution.

It in addition holds forth in cases involving (42) regulation of immigation, State regulation of immigration, Truax v. Raich, which holds that aliens have a right to enter into and abide in states, and in fact, Truax v. Raich is cited by Justice Potter Stewart in the Shapiro v. Thompson concurring opinion, with U. S. v. Guest, as a source of the right to travel in this country. So there are then two bases for the right to travel.

The fact that this citizenship requirement deters aliens coming into this State and in a sense penalizes them when they do come here, forcing them to leave the State, I think is clear beyond a doubt. The Supreme Court in fact inferred from a one-year residency bar that there is a deterrence to people coming in and that there is a penalty or chilling effect, is the term that was used there, upon their exercising this right to interstate travel and coming into states, including Pennsylvania.

In fact, I think afortiori in this case you have something even worse than a one-year residency requirement. You have a complete bar to aliens wishing to enter into this Commonwealth, and the aspect of the right to travel goes not only on the merits of that point, that there is an abridgement of a liberty which is extended to aliens, but it also goes to requiring a (43) compelling state interest test to be applied in this particular case.

I might add that the Commonwealth has claimed that the right to travel only applies to citizens of this country. It is true that in cases like United States v. Guest, or a few of these other cases, that citizens were the parties coming before the Court, although I might add Truax v. Raich included aliens and was solely aliens, but the Due Process Clause has been viewed as one source of the right to travel, and it is clear on the face of the Due Process Clause that that reads:

"No person shall be denied liberty," and Courts begining with Yick Wo v. Hopkins have held that both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment are applicable to aliens.

On the second claim, the Equal Protection Claim, I think one should begin that analysis by looking at the case law, which requires a particular scrutiny of this requirement by the Court. The Takahashi v. Fish & Game Commission established that, as did other case law.

Alienage is a very suspect criteria just like race. It has been equated to race in a number (44) of Supreme Court decisions, and because that is so the Courts have really set a very high threshold of justification upon states to justify this requirement.

In addition, case law substantiates that when you are dealing with a politically voiceless minority, a concrete or insular minority, similarly a Court must give very careful scrutiny to this type of requirement.

On the merits of the equal protection claim, Shapiro v. Thompson is we believe very strong authority for holding that states cannot establish these two classes of claimants for public assistance. Shapiro v. Thompson went through a whole range of state interest, matching it against the compelling state interest test, and voided each of them.

The only state interest which the Commonwealth offers is precisely that the Commonwealth has a right to save money, not to expend that small sum of money for those 65 or 70 claimants.

JUDGE KRAFT: Does the smallness make any difference in your view?

MR. STEIN: Not really.

JUDGE KRAFT: It seems to me you are trying to argue a constitutional point on one side and (45) then say, "Oh, it ought to be thrown out because it wouldn't cost the State much money anyway."

MR. STEIN: Well, we only raise it in terms of its going to the request for injunctive relief in terms of diminimus harm to the State.

In fact, to compare the cost and the numbers to the residency requirement, it is perhaps 1/10 the number of people, and 1/10 the cost involved here, as in the residency case. But you are right in terms of the constitutional claim. I don't think that amount, of course, is particularly significant.

The Supreme Court in Shapiro did say very clearly that the saving of welfare costs cannot be a valid, independent basis for an invidious discrimination, and in fact that is the only basis offered to us by the State in this case today.

JUDGE ADAMS: I don't think that is a correct summary of Mr. Work's briefs. As I understand Mr. Work's brief he looks at the Purpose Clause in the Act and he interprets that because of the specific language as showing a purpose on behalf of the Commonwealth to assist citizens as distiguished from noncitizens, and he says that this is a valid purpose, and that is the basis for the distinction. I didn't think (46) he was saying anything about saving money.

MR. STEIN: Well, I mean, I think in terms of directing a state's interest just to citizens—

JUDGE KRAFT: Suppose Pennsylvania had been immediately adjacent to Cuba when the Castro problems arose and Pennsylvania had in the eastern portion of its borders the same

influx of aliens that Florida has had and that the Federal Government declined to afford any aid of any kind and said that these aliens are being admitted, they have the right to travel, they have settled in the nearest state, which is Pennsylvania, and Pennsylvania is without right to deny them public assistance? The mere fact that there may be a few now—Florida a few years ago no doubt had a great impression that there wouldn't be the overwhelming influx of Cuban refugees that there was—so the fact that it is at the moment so doesn't mean that it will hereafter forever be that way.

Suppose the North Irish and the other Irish get more embattled than they currently are and one group suddenly decides to immigrate to we will say the Scranton-Wilkes-Barre area in Pennsylvania, which has quite a heritage of Irish forebears?

MR. STEIN: Right, but I think when that happens, Your Honor, when you have the enormous influx—(47) and I think the Cuban example is a good one—in those cases one finds a national response to the problem.

JUDGE KRAFT: Suppose one doesn't find the national response? You can't count on the national response as a thing certain. Suppose Congress is beset with so many other problems it says, "We simply can't do anything about it" and the state into which they move after they get here, whether they arrive directly from we will say Cuba or whether they land at Cape May and

come across New Jersey into Pennsylvania, it could be great numbers. The political changes in other nations in the world historically have begotten migrations into this country, and historically, at least in my view, a large part of the migrations thus begotten have had tendencies to gravitate to particular areas, which is humanly understandable.

MR. STEIN: Right, but our only real answer to that—and in fact that involves the preemption argument about the national Government's role, and they have a very substantial role in this area—is that at least as to the only examples we can think of—and I think the Cuban example is precisely that—the Federal Government in the Cuban example did make provision for substantial amounts of public assistance; no (48) state money, 100 percent of Federal money. I am fairly certain if history teaches us anything that the Federal Government faced with that problem does react, if not in the Cuban way of providing the Federal money, then in fact barring aliens from coming into this country.

JUDGE KRAFT: Suppose we should decide this case in your favor and the State should then enact legislation repealing entirely this form of welfare in the State. I am sure that would have some effect on the inclination of people to travel. Do you think it would be unconstitutional then for the State to abolish entirely this what I will call Form 5 of the General Welfare Plan?

MR. STEIN: No, it would not be unconstitutional. There is no constitutional duty to provide welfare, but there is a constitutional duty that when welfare is provided it be provided on a nondiscriminatory basis, and that really is the issue before the Court today, the fact that there is assistance provided but it is provided on a discriminatory basis.

I might add that the Supreme Court opinion of just a week ago, Goldberg v. Kelly, did at least view public assistance as not being mere charity. In fact, they quoted the Preamble to the U. S. Constitution that it (49) is part of our purpose of providing the general welfare and to secure the blessings of liberty to all people within the borders of the United States. So that although it is not a constitutional right, these courts, the Supreme Court and the lower district courts, have viewed it as of extreme importance, and perhaps of the same importance as constitutional values in this country.

To summarize, then, on the equal protection argument, the standard which is applicable is the compelling state interest standard of Shapiro v. Thompson, because of two reasons: One, there is a right to travel involved here, although perhaps the Court does not have to rule totally on whether there is an abridgement here. There is that interest here, that right which comes into play in this case; and secondly, there is the very subsistence of claimants at stake.

The Supreme Court's opinion in Shapiro can be viewed as really two-hinged, as two bases

to the compelling state interest doctrine: One, fundamental constitutional right of right to travel, and the other the fundamental interest of providing subsistence income to someone who will have no other source of living, and the Court did mention that one's very food, clothing and shelter is at stake, and that is part of the Court's (50) holding that a compelling State interest is required in this case.

As we said before, just providing for one's citizens does not appear to meet that standard of compelling state interest.

The Courts in the preemption area—and I might add cases like Takahashi really go off on both equal protection and preemption grounds, that states like Pennsylvania cannot not only interfere with Federal regulations in this area but cannot enter into the area of regulation of aliens.

The fact that there is interference is very clear. The Immigration and Naturalization Law states that it does bar paupers into the country and does say that people who are likely to become a public charge within five years who cannot affirmatively show that their condition preceded their entry into the country, that is, that the need for assistance did not arrive after their entry into the country, those people are subjected to deportation from this country.

Now, the State citizenship requirement cuts enormously broadly. It bars aliens irrespective of their length of stay in this country, irrespective of when their need for assistance arose in this

country, and (51) on those two points alone this goes contrary to Federal law.

In addition, there are requirements, there are provisions in the Civil Rights Act of 1964 and in 42 U. S. C. 1981 which extend privileges to aliens. They are really results of the Fourteenth Amendment's equal protection, which extends an equality of privileges to all, including aliens.

The Commonwealth I think on this preemption argument has relied very heavily on somewhat old case law resting upon the so-called proprietary interest rationale, People v. Crane, the leading case there, and this proprietary interest or special public interest doctrine has been largely repudiated. Takahashi v. Fish & Game Commission I think sounded the death knell, in the words of the California Supreme Court this past year in Purdy, to that doctrine.

JUDGE KRAFT: What would you say if a law enacted by a state, we will say anent, one, fishing and two, hunting, that imposed a $5 fee for resident fishing licenses and resident hunting licenses each, $25 for nonresident fishing licenses and nonresident hunting licenses, and provided that licenses may not be issued to aliens and provided that no hunting or fishing could (52) be done within the borders of the state on state-owned lands without a license?

MR. STEIN: The clearest invalidity of that is the prohibition against aliens, but since it does involve an area of conservation and wild

life, that happens to be one of the few narrowly carved exceptions which the special public interest doctrine represents.

JUDGE KRAFT: Well, is the wild life regarded as the property of the state?

MR. STEIN: Well, some Courts have viewed it as such, and these are decisions going back quite a bit. There hasn't been very much recent case law. The most recent case law, of course, is Takahashi v. Fish & Game Commission.

JUDGE KRAFT: Yes, but Takahashi was offshore fishing. That wasn't within the boundaries, the clearly undisputed boundaries of the state.

MR. STEIN: Well, they also included a claim to the three-mile limit off California, but granted that the aspect of that being a property of the state is not as clear cut there because it was fish outside the borders of the state, but I think even if that is a valid doctrine today—and Takahashi suggested it is not—(53) I think it is a very narrowly carved one which is not applicable to this case.

If one analyzes the People v. Crane case, which has a similar proprietary interest rationale, that really goes off on grounds of the fact that public employment or employment on public works is a privilege, and as Justice Cardoza said over half a century ago, privileges can be denied to aliens.

JUDGE KRAFT: Don't say that was sustained. Most of us on the bench here were born more than half a century ago, and we don't feel, as bright as young people like you are, that you know it all yet.

MR. STEIN: Well, I surely didn't mean to imply that, Your Honor. I only meant to imply that recent case law, Sherbert v. Verner and the Goldberg v. Kelly case decided last week really sounds the demise of this distinction between privileges and rights, and that one cannot by just calling something a privilege somehow erect that as a separate category of things which can be denied to aliens but granted to citizens. That really is the rationale of People v. Crane.

In addition, People v. Crane mentioned that aliens don't pay taxes, and that was another aspect to the case, and it is clear at least in our named (54) plaintiffs they have been employed, they have paid taxes to Pennsylvania, as have other aliens in the class.

I just might add in concluding this point on the preemption ground that the Purdy & Fitzpatrick v. California case is really the most recent case, a 1969 case of the California Supreme Court, and that gives a very detailed review of the prior case law, and I think that plus Takahashi is the authority which substantiates our point that this is a violation of the preemption doctrine.

JUDGE ADAMS: Purdy doesn't mention Crane.

MR. STEIN: I am not certain whether it cites Crane in particular. It does I believe cite two related cases of proprietary interest.

I am just refreshing my memory. We did deal with this case at page 19 of our brief. Yes, it does say:

"May the State simply favor its own citizens in the disbursement of public funds?"

This is really the basis I think of the Commonwealth's claim of preferring one's own citizens.

It goes on to say that aliens support the State of California with their tax dollars, and they (55) continue about the stake which an alien has, and then:

"Finally, any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis . . ."

JUDGE KRAFT: Wasn't that the state which rounded up all the American born nisei?

MR. STEIN: That is true, Your Honor, during the war.

JUDGE KRAFT: Things have changed in that State.

MR. STEIN: Right; that they have, fortunately. And in fact, if one looks to those times and one looks to the period of 1939, one sees that the Pennsylvania Legislature in addition to passing this law was passing its Alien Registra-

tion Act, and it is that Act which passed within five days of the citizenship requirement which arose in Hines v. Davidowitz, and that case went up to the Supreme Court and there was very strong language there that where there is a full scheme of regulation in an area like naturalization and immigration, a state cannot interfere with, complement, set any additional requirements, really just cannot at all regulate in that area, and I think that is very strong (56) authority for striking down a citizenship requirement.

JUDGE KRAFT: Might that not be a good ground for a basis of distinction on the part of the State in saying that, "Since we have no voice in the admission, and since that is a matter solely within the control of the Federal Government, we will provide welfare generally for our own citizens only and let the Government that has preempted the field make the provisions for those whom they admitted in exercise of their preemptive rights"?

MR. STEIN: I don't think it is totally accurate to say that Pennsylvania has no voice in this area. In our constitutional system Pennsylvania has representation in the Senate and the Congress to make its voice heard as to the regulation of aliens, and I think that presents at least Pennsylvania with a basis for getting its say or having its problems heard in a national forum. But we do maintain, though, that the Congress has set very clear requirements about admission

of poor people into the country and as to whether they can in fact stay in this country, and because they have done so, at least Pennsylvania as one state is forbidden from setting any of the requirements that they have, particularly the citizenship requirement that is before the Court in this area.

(57) That concludes our argument. I just might make one very brief reference to Mrs. Jervis. We did seek a temporary restraining order some time ago which was denied without prejudice. We do at this point wish to renew that application, and particularly in light of the fact that Mrs. Jervis did apply for assistance at the end of February, some four or five weeks ago, and she has been served with a notice of distraint from a constable for failure to pay rent. We think—

JUDGE KRAFT: How long has she been here from Panama? I have forgotten.

MR. STEIN: Mrs. Jervis I believe has been here close to two years.

JUDGE KRAFT: How old is she?

MR. STEIN: She is 57 years old.

JUDGE ADAMS: Mr. Work, do you wish to address yourself to the Mrs. Jervis application at all?

MR. WORK: Only, Your Honor, that I would renew my objection to the granting of a temporary restraining order for the same reason that I voiced objection to it before.

I think, first of all, that assuming every case of undue hardship that presents itself to the Court, regardless of the nature of the case, is a ground for a (58) temporary restraining order is somewhat a unique situation. Secondly, the granting of a temporary restraining order in such a case has the effect of the Court granting a mandatory injunction to the State to violate a present presumptive constitutional State statute. I think for those reasons, Your Honor, we oppose it.

JUDGE WOOD: We do have the unfortunate situation, though, where I did grant one as to Mrs. Leger and then I stopped issuing them every week or so. We have one outstanding.

JUDGE KRAFT: Of course we can always please the plaintiff by vacating that until we make a decision on the entire matter, can we not?

MR. STEIN: That is an option. We would question that, obviously.

I do want to point out that this notice of distraint is a new fact going to irreparable harm which was not before Judge Wood.

JUDGE WOOD: Oh, now don't say it wasn't before me. Mr. Work is indicating he agrees. Why, irreparable harm is clearly indicated.

MR. STEIN: And going to the standard of issuing a temporary restraining order.

JUDGE WOOD: That wasn't the point. The point was you started this action over three months ago. (59) You were in an awful hurry then. Then a week later or two weeks later, perhaps a month later, you added another defendant. Then you proceeded to make a class action of it. I just didn't know when we would stop with the restraining orders.

MR. STEIN: Right. Our only reason for requesting the restraining order today—and we are aware that at least preliminary and permanent injunctive relief could and obviously would provide relief for Mrs. Jervis—there is at least irreparable harm which is before the Court today in terms of her available resources of food, clothing and shelter, and the latest being this notice of distraint. The standard, of course, for a temporary restraining order is merely, one, a claim which is not capricious or wholly unreasonable and Judge Joseph Lord in the Residency Case, Smith v. Reynolds, issued restraining orders for the named plaintiffs there and for the added plaintiff, and that had the same effect of this mandatory effect of providing assistance, as did Judge Davis in Williford v. Laupheimer in this District, and Judge Caleb Wright sitting by designation in Cooper v. Laupheimer, and that was a class temporary restraining order, the latter.

(Discussion off the record.)

(60) (Recess, 11:20 o'clock a.m.)

MR. WORK: May it please the Court, Your Honors, I would like to say briefly that

this case in my opinion represents another in a long line of cases in which we have found or recognize a social wrong, where plaintiffs say, "Well, since you haven't responded to the social wrong, clearly your failure to respond must be unconstitutional in one sense or another."

I recognize certainly as fully as anyone that there are social ills. My heart is as big as anyone's to those ills. However, Your Honors, I submit that I don't believe that in every case where we find a social ill we can immediately look to the State and say, "You have to rectify this situation", because I don't believe that the Constitution requires that, and I certainly don't believe that morality requires it either.

The Fourteenth Amendment, as we have conceded in our brief, certainly applies to aliens. We don't deny that. However, we submit to Your Honors that the cases which have been cited in plaintiff's brief as well as in defendant's very clearly indicate that the State may distinguish between citizens and aliens (61) if the distinction bears some reasonable relationship to a legitimate state objective, and for the State's objective, Your Honor, we submit the only place that we can turn is the statute itself, and I beg the Court's indulgence to read very briefly the Preamble to the statute which I have set forth in my brief, which I think sets forth the State's objective:

"It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by provid-

ing public assistance to all its needy and distressed; that assistance shall be administered promptly and humanely with due regard for the preservation of family life and without discrimination on account of race, religion or political affiliation; and that assistance shall be administered in such a way and manner as to encourage self respect, self dependency and the desire to be a good citizen and useful to society."

Therefore, Your Honor, we state the purpose read in its entirety is to promote the welfare of citizens of the Commonwealth.

JUDGE ADAMS: Do you have page 4 of your brief in front of you?

(62) MR. WORK: Yes, Your Honor.

JUDGE ADAMS: You have read this rather quickly, but just to make my point:

"It is hereby declared to be the legislative intent to promote the welfare and happiness of all the people of the Commonwealth, by providing public assistance to all its needy and distressed . . ."

MR. WORK: That is right, Your Honor.

JUDGE ADAMS: It doesn't say "all its needy and distressed citizens," it says "to all its needy and distressed." When it uses the word "citizens" it is down near the end of the section you read, and it says ". . . and the desire to be a good citizen . . ."

MR.WORK: That is right, Your Honor.

JUDGE ADAMS: It doesn't say "for good citizens".

MR. WORK: No, it doesn't say "for good citizens," Your Honor, but we submitted in our brief, and my only answer to the Court's argument is that the Preamble has to be read in its entirety, in that the reference to the word "people", we are referring to citizens as shown by the concluding clause of the paragraph.

That, however, doesn't answer the question (63) before the Court, because the question then becomes if we even assume for the sake of argument that that is the State's objective, the question then becomes whether or not that objective is legitimate, and that of course brings us to the cases which plaintiffs have cited and which we have also cited, dealing with the supremacy clause, and those cases, of course I submit, Your Honors, there is a clear distinction between those cases and the case presently before this Court, and I include in those cases the most recently decided case by the California Supreme Court.

I submit to Your Honors that those cases all involved a very fundamental right, and that was the right to earn a livelihood, and, Your Honors, I am sufficiently naive to feel that there is still a part of that great American ideal left that we can draw a distinction between the right to earn a livelihood and the right to receive public assistance, notwithstanding the language of the Supreme Court in the Goldberg v. Kelly case, which referred to a statutory right of entitlement.

I would point out that as I read the opinion in Goldberg v. Kelly, Your Honors, the Court has not even in that case said that the right to receive public welfare is a constitutional right. In fact, as (64) Your Honors will recall from the opinion, the Court specifically avoided that specific question by saying it was a right of statutory entitlement.

JUDGE ADAMS: Well, it does say this:

"The constitutional challenge cannot be answered by an argument that public assistance benefits are a privilege and not a right."

That is from the majority opinion by Mr. Justice Brennan.

MR. WORK: That is correct, Your Honor, but I believe Your Honor will note in the body of the opinion the Court later at least clarified that situation to say it is a statutory right of entitlement by stating that the Federal Government and the states had seen fit to grant this right and therefore would have to do so in accordance with the terms of due process.

JUDGE ADAMS: But isn't Mr. Justice Brennan suggesting along the lines hinted at by Judge Kraft before? You may not have to grant public assistance, and if you don't pass a Public Assistance Act that is not unconstitutional, the failure to pass the Act, but once you pass the Act, the Act must be made available to all persons under the Equal Protection Clause, which does not go off on citizenship. Isn't that the question (65) in the case?

MR. WORK: I think it is, Your Honor, and I think the cases which we have referred to, the Truax v. Raich, the Takahashi case, all of those cases, the Crane case in New York, refer to that right but then go one step further and develop the special public interest doctrine which says the state in its administration of its public funds may constitutionally restrict the use of those funds to citizens.

By the way, Your Honors, in saying that the Takahashi case overruled or laid to rest the case of People v. Crane, I would call the Court's attention to the fact that the People v. Crane case was not only affirmed by the Supreme Court in 239 U. S. 195, but as late as 1961 was cited as authority in the Cafeteria and Restaurant Worker's Union v. McElroy, 367 U. S. 886.

JUDGE ADAMS: Was it cited as authority?

MR. WORK: Well, I think I have used the wrong word when I said it was authority, Your Honor. At least as of that moment the Supreme Court was not saying that the case was laid to rest, and this was a great deal subsequent to both the Takahashi and the Truax cases.

JUDGE ADAMS: 1961.

MR. WORK: Now, the question, of course, (66) becomes again under the Supremacy Clause whether or not the Federal Government has expressly preempted this field. To that I would say several things, Your Honor, the first of which is that the Pennsylvania statute dealing with the granting of public assistance does

not attempt in any way to regulate aliens. It is regulating the public funds administered on behalf of the Commonwealth and establishing an eligibility for those funds.

The eligibility indirectly, of course, would have the effect of denying to aliens the right to public assistance. However, I submit, Your Honor, that in addition to not attempting to regulate aliens, such a purpose is entirely consistent with the Federal statutes on the subject, and I call the Court's attention to those sections of the statute which have been cited in both briefs with respect to 1182(a)(7) of Title 8, 1182(8), 1182(15), 1183 and 1251, the basic reasoning of which is that a person may not be admitted to the country if he is indigent. In some cases if he shows any indication of becoming indigent he may be required to post a bond. If he becomes indigent within five years after admission to this country for causes which, with the burden being on the alien to show, did not occur prior to his entry, he may be deported.

(67) At this point I should like to point out to the Court that both of the named plaintiffs before this Court at the present time are technically I believe subject to the provisions of that deportation statute. While the stipulation of facts which counsel has said indicates that these causes arose after the entry of the individual, I would submit that such a stipulation of facts would not be binding on the Federal authorities. Therefore, while I do not raise it for any part of

the Court's decision in this case, I merely point it out to show that even where plaintiffs have become indigent and seek the redress through the Federal Court, that it may well be that the Federal purpose is not to be thwarted thereby, because the Attorney General still in both cases here would have the right to commence such deportation proceedings, which brings us to the so-called right to travel.

First of all, I again point out to the Court that the conditions upon the entry of an alien into this country, that is, requiring that he not be indigent, should therefore indicate that the State's laws with respect to indigency would have no effect on the determination of that alien to settle in one state or another.

(68) Secondly, the right of the alien to travel freely throughout the United States I submit to Your Honors has not been established by the Shapiro case or any of the other cases cited in that field. Those cases all specifically and very specifically state "citizens". However, even if we admit for the purposes of argument that the right to travel is extended to aliens under the Due Process Clause, we submit, Your Honor, that the public assistance policy of this Commonwealth with respect only to general assistance categories does not interfere with that right, and in fact as Judge Kraft so aptly noted, perhaps it would stimulate it in some instances.

Also, Your Honors, I think that there are several important things to note, and that is with

regard to Pennsylvania's other statutes affecting this general area, the statutes have clearly expressed an intention not to discriminate among aliens.

I call the Court's attention to the section of the Public Human Relations Act which is set forth in our brief with respect to employment, housing accommodations, any of those matters which have been found to be matters of right under the Constitution. We clearly set forth it is our intention not to limit those to citizens of Pennsylvania, and only in the very general area of (69) public welfare have we taken to draw a distinction, and the purpose I submit to Your Honors is not to save money in that sense but to conserve the assets of the Commonwealth of Pennsylvania for the people of Pennsylvania, the citizens of Pennsylvania, which is clearly expressed in the statute.

Finally, I think that with respect to the Takahashi case, which, by the way, both it and Truax expressly recognized the People v. Crane case in the decisions and distinguished the right to earn a livelihood from the right to receive public charity, the Takahashi case, as the Court very appropriately noted, involved a much more invidious discrimination than between aliens and citizens, and that is that it discriminated even between aliens, applying only to those of Japanese ancestry.

With respect to the situation which Judge Kraft noted, I think that the two situations are

very analogous because we have had instances of a distinction being used in the area of fish and game and other natural objects of bounty within the Commonwealth which are not said necessarily to be objects of proprietary interest, but that the Commonwealth as trustee of those rights has the right to delve them out among its (70) citizens, as it sees fit, and as Your Honors are aware, and I am sure Judge Kraft was aware when he asked his questions, we do in our statutes draw a distinction with respect to fishing privileges and hunting privileges, all areas of that nature, with respect to aliens and citizens of the Commonwealth.

JUDGE KRAFT: Do you know whether there is any such provision in the statute which licenses persons to carry firearms? Are you familiar with the statute? Do you know offhand whether or not there is a provision in that statute which limits the right to apply for such a license to citizens?

MR. WORK: You are referring now to the Uniform Firearms Act?

JUDGE KRAFT: Yes.

MR. WORK: Yes, Your Honor, there is a provision in that statute which restricts the right of aliens from carrying firearms.

The Court has also noted some very important distinctions with respect to what we consider rights which are not afforded to aliens, the right to hold public office, the right to vote, any

number of areas in which with respect to citizens the Courts have long since held they are rights, but nevertheless have as of (71) this time not said that they had to be afforded to aliens.

So that I think, Your Honors, that under the special public interest doctrine the state is clearly within its rights in the general assistance categories of limiting those objects of its bounty to citizens.

With respect also to those same areas, we have the plaintiff saying, "But nevertheless these individuals pay taxes", and of course I think that also applies equally to the areas of which I have just mentioned. They also pay taxes, income taxes and otherwise, in the same areas. However, they are still denied certain privileges whether or not they are taxpayers.

I think the tax area is also important from the standpoint of saying that this perhaps restricts people from coming into Pennsylvania when they are talking about the noncitizenship eligibility. I think this might also be said of Pennsylvania's tax structure. This perhaps would deter certain aliens from settling in the Commonwealth. If plaintiffs' theory were valid, we would then say that those taxes are not constitutional because they infringe upon the right of people to come into the Commonwealth. We submit, Your (72) Honors, that the Supreme Court has certainly not said that to date. Thank you.

JUDGE KRAFT: Counsel, we have concluded that we would like the Commonwealth's counsel—and if it can be stipulated by plaintiffs' counsel we would welcome it—to list in a supplemental brief or memorandum all legislation in Pennsylvania which makes distinctions between citizens and aliens respecting the enjoyment or the omission of the enjoyment of anything, and I would like them listed very briefly categorically with a reference to the statute, and then if either counsel wants to supplement what they have said in their present briefs, by making a further written argument as to analogy or want of analogy, counsel are invited so to do.

MR. WORK: Does Your Honor want those in chronological order as well as—

JUDGE KRAFT: I don't care. I would say I would prefer them in category form. In other words, by way of illustration, right to hold office, right to vote, right to be licensed to hunt, right to be licensed to fish, right to be licensed to carry firearms, and whatever other things the Legislature has in this State acted upon.

JUDGE ADAMS: I thought we would get to (73) the question of time. You are probably down from Harrisburg right now, aren't you, Mr. Work?

MR. WORK: Yes, Your Honor.

JUDGE ADAMS: Would this be a good time for you and Mr. Stein to try to get together on the stipulation, or is that inconvenient for you?

MR. WORK: Fine, Your Honor.

JUDGE ADAMS: We don't want to impose, we just want to do something that is reasonable. Perhaps you could get the first stipulation which dealt with the testimony in what, in the next few days? Is that reasonable?

MR. WORK: Yes.

JUDGE ADAMS: I would guess that the material that Judge Kraft is referring to will take you a week, but we would rather hear from you as to an estimate.

MR. WORK: We would like the Court to give us a week, Your Honor. Within that time we will also try to—

JUDGE KRAFT: We want to expedite it, but we don't unreasonably want to hamper either side in that research. Tell us your own view as to what you would regard as a reasonable time to compile that and (74) get it in written form to transmit it to the Court. Then we will hear what your adversary has to say.

MR. WORK: I would say certainly 10 days would be a maximum time, Your Honor, and we would try to shorten that by a great deal.

JUDGE KRAFT: Mr. Stein?

MR. STEIN: I would agree exactly with that.

JUDGE KRAFT: All right, because I see no reason why you cannot move on it simultaneously.

MR. STEIN: Right, and I think we can.

JUDGE KRAFT: Very good. Thank you.

JUDGE ADAMS: Why don't we have the stipulation before the end of the week. Why don't we have that filed before the end of the week, but we would suggest that you try to dispose of it while you are both here, and we will have the statutory material that Judge Kraft has referred to within the ten days that you have suggested.

Is there any objection to that?

MR. STEIN: No. If the Court please, we would like to make rebuttal argument. We could make the rebuttal in our supplementary memorandum of law if the Court sees fit.

JUDGE ADAMS: Would you, please?

MR. STEIN: Yes.

(75) And, finally, we do have our motion for a restraining order for Mrs. Jervis still outstanding and we would like to know whether the Court wishes—

JUDGE ADAMS: We have agreed that this would be a combined temporary and final injunction proceeding. There is no objection to that. We will dispose of those together, but you are pressing us now on the temporary restraining order?

MR. STEIN: Yes, particularly because of the specific harm for Mrs. Jervis.

JUDGE ADAMS: They are the only two things outstanding, plus the objection that you made, Mr. Work, regarding some of the testimony.

MR. WORK: Yes, Your Honor.

JUDGE ADAMS: What is the pressing nature of this document you have referred to before?

MR. STEIN: Well, Mrs. Jervis received a notice of distraint that the constable will levy upon her furniture listed.

JUDGE ADAMS: How much is owed?

MR. STEIN: Well, the total sum, rent plus all the fees involved, is $55 and change. In addition she has food stamps and she has informed me today she has about $3 worth of food stamps, so that (76) her ability to purchase food is—

JUDGE ADAMS: I thought all of these constable's restraints were enjoined by a three-judge court.

JUDGE WOOD: That is what I thought.

MR. STEIN: The confession of judgment has been temporarily restrained. This gives her notice that there will be an action taken against her in Landlord and Tenant Municipal Court and does advise her that the constable is authorized to levy on her personal property for the rent due, listing her personal property.

So it is both this notice of distraint and her food situation, which is close to having no food

at all available in her home. One month's assistance, if that would be it, I think would be clearly deminimus in terms of temporary restraining order standards.

JUDGE KRAFT: Aren't there many other public charitable agencies where she could get temporary relief, rather than ask us as a three-judge court now called on to decide the whole question? I wouldn't want any action taken by me as a member of this Court now to be misread now as indicating prospectively what I might intend to do after I have had an adequate opportunity to review it, study it and come to a final conclusion.

(77) MR. STEIN: We understand.

JUDGE KRAFT: I think certainly charitable groups like the Salvation Army, Red Cross and the like, with the peculiar circumstances that exist here where there is an application pending in court would afford her some temporary relief.

MR. STEIN: Well, it appears that there are no available resources from other community sources. We could put testimony on to that effect. Her financial situation is really extreme. She did apply for assistance six weeks ago.

JUDGE KRAFT: Has she gone to the Panamanian Consul?

MR. STEIN: I don't believe so.

JUDGE KRAFT: She is a Panamanian national.

MR. STEIN: I don't believe so, but the three-judge court statute, 2284, allows a single judge of the three-judge panel to provide temporary relief, or whatever temporary relief is required.

JUDGE KRAFT: I know, but we have now convened and we have heard it as a three-judge court, and I think any action that we take now, since none was granted in her case heretofore, is to easily susceptible (78) of misreading as to what the ultimate conclusions of the Court will be.

MR. STEIN: Well, I think the nature of it being a temporary restraining order is clear, at least would be clear to everyone before this Court today.

JUDGE WOOD: I don't think we have time to listen. I listened to this argument from you before and I am not going to listen to it again. We know all the facts. We know all the facts. If the three of us decide you will get it, you will get it. If we decide you won't, you won't. If you want to refer it to one judge, I will be glad to hear it, but I won't make a decision today.

MR. STEIN: We would be happy to bring it before Your Honor.

JUDGE WOOD: I have already heard your argument on that. The mere fact that this paper was served doesn't change it any. It is a little more shocking, perhaps, but that has been the trouble with your case.

I don't want to repeat myself, but you started this three months ago. You started with Mrs. Leger and then a while later you had Mrs. Jervis in. Then you bring a class action in. Now, are you going to come in next week and ask for a restraining order for somebody (79) else?

MR. STEIN: Well, when we filed this action Mrs. Jervis was not a party plaintiff.

JUDGE WOOD: Of course she wasn't. Why wasn't she? She has been here six months, you say.

MR. STEIN: But at that time she had not applied for assistance and was not denied assistance. Your Honor did deny the temporary restraining order without prejudice, that is quite true.

JUDGE WOOD: That is right, and it is still without prejudice.

MR. STEIN: If you will entertain our application for that temporary restraining order—

JUDGE WOOD: Well, I won't do anything that my colleagues don't agree to, obviously.

JUDGE ADAMS: Why don't we take this matter under advisement You will hear from all of us or from Judge Wood individually on that question.

MR. STEIN: Thank you.

JUDGE ADAMS: Is there anything further that is to be said? If not we will ask that court be adjourned at this time.

EXHIBIT P-1

GENERAL ASSISTANCE AND THE ALIEN IN PENNSYLVANIA

1939 *Amendment of the Public Assistance Law Denying General Assistance to Certain Aliens.* (Act of 1937, June 24, P. L. 2051, Sec. 9(d); Act of 1939, June 26, P. L. 1091, Sec. 9(d). Eligibility for Assistance.)

The Public Assistance Law of 1937 provided for *all needy residents* of Pennsylvania.

As war threatened the United States in 1939, many anti-alien bills were introduced in Congress and in state legislatures. In our own legislature, Representative John E. Van Allsburg of Erie County, introduced in 1939 an omnibus bill making a number of changes in the public assistance laws. Some parts of this bill were defeated and some provisions have since been repealed, but the provision in regard to aliens still remains law. This provision reads as follows:

". . . Other persons who are citizens of the United States and also have a settlement in Pennsylvania, and *all aliens* who have within two years previous to the first day of January, one thousand nine hundred and forty, filed their declaration of intention to become a citizen and who have a legal settlement in Pennsylvania, and need assistance to enable them to maintain for themselves and their dependents a decent and healthful standard of living, and who do not require institutional care because of physical or mental infirmity."

This amendment limited the eligibility of aliens for General Assistance to those who took out "first papers" between January 1, 1938 and December 31, 1939.

In October, 1946, guided by the opinion of the Attorney General, the Department of Public Assistance ruled that aliens who have not become citizens were no longer eligible for General Assistance after January 1, 1947. The reason for this ruling was that "first papers" are valid only for a period of seven years.

In December, 1946, the Attorney General declared, on the basis of a revised opinion, that aliens who had declared their intention to become citizens between January 1, 1938 and December 31, 1939, had acquired "continued eligibility" and are entitled to General Assistance.

During the 1947 session of the State Legislature remedial legislation was introduced in the form of House Bill 1098 (Helm) and House Bill 656 (Bower). H. 1098 passed both Houses and was sent to the Governor on June 4, 1947, but before he had signed it, both Houses recalled it for amendment of the portion which dealt with care of the infirm and chronically ill in public institutions. The amendments were controversial, the time was short, and the bill died with the end of the session. Meanwhile, H. 656, which only repealed the alien provision, had passed the House but died in the Public Health and Welfare Committee of the Senate when it appeared that H. 1098, which carried the same provision, would become law.

Now, in 1949, during the present session of the State Legislature, the same remedial legislation has been introduced for the removal of restrictions against granting General Assistance to aliens.

Data on Aliens in the United States.

The number of aliens in this country has shown a remarkable decrease in recent decades. This decrease is due primarily to restrictive immigration laws, and the recent war, which prompted many aliens already in this country to apply for citizenship.

The Table below gives the number of immigrants admitted to this country during the years 1901 to 1947.

Immigration to the United States
1901-1947

(Source: 1947 Annual Report of the Immigration and Naturalization Service, Department of Justice.)

Period	*No. of Persons Admitted*
1901-1910	8,795,386
1911-1920	5,735,811
1921-1930	4,107,209
1931-1940	528,431
1941-1947	426,965

It is quite apparent from the Table above that with the enactment of the Immigration Act of 1924, which established an annual immigration quota of 153,744, the number of immigrants to this country fell drastically. Also, immigration figures taken from the Immigration and Naturalization Service Annual Report for 1945 reveal that for the period 1931-40, there was a net increase of only 68,693 immigrants, since during the same period 495,738 immigrants left the coun-

try. In the period immediately preceding and following the war (between 1938 and 1947), 2,370,089 aliens were naturalized, against 648,614 newly admitted immigrants.

According to the Alien Registration figures, at the end of 1942 there were 4,280,056 aliens residing in this country. The median age of the alien in 1940 was 48 years as contrasted with the median age of 28 years for native born, and 64.5 percent of the aliens were 45 years or over. Of the total registered aliens, 70 percent came to this country before 1924, and of these, over 900,000 came here prior to 1906. Approximately 700,000 aliens were found to be illiterate.

There is good reason to assume that the number of aliens is constantly declining and that within a short period of years the number will be insignificant. From 1942, (the year for which we have the Alien Registration figures) to 1947, only 346,408 new immigrants were admitted against a 1,236,280 who were naturalized. It is a well known fact to Immigration and Naturalization authorities that recent immigrants "declare their intention to become citizens" almost on the day of their arrival, and take out their citizenship papers as soon as they meet the five years residence requirement. In addition, as indicated above, the aliens represent an aging group of the population and with the passing of years their number is greatly reduced.

Aliens in Pennsylvania Receiving Public Assistance.

The number of aliens in Pennsylvania in 1940, as shown in the Alien Registration, was 365,192 or 3.6 percent of the total state population.

According to a report submitted in 1939 to the State Senate by Howard L. Russell, Public Assistance Secretary, a total of 50,144 aliens were on relief rolls in Pennsylvania. Of these, 43,131 aliens were receiving General Assistance; 3,659, Old Age Assistance; 670, Blind Pensions; and 2,684, Aid-to-Dependent-Children. Included in the total were 13,200 aliens who had applied for citizenship. In 14,200 families with 42,000 citizen dependents, the head of the family was an alien. In 3,437 families in which the head of the family was a citizen, there were 3,523 alien dependents and 11,124 citizen dependents.

In 1947 there were 1,310 aliens receiving General Assistance as a carryover from the period before the citizenship requirement went into effect on January 1, 1940.

Two Sample Studies of the Dependent Alien.

In April, 1947, an effort was made to determine some of the characteristics of the dependent alien.

The Allegheny County Board of Assistance, in cooperation with the Public Charities Association, the Federation of Social Agencies and four private case work agencies conducted two studies and gathered pertinent information in respect to aliens on general assistance and those receiving aid from voluntary agencies in the community.

The study of the Allegheny County Board of Assistance included all of its 391 aliens on relief. The four private agencies examined 48 aliens who were receiving financial aid from them. Both studies showed a striking similarity. The dependent alien is, generally speaking, an old, sick and lonely person.

The Allegheny County Board of Assistance caseload of aliens showed that 79 percent were 55 years of age or over; with the men, as a group, older than the women. A further study of every fourth case in this group, representing a total of 84 aliens, showed that health defects were almost universal among them and illiteracy was common. Seventy-six of the 84 aliens had some handicapping defect. The most frequently occurring disabilities among the men were mental illness or defect, rheumatism, heart disease, visual handicaps, hernia. Only 16 of the 84 aliens, or 19 percent, could be called literate in respect to the English language. Since literacy is a naturalization requirement, it would seem that 81 percent of these aliens were not even eligible to become citizens. Half of this group blamed their failure to complete the citizenship process on lack of educational requirements.

While nearly two-thirds of the men had never worked in any other capacity than as common laborers, and about the same number had not worked for more than five years, the majority of these aliens had a long history of productive work in the past. Only 29 have worked less than 10 years in the United States, while 24 had worked from 10 to 20 years and 16 from 20 to 30 years. Four men had worked in the United States for more than 35 years.

These 84 aliens are not newcomers to our shores; none of them had been in this country for less than 20 years. The great majority (87 percent) had been here more than 30 years and none had been in Pennsylvania for less than 10 years.

The 23 alien men and 25 alien women receiving financial aid from the four private agencies were also an aging group of people. Nearly half of them were over 60 years of age. More than half had been here longer than 35 years and only two had been in the state less than 10 years. Like the aliens receiving public aid, they were for the most part persons who lived alone and had few, if any, relatives in this country. More than half of them were in very poor health. Most of them had been held back from attaining citizenship status because of lack of education or inability to prove legal entry to this country. Only a few had failed to become citizens through their own neglect.

Both sample studies show that we are dealing with people who had come to this country years ago, when our gates were wide open to all newcomers and our industrialists were seeking to attract workers from other lands with promises of untold prosperity. Many persons who came through these gates were able to adjust their golden dreams to the realities of work and opportunity. Others, plagued by misfortune and handicapped by language difficulties and lack of special skill, were unable to build up security against illness and the decreasing industrial usefulness of advancing age. Uneducated and born to other traditions, some perhaps understood poorly the importance of the privileges and responsibilities of citizenship. Their failure in this respect does not make less real their present inability to help themselves without the aid of the society in which they have long worked and lived.

New Immigrants and Displaced Persons

Immigration to this country is nowadays limited and well regulated. Precautions are taken to avoid the admission of persons who might become public charges. Before a visa is issued, the immigrant has to meet certain health standards, pass a literacy test and prove to the United States consular authorities that he will not become a public charge. If he does become a public charge within five years from the time of his entry, he is liable to deportation. The Immigration and Naturalization Service authorities feel that the number of recent immigrants who may become public charges is very small.

Displaced persons coming to the United States must be vouched for by individual or corporate affidavits guaranteeing that the immigrant admitted will not become a public charge. Organizations bringing displaced persons here on their corporate affidavit assume responsibility for them until they become economically independent. Public funds cannot be used for their support because aliens are subject to deportation if they become public charges during the first five years of their residence in this country.

Summary

(1) The 1939 amendment to the Public Assistance Law, denying General Assistance to aliens, was adopted at a time of war hysteria and anti-alien feelings. It is against the traditions of the state, which always provided assistance to those in need.

(2) The group of aliens in need of General Assistance represents the marginal residue of the mass

immigration to this country before and immediately after the First World War.

(3) The group of dependent aliens is made up for the most part of aging, illiterate, physically handicapped and chronically sick people. Many of them spent their active lives working in mills and mines and contributed to the growth and development of this country.

(4) The number of such needy aliens has been constantly decreasing over the years.

(5) Private agencies, though they are providing financial aid to a small number of aliens ineligible for General Assistance, do not consider aiding this group to be their function or responsibility.

(6) It is very unlikely that any considerable number of present day immigrants or displaced persons will become public charges. Immigration and Naturalization authorities confirm this view.

Alexander J. Stein,
Field Secretary,
American Service Institute

February 17, 1949.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 69-2869

Elsie Mary Jane Leger et al.

v.

William P. Sailer et al.

IX.
ORDER CONSTITUTING A THREE-JUDGE COURT

Pursuant to the provisions of Section 2284, Title 28, United States Code, I designate Honorable Arlin M. Adams, United States Circuit Judge and Honorable C. William Kraft, Jr., United States District Judge, to sit with Honorable Harold K. Wood, United States District Judge, as members of the Court for the hearing and determination of the above entitled case.

William H. Hastie,
Chief Judge, Third Judicial Circuit

Dated: March 11, 1970.
Filed March 12, 1970.
John J. Harding Clerk.
By C. L. J., *Dep. Clerk.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 69-2869
Class Action

Elsie Mary Jane Leger, Beryl Jervis, on behalf of themselves and all others similarly situated

v.

William P. Sailer, individually and as the Executive Director of the Philadelphia County Board of Assistance

Stanley A. Miller, individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania

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X.

OPINION AND ORDER

July 13, 1970

Concurring Opinion, Circuit Judge Adams and District Judge Kraft; Dissenting Opinion, District Judge Wood.

The issue in this case is whether Pennsylvania's general assistance program runs afoul of the United

States Constitution because it provides welfare aid to United States citizens residing within the Commonwealth, but denies such aid to persons residing in the Commonwealth who are not United States citizens.

The suit comes before us in the form of a class action. The plaintiffs, representing aliens who meet all other eligibility requirements for general assistance, allege that the Pennsylvania statute denies aliens the equal protection of the laws guaranteed by the Fourteenth Amendment, abridges aliens' freedom of interstate travel, and violates the Supremacy Clause of the Federal Constitution since it clashes with the federal power to regulate immigration and naturalization.

Because plaintiffs sought to enjoin a state statute on constitutional grounds which are not insubstantial, a three-judge court was convened pursuant to 28 U.S.C. §§2281, 2284.[1]

There are two major public assistance programs in Pennsylvania. The larger one is known as categorical assistance. Slightly more than one half of the funds for this program, which had its genesis in the Social Security Act of 1935, are provided by the Federal Government. The federally supported arrangement includes programs for aid to the blind, aid to the aged, aid to the permanently and totally disabled and

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[1]The jurisdiction of the Federal Court is invoked under 28 U.S.C. §1343(3) and (4), 42 U.S.C. §1983, 28 U.S.C. §2201, §2202, this being an action for declaratory judgment and preliminary and permanent injunctions to redress the deprivation under color of state law of rights, privileges and immunities secured to plaintiffs by the Constitution and laws of the United States.

aid to families with dependent children. In Pennsylvania, aliens are eligible for categorical assistance. The other welfare program in Pennsylvania is general assistance. Section 432(2), Pennsylvania Public Welfare Code, 62 P.S. 432(2).[2] This program provides aid for the needy who do not qualify for grants under the categorical assistance provisions. Because of the citizenship requirement in the general assistance statute, residents of Pennsylvania who are not citizens and who have economic need but do not fit into any of the four federal categories cannot obtain state aid.

The sole reason given for excluding aliens from the general assistance legislation is that such a policy saves money or preserves the Commonwealth's financial resources for citizens. We consider this an inappropriate basis to support such a discrimination under the Equal Protection clause.

The applicable provisions of the Fourteenth Amendment extend protection to "all persons", and therefore include aliens. As early as 1886 the Supreme

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[2] "Section 432. Eligibility.

Except as hereinafter otherwise provided, and subject to the rules, regulations, and standards established by the department, both as to eligibility for assistance and as to its nature and extent, needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance:

(1) Persons for whose assistance Federal financial participation is available to the Commonwealth * * *.

(2) Other persons who are citizens of the United States, or who, during the period January 1, 1938 to December 31, 1939, filed their declaration of intention to become citizens."

Court held that the Equal Protection and the Due Process Clauses are "universal in their application to all persons within the territorial jurisdiction without regard to any differences of race, color, or of nationality". Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). See also Takahashi v. Fish & Game Com'n, 334 U.S. 410, 420 (1948); Truax v. Raich, 239 U.S. 33 (1915). Cf. Hellenic Lines Ltd. v. Rhoditis, No. 661 (U. S. Sup. Ct. filed June 8, 1970), slip op. at 4. Although the Fourteenth Amendment does not prohibit all classifications in state laws, it requires that such classifications between groups of persons have a legitimate state objective, and that the distinction drawn have a rational basis to effectuate that purpose. Eg. McGowan v. Maryland, 366 U.S. 420 (1961). See Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1082-1087 (1969). The policy of upholding a discriminatory state law provided there is some reasonable basis to do so applies to welfare legislation as well as other state economic or social regulations. Dandridge v. Williams, 397 U.S. 471 (1970). When, however, state legislation in any field —social, economic or political—evidences an intent to discriminate on a basis of race, color, or nationality, the state bears a very heavy burden to justify it.[3] Discrimination on the basis of alienage, even though not a discrimination against a particular nationality, affects a "disadvantaged minority" and is therefore subject to strict judicial scrutiny. Takahashi v. Fish & Game Comm'n, 334 U.S. at 420.

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[3]*See e.g.,* Dandridge v. Williams, 397 U.S. at 485 n. 17; Loving v. Va., 388 U.S. 1, 9 (1967); McLaughlin v. Fla., 379 U.S. 184, 191-92 (1964). Korematsu v. United States, 323 U.S. 214, 216 (1944).

In Takahashi, the Supreme Court specifically compared discrimination based on alienage with discrimination based on color. The Court said that "the Fourteenth Amendment * * * protect[s] 'all persons' against state legislation bearing unequally upon them either because of alienage or color", and that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." 334 U.S. at 420.[4]

In Hobson v. Hansen, Judge Wright explained that "[T]he Supreme Court has been vigilant in erecting a firm justification principle against every legal rule which isolates for differential treatment a disadvantaged minority, whether defined by alienage, * * * nationality * * *; or race * * *." 260 F. Supp. 401, 506-7 (D.D.C. 1967) aff'd sub nom. Smuck v. Hobson, 408 F. 2d 176 (D.C. Cir. 1969).[5]

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[4]In Takahashi the Supreme Court also stated (334 U.S. at 419-20) that aliens are protected by 42 U.S.C. §1981 (formerly Section 41 of the Nationality Act, 8 U.S.C. §41) which provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other".

[5]Takahashi has been cited a number of times to illustrate a classification which is "inherently suspect". *See* Kramer v. Union Free School District, 395 U.S. 621, 628 n. 9 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663, 682 n. 3 (1966); NAACP v. Alabama, 377 U.S. 288, 295 n. 7 (1964).

The reason advanced for the citizenship requirement—saving or preserving public funds—is not compelling when we consider the severity of the deprivation imposed upon the excluded group. Those excluded are deprived of the "means to subsist—food, shelter, and other necessities of life." Shapiro v. Thompson, 394 U.S. at 618, 627 (1969). Though a state is not obligated to grant public assistance, the Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970), clearly recognized the significance of such aid when it said: "Public Assistance is * * * not mere charity, but a means to 'promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity.' " 397 U.S. at 265.

In Shapiro v. Thompson, 394 U.S. at 627, the Supreme Court held that the interest of economy was an insufficient foundation to justify the denial of welfare benefits to persons who resided within the state for less than one year. In holding the state residency requirements for welfare eligibility unconstitutional, the Court said that it agreed with the contention that "the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them the equal protection of the laws". 394 U.S. at 627. Mr. Justice Brennan, speaking for the Court, made it abundantly clear that a discrimination which denied welfare benefits to a particular group could not be sustained on the ground that such denial saves government funds.[6]

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[6]Financial expense has been held an inadequate reason to justify discrimination in the criminal law. *See* Rinaldi v.

> "We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot justify an otherwise invidious classification." 394 U.S. at 633.

In Goldberg v. Kelly, the Court repeated the proposition that "these governmental interests [of reducing administrative expenses and preventing the disbursement of funds it could not recover] are not overriding in the welfare context." In Goldberg, the Court held that such reasons did not justify the failure to provide a hearing to welfare recipients before aid is terminated, 397 U.S. at 266.

Dandridge v. Williams, one of the most recent Supreme Court cases in the welfare area, does not support the Pennsylvania legislation. Dandridge upheld a state regulation which set a maximum ceiling on the amount of aid for each family regardless of the number of children above a given figure. Although the plaintiffs claimed this created two classes—those with large families and those with small families—

Yeager, 384 U.S. 305 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

the Supreme Court found that the state had valid reasons, namely, to encourage employment and to avoid discrimination between welfare families and the families of the working poor, which provided a "solid foundation for the regulation". 397 U.S. at 486. Dandridge is distinguishable from the present case on two additional grounds: First, the classification between large and small families is not inherently suspect as is one based on alienage; second, the state did not completely exclude a particular group from all benefits—it merely limited the amount of payment per family.

The justification of limiting expenses is particularly inappropriate and unreasonable when the discriminated class is aliens. Aliens like citizens pay taxes and may be called into the armed forces. Unlike the short-term residents in Shapiro, aliens may live within a state for many years, work in the state and contribute to the economic growth of the state. This is illustrated by the stipulated facts in the present case. One of the named plaintiffs here worked in Pennsylvania for four years, until illness forced her to terminate employment.

Pennsylvania's efforts to justify the exclusion here are further weakened when the treatment of aliens in its entire public welfare program is carefully analyzed.

Although the federal statute does not require states to grant assistance to aliens,[7] Pennsylvania permits

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[7]In Richardson v. Graham, a three-judge court held that a 15 year residency requirement in Arizona for aliens requesting public welfare under Arizona's federally supported

aliens to participate in its various categorical assistance programs. 62 P.S. §432(1). The categorical programs are substantially larger than the general assistance program. Indeed, figures from the Commonwealth show that approximately 585,000 persons are on categorical assistance and 85,000 on general assistance.[8] Furthermore, in this case, there was evidence that non-citizen applicants for general assistance are less than 100 per year.[9] Accordingly, it is difficult to lend credence to the rationale that aliens

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programs violated the Equal Protection Clause of the Fourteenth Amendment. No. CIV. 69-158 TUC. (D. Ariz., filed May 27, 1970.)

[8]Department of Public Welfare Report of Public Assistance, Dec. 31, 1969.

[9]Although the Pennsylvania statute does not involve the federal social security program, the defendants say that Congress authorized discrimination against aliens in the federal statute when it stated:

> "The Secretary * * * shall not approve any plan which imposes, as a condition of eligibility for aid * * * * * * * * * * * *
>
> "(2) Any citizenship requirement which excludes any citizen of the United States. 42 U.S.C. 1202(b)(2) (1964). See also 42 U.S.C. §1352(b)(2) (disabled); 1382(b)(3) (aged, blind or disabled); §302(b)(3) (aged)."

A similar provision in the Federal statute regarding residency was not considered congressional authority to allow one year residency requirements. Shapiro v. Thompson, 394 U.S. at 638-41. The Court in Richardson v. Graham, supra, note 7, also rejected an argument which was similar to that made by the Commonwealth.

In the Civil Rights Act of 1964, Congress prohibited discrimination because of national origin in any program receiving federal assistance. 42 U.S.C. 2000(d).

are denied access to the general assistance program in order to conserve funds.

Pennsylvania attempts to rationalize its discrimination against aliens and contends it is not violating the Fourteenth Amendment because the state has an unqualified right to preserve public money or property for its own citizens. It draws this rule principally from People v. Crane, 214 N.Y. 154, 108 N.E. 427 (1915), aff'd sub nom. Crane v. New York, 239 U.S. 195 (1915).[10] Crane, decided fifty-five years ago, upheld a New York statute which prohibited aliens from working on construction projects paid for with government funds. The validity of this discriminatory legislation today is exceedingly doubtful when the principles enunciated in Takahashi are considered.

In Takahashi, the Supreme Court refused to uphold a California law which denied commercial fishing licenses to aliens although the Court assumed that the provision was passed on "to conserve fish in the California coastal waters or to protect California citizens engaged in commercial fishing from competition by Japanese aliens or for both reasons". 334 U.S. at 418. In that decision, the Court held that the state power to apply its laws exclusively to aliens as a class is confined within narrow limits, and thus reduced the range of legislative purposes which can justify "[s]tate laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States". 334 U.S. at 419.

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[10]Crane was affirmed on the basis of Heim v. McCall, 239 U.S. 175 (1915) which in turn relied on Atkins v. Kansas, 191 U.S. 207 (1903). But see Powell, The Right to Work for the State, 16 Col. L. Rev. 99, 111 (1916).

Judge Cardoza's rationale for the decision in Crane was in large measure grounded on the theory that public employment is a privilege rather than a right. He said: "The state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens. Whatever is a privilege, rather than a right, may be made dependent upon citizenship." 108 N.E. at 430. The "privilege-right doctrine" no longer has vitality as a justification for the deprivation of a constitutional right. The Supreme Court has only recently stated, "the constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'." Shapiro v. Thompson, 394 U.S. at 627, n. 6; Goldberg v. Kelly, 397 U.S. at 262 and cases cited therein. See also Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 82 Harv. L. Rev. 1439 (1968).

The Crane decision, which has not been relied on to uphold anti-alien legislation since it was decided, was rejected as controlling by the California Supreme Court sitting en banc last year.[11] In Purdy & Fitzpatrick v. California, 456 P. 2d 645, 79 Cal. Rptr. 77 (1969), the California Court held that a section of the Labor Code which prohibited employment of aliens on public works was unconstitutional. That Court could find no " 'special public interest' to justi-

[11]Ratti v. Hinsdale Raceway, Inc., 249 A. 2d 859 (N.H. 1969); Garden State Dairies v. Vineland, Inc., 46 N.J. 349, 217 A. 2d 126 (1965); Department of Labor & Industries v. Cruz, 45 N.J. 372, 212 A. 2d 545 (1965), in dicta all indicate doubt as to the validity of Crane.

fy this discriminatory legislation which encroaches upon, the congresisonal scheme for immigration and naturalization, and violates the equal protection clause of the Fourteenth Amendment. 456 P. 2d at 50, 653. It rejected the theory of an absolute proprietary interest in the disbursement of public funds on the basis of the standard and holding of Takahashi.

Pennsylvania also relies on Patsone v. Pennsylvania, 232 U.S. 138 (1914), which allowed a state to preserve game for its own citizens, and on a number of cases upholding restrictions on an alien's right to own property. Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923). The land cases, questioned by the Supreme Court in Takahashi and Oyama v. California, 332 U.S. 633 (1948),[12] are insufficient authority to uphold discriminatory welfare legislation, just as they were insufficient authority to uphold discriminatory employment legislation in Takahashi and Purdy & Fitzpatrick.

Although there may be an area in which the state may permissibly preserve natural resources for its own citizens by discriminating against aliens, just as it may in such respects discriminate against residents of other states, a discrimination against resident aliens

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[12]In Oyama four justices said the restrictions were unconstitutional. These cases were by two states to invalidate their laws. Fjuii v. State, 38 Cal. 2d 718, 242 P. 2d 617 (1952). Kenji Namba v. McCourt, 185 Ore. 579, 204 P. 2d 569 (1949). See Comment, The Alien and the Constitution, 20 U. Chi. L. Rev. 547, 564-70 (1953). See also State v. Oakland, 287 P. 2d 39, 42 (Montana, 1955).

which, as the parties in this case stipulated, "causes undue hardship by depriving them of the means to secure the necessities of life, including food, clothing and shelter", and "discourages continued residence in Pennsylvania of indigent resident aliens and causes such needy persons to remove to other states which will meet their needs", is substantially different and invalid.

Pennsylvania has cited numerous state statutes which discriminates against aliens.[13] These statutes have not been subjected to judicial scrutiny, and we do not decide the validity or invalidity of any of them at this time. We note, however, that the validity of restrictions on an alien's right to work have been seriously questioned on the basis of Takahashi. See Constitutionality of Restrictions on Aliens' Right to Work, 57 Col. L. Rev. 1012 (1957);[14] Note, 1947-48 Term of the Supreme Court: The Alien's Right to Work, 49 Col. L. Rev. 257 (1949).

We hold that the provision in the general assistance law prohibiting its applicability to residents of Pennsylvania who are not citizens is invalid as violating the Equal Protection Clause of the United States Constitution. In view of this decision we consider it unnecessary to pass upon plaintiffs' other contentions that the Pennsylvania statute violates the Supremacy

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[13]But see Limestone Company, Ltd. v. Fagley, 187 Pa. 193 (1898), where the Pennsylvania Supreme Court invalidated a discriminatory tax on alien employees as violative of the Equal Protection Clause of the Fourteenth Amendment.

[14]For a list of law review material discussing the unconstitutionality of the aliens right to work * * *

Clause of the Constitution and interferes with the aliens' right to interstate travel.

The above constitutes the findings of fact and conclusions of law required by Rule 52(a). Accordingly, the motion for preliminary and permanent injunction will be granted.

Arlin M. Adams,
Circuit Judge
C. William Kraft, Jr.,
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

Civil Action No. 69-2869
Class Action

Elsie Mary Jane Leger, Beryl Jervis, on behalf of themselves and all others similarly situated

v.

William P. Sailer, individually and as the Executive Director of the Philadelphia County Board of Assistance

Stanley A. Miller, individually and as Secretary of the Department of Public Welfare of the Commonwealth of Pennsylvania

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ORDER

On this 13th day of July, 1970, there having been hearings on plaintiff's motions for preliminary and permanent injunctions and declaratory judgment, such motions having been briefed and argued by counsel, and the majority of this Court having decided in an opinion filed July , 1970, that Pennsylvania's general welfare law, 62 P.S. §432(2), violates the Equal Protection Clause of the United

States Constitution, it is ordered and adjudged that the defendants be and are hereby enjoined from enforcing that portion of the Pennsylvania Statute which denies general assistance to persons because of alienage.

Arlin M. Adams,
Circuit Judge
C. William Kraft, Jr.,
District Judge

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DISSENTING OPINION

Wood, District Judge, July 13, 1970.

I must respectfully dissent.

This is a class action brought on behalf of resident aliens to challenge the constitutionality of Section 432(2) of The Pennsylvania Welfare Code, 62 P.S. §432(2) insofar as it denies general public assistance to persons otherwise qualified to receive it solely

on the ground that they are not citizens of the United States.[1] The defendants, who are the state officials charged with administration of the statutory provision which is challenged, concede that the named plaintiffs would qualify for general assistance except for the fact of their alienage, but they maintain that neither federal law nor the constitution precludes the state from denying to aliens that assistance which it dispenses to citizens solely from its own resources.

Plaintiffs first contend that Pennsylvania's citizenship requirement is invalid because it places an undue burden on their right to interstate travel. They place great reliance on Shapiro v. Thompson, 394 U.S. 618 (1969) in which the Supreme Court invalidated Pennsylvania's one year residence requirement for welfare recipients because it "touche[d] on the fundamental right of interstate movement" of citizens and was not justified by any "compelling state interest". However, even assuming *in arguendo* that aliens have the same right in all respects to travel freely between states as do citizens,[2] I do not think

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[1]Since the funds for the general assistance program here challenged are provided entirely by the state and municipalities therein and the program is not supported by federal grants, there is no question presented here of whether the state provisions are in conflict with the Federal Social Security Act or regulations thereunder.

[2]The right to travel between states is not specifically enumerated in the Constitution, but Courts have inferred such a right from several of its provisions. However, when such a right has been mentioned, the Court has referred to it as a right belonging to "citizens". See Shapiro v. Thompson, 394 U.S. 618, 629, 633, ". . . the nature of our Federal Union and our constitutional concepts of personal liberty

that the statutory classification in this case "touches on the fundamental right of interstate movement"[3] in the same respect as the classification proscribed by the Court in Shapiro and that the Court in Shapiro did not intend its holding to encompass state statutes such as the one before us. In Shapiro, it was undisputed and the Court found that the Pennsylvania statute created two classes, the only difference between them being that members of one had been residents of Pennsylvania for a year and members of the other had not, and proceeded to favor the former class on that ground alone. Here, on the other hand, the distinction drawn by the statute in question is between aliens and citizens of the United States. Whether an alien is a long-time resident of Pennsylvania or is newly-arrived from another state is irrelevant; plain-

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unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement"; Edwards v. California, 314 U.S. 160, 181 (1941) ("The conclusion that the right of free movement is a right of National Citizenship stands on firm ground.") Passenger Cases, 7 How. 283, 492 (1849); Kent v. Dulles, 357 U.S. 116, 125 (1958); Ward v. Maryland, 12 Wall 418, 430 (1871). On the other hand, in Truax v. Raich, 239 U.S. 33, 42 (1915) and other cases, the Court has held that aliens lawfully admitted to the country under the authority of acts of Congress have the right to "enter and abide" in the various states. The Court indicated that the alien's right to "enter and abide" stemmed from federal law and not from the Fourteenth Amendment and could therefore be retracted by federal statute. Therefore, it is doubtful that this right to enter and abide of aliens is the same in all respects as the right of citizens to travel between states.

[3] 394 U.S. at 638.

tiffs are denied welfare by Pennsylvania not because they have traveled to Pennsylvania from another state, but rather because they are aliens.

To extend Shapiro by holding that the state statutory classification in this case touches on the "fundamental right of interstate movement" and must be abandoned absent a "compelling" state interest would be to put in jeopardy all state laws which treat a certain group of people less generously than that group is treated by another state, and which therefore might disincline persons of lesser means from travelling into that state. Such a holding would virtually require states to provide indigents moving inside its borders with enough money to stay. I am unable to go so far. Since I would not find that Pennsylvania's classification here touches on the right of interstate movement enunciated in Shapiro, I would not reach the question of whether Pennsylvania has demonstrated a "compelling" interest in the classification.

Plaintiffs secondly contend that Pennsylvania's citizenship requirement is invidious and offensive to the equal protection clause. Both parties agree that, as a general proposition, the word "person" in the Fourteenth Amendment includes resident aliens, and that therefore aliens are entitled to the same substantive and procedural benefits of the Amendment as citizens. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Further, the plaintiffs concede that in a number of cases in the wake of Yick Wo the Court carved out a number of exceptions to the foregoing general proposition, one among them being that the "moneys of

the state belong to the people of the state" and "do not belong to aliens" and therefore the state may favor its citizens to aliens in the distribution of the common property or resources of the people of the state. McCready v. Virginia, 94 U.S. 391 (1877). As Justice Cardozo, at the time a member of the New York Court of Appeals, stated in a case involving state preference of citizens over aliens in public works contracts:

> "Every citizen has a like interest in the application of the public wealth to the common good and the right to demand that there be nothing of partiality, nothing of merely selfish favoritism in the administration of the trust. But an alien has no such interest; and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination but arbitrary discrimination. To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise, such discrimination may be. It is not for that reason unlawful." People v. Crane, 108 N.E. 2d 425 (1915).

The decision of the New York Court was thereafter unanimously affirmed by the Supreme Court in an opinion which summarily dismissed as "without foundation" the plaintiffs' claim that the state's preference of citizens over aliens in public works violated the equal protection clause. Crane v. New York, 239

U.S. 195, 199 (1915). See also Heim v. McCall, 239 U.S. 175 (1915).[4]

The plaintiffs contend, however, that these early precedents have in effect been overruled *sub silentio* by other decisions. I disagree because I think to the contrary that subsequent decisions have either affirmed or left untouched the Crane doctrine. In Truax v. Raich, 239 U.S. 33 (1915), cited by the plaintiffs, the Court held that a state statute providing for discrimination against aliens in matters relating to "ordinary private enterprise" violates the right of aliens to "enter and abide" in that state unless there is a "special state interest" involved and invalidated an Arizona law requiring all private commercial business to have work forces composed of at least 80 percent United States citizens. The Court found in that case that there was no "special state interest" in such an all encompassing regulation of "all ordinary private enterprise".[5] In its decision, which was handed down the same year as Crane, the Court said nothing to diminish the effect of the McCready-Crane doctrine and in fact specifically cited McCready and

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[4]In which a unanimous court upheld against attack on Fourteenth Amendment grounds a New York statute which provided that "In the construction of public works by the state or a municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works preference shall be given citizens of the State of New York".

[5]The Court stated at 239 U.S. 43 that "no special public interest with respect to any particular business is shown that could possibly support the enactment, for as we have said it relates to every sort".

some of its progeny with approval. See 239 U.S. at p. 40.

More recently, in Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), also relied upon by the plaintiff, the Court cited with approval the standards enunciated in Truax and invalidated a California law forbidding Japanese aliens from commercial fishing off the California coast on the ground that the state had not demonstrated a "special public interest" in regulating Takahashi's commercial fishing. It is true that in Takahashi the Court recognized the technical possibility that California might in some sense "own" those fish which ventured inside the three-mile ocean limit,[6] but the Court treated the California law as a regulation of aliens in private enterprise under the Truax test and left untouched the McCready-Crane doctrine.

I have not found, nor do I find in Shapiro v. Thompson,[7] supra, or Goldberg v. Kelly, 397 U.S. 254 (1970)[8] cited by the plaintiffs (neither of which

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[6] The law in question barred all aliens residing in California from commercial fishing off the California coast, whether within or without the three-mile limit.

[7] Shapiro was decided on the ground of interference with the right of interstate movement and has already been discussed on that ground. We note in passing that contrary to the plaintiffs' assertions, the "compelling state interest" required to justify state legislation relating to interstate movement in Shapiro does not apply to cases involving welfare legislation. Dandridge v. Williams, 397 U.S. 471 (1970).

[8] In Goldberg, the Court held that whether welfare was considered as a privilege or a right, it could not be terminated without a fair hearing. However, subsequently in Dandridge v. Williams, supra, the Court intimated that the hold-

relates to aliens) any indication that the Court has overruled the doctrine of Crane and Truax[9] that while the state, absent a special state interest, is not permitted to intrude upon an alien's right to "enter and abide" by statutes which discriminate against them as opposed to citizens in the conduct of ordinary private enterprise, the state as proprietor of the resources of the citizens of the state may favor its own citizens in

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ing in Goldberg was not intended to affect state determination of welfare eligibility:

> "The constitution may impose certain procedural safeguards upon systems of welfare administration . . . (citing Goldberg) *But the constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.*" (Emphasis mine.) 397 U.S. 471, 487 (1970).

[9]I do not see anything in Takahashi, supra, at p. 420 to the effect that because state legislation relating to aliens affects a "disadvantaged minority" it is therefore subject to "strict judicial scrutiny" apart from the ordinary "rational basis" test ordinarily applied to state welfare legislation. Cf. Dandridge v. Williams, 397 U.S. 471 (1970). At that point in Takahashi, supra, the Court in effect points out that in view of the general rule enunciated in Yick Wo v. Hopkins, supra, the superseding effect of federal laws regulating aliens, Hines v. Davidowitz, 312 U.S. 52 (1941), and 8 U.S.C. §41, the power of the states to pass laws relating to aliens is limited. Both parties here concede this. Moreover, the Court in Takahashi, supra, was making the point, with which all are in agreement, that pursuant to its powers to regulate aliens, Congress can make certain distinctions which the states cannot. Accordingly, the compelling state interest required to justify state legislation inhibiting an alien's right to travel, Cf. Shapiro v. Thompson, supra, or to legislation affecting a "disadvantaged minority" would be inapplicable here.

the disbursement of those resources.[10] Being mindful of the recent admonition of the Supreme Court that the *"Fourteenth Amendment gives the federal courts no power to impose on the states their views of wise economic or social policy"*[11] I would not overturn what I consider to be a settled precedent.

Plaintiffs' final contention is that Pennsylvania's general assistance citizenship requirement conflicts with federal laws relating to the admission and naturalization of aliens and is therefore preempted pursuant to the supremacy clause. We are specifically directed to several provisions of federal law relating to the admission of indigents to this country: Title 18 U.S.C. §§7, 8, and 15 provide *inter alia* that the following classes of aliens shall be excluded from admission: "paupers", "aliens . . . who are likely at any time to become public charges", and "aliens . . . who are certified . . . as having a physical defect, disease, or disability . . . of such a nature that it may affect the ability of the alien to earn a living . . ." Section 1251 allows the Attorney General under certain circumstances to deport an alien who has become a public charge. Section 1183 provides that an alien excludable because he is likely to become a public charge may be admitted at the discretion of the Attorney General after posting a bond.

I take the standard for determining whether a state law relating to aliens is preempted by federal

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[10]This distinction was cited with approval by the Supreme Court as recently as 1960 in Cafeteria Workers v. McElroy, 367 U.S. 886 (1961).

[11](Emphasis mine) Dandridge v. Williams, supra, at p. 486 (1970).

law from Hines v. Davidowitz, 312 U.S. 52 (1941). In that case, where the Court invalidated a Pennsylvania alien registration law, because it overlapped federal law, Justice Black stated *inter alia* that:

> ". . . where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, 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. 66-7.

It was further stated that any concurrent power in such a field must be "restricted to the narrowest of limits", 312 U.S. at 68, but that "in the final analysis, there can be no one crystal clear distinctly marked formula" for determining whether the state law is inconsistent with federal law.

> "Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". 312 U.S. at 67.

In the light of these standards I cannot conclude that Pennsylvania's citizenship requirement is preempted by federal law. Hines and other cases relied upon by the plaintiffs were concerned with requirements under state law which would hinder, obstruct, or harass aliens in such a way as to interfere with the federal scheme of regulation. Pennsylvania's citi-

zenship requirement does not regulate the conduct of aliens, but rather excludes them from an affirmative benefit which the state may or may not decide to dispense to its own citizens. If the state had no welfare program at all, federal laws relating to aliens would not be obstructed; it is difficult to see how federal laws are obstructed any more because the state decides to give welfare payments to citizens.

By the same token, I am unable to conclude that the specific statutory provisions cited previously and relied on by the plaintiffs evidence any Congressional intent to require the states to include (or, for that matter, not to include) aliens as beneficiaries of their welfare programs. To the contrary, the federal laws cited previously leave the impression that Congress wanted to relieve the states (and the federal government) of the burden of aliens who were, or might become, public charges. I cannot infer from such an intent to relieve the states of such a burden, a corresponding intent to require the states to pay welfare to aliens.

Accordingly, I respectfully dissent.

Harold K. Wood,
J.