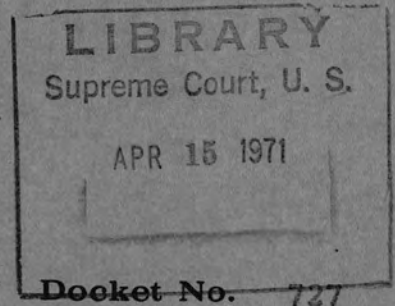


# Supreme Court of the United States

OCTOBER TERM, 1970



In the Matter of:

----- X  
WILLIAM P. SAILER, et al.,  
Appellants  
vs.  
ELSIE MARY JANE LEGER AND  
BERYL JERVIS,  
Appellees  
----- X

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\* \* \* \* \*

## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

-----  
WILLIAM P. SAILER, ET AL.,  
Appellants

vs

No. 727

ELSIE MARY JANE LEGER AND  
BERYL JERVIS,  
Appellees  
-----

The above-entitled matter came on for argument  
at 1:00 o'clock p.m. on Monday, March 22, 1971.

## BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

## APPEARANCES:

JOSEPH P. WORK  
Assistant Attorney General  
State of Pennsylvania  
Harrisburg, Pennsylvania  
On behalf of Appellants

JONATHAN M. STEIN, ESQ.  
313 South Juniper Street  
Philadelphia, Pennsylvania 19107  
(pro hac vice)  
On behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Number 727: Sailer against Leger and Jervis.

Mr. Work.

ORAL ARGUMENT BY JOSEPH P. WORK, ESQ.

ON BEHALF OF APPELLANTS

MR. WORK: Mr. Chief Justice and may it please  
the Court:

I move for leave to permit Mr. Jonathan Mr. Stein  
a member of the Pennsylvania Bar to argue pro hac vice on  
behalf of the Appellees in this case.

MR. CHIEF JUSTICE BURGER: Your motion is granted.

We will be glad to hear from Mr. Stein.

MR. WORK: Thank you, Your Honor.

Your Honors, this case comes before you on direct appeal from a decision of a three-judge statutory court convened in the Eastern District of Pennsylvania, the decision of which court was rendered on July 13, 1970; and which decision held Section 432(2) of the Pennsylvania Welfare Code unconstitutional.

And that in denying general assistance to aliens who are residents of the Commonwealth it violated the precepts of the Equal Protection Clause of the 14th Amendment.

The facts of the case, Your Honors, is relatively simple. The Appellee, Elsie Mary Jane Leger immigrated to



1 this country from Scotland on May 18, 1965 and undertook  
2 employment in which she remained for a period of four years.  
3 She applied for general assistance, together with her common-  
4 law husband shortly prior to December 9, 1969 and she was  
5 denied assistance at that time solely on the grounds that she  
6 is an alien.

7 She commenced her action in the Federal District  
8 Court on December 9, 1969. The Court subsequently permitted  
9 amendment of the action to add Mrs. Jervis as a party plain-  
10 tiff and to permit the action to continue as a class action.

11 Mrs. Beryl Jervis, who is the other party plain-  
12 tiff to this action, immigrated to the United States from  
13 Panama on March 1, 1968 and after working for two years, ceased  
14 her employment because of illness and applied for assistance.  
15 She, too, was denied assistance solely on the basis of our  
16 statute which prohibits the dispensing of assistance to aliens.

17 I perhaps said that wrong; it doesn't prohibit it;  
18 it doesn't provide for it.

19 Presently there are two assistance programs in  
20 Pennsylvania. One, of course, is the categorical assistance,  
21 which provides Aid to the Blind, Aid to the Aged, Aid to the  
22 Totally and Permanently Disabled and Aid to Families with  
23 Dependent Children. These are all Federally-supported cate-  
24 gories of assistance in which we receive slightly over one-  
25 half of the funds from the Federal Government.

1           Neither of the named parties here are qualified  
2 for any of the Federal assistance categories. The other  
3 assistance program which we have in Pennsylvania is our so-  
4 called General Assistance Program, which is wholly state-  
5 financed and which provides aid to all other persons who are  
6 citizens of the United States for whom no aid is provided  
7 under the categorical assistance program.

8           I am going to be completely frank with this  
9 Court, as I was with the lower court and state that there is  
10 no question but what this statute draws a distinction between  
11 citizens and aliens. And if the special public interest  
12 doctrine had been overruled, sub silencio, as the lower court  
13 found that it was, then I am going to have a very difficult  
14 task indeed in justifying the distinction.

15           However, if the Court will bear with me for a  
16 few short moments, I should like to discuss just briefly the  
17 two cases by which the lower court found that this Court had  
18 overruled the special public interest doctrine.

19           The first of these, of course is the Truax case,  
20 which involved the employment or failure to employ a person  
21 as a clerk in the State of Arizona because of the fact that  
22 the Arizona statute provided that employment had to be 80  
23 percent citizens.

24           Justice Hughes in that case, however, specifically  
25 noted that the special public interest doctrine was an

1 exception to the ordinary tests of discrimination. He stated:  
2 "This discrimination defined by the act does not pertain to  
3 the regulation or distribution of the public domain or of  
4 common property and resources of the people of the state, the  
5 enjoyment of which may be limited to citizens, as against both  
6 aliens and citizens of other states."

7 We will, of course, admit immediately, Your  
8 Honors, that we realize that this doctrine has been somewhat  
9 changed by your decision in the Shapiro case, with respect at  
10 least to citizens of other states.

11 We submit, however, that it retains full vitality  
12 insofar as application to aliens is concerned. Thirty-two  
13 years later in the Takahashi case this Court also said,  
14 speaking through Mr. Justice Black, that the special public  
15 interest doctrine was still in existence; although this Court  
16 specifically denied the claim that the preservation of fish  
17 within its three-mile border was a special public interest  
18 for the State of California.

19 One thing I think, however, Your Honors, is very  
20 important to note in the Takahashi case, and that is, if I  
21 understand the case correctly the statute there also discrimin-  
22 ated among aliens, in that those who would have been denied the  
23 right to apply for the fishing permit would have been those who  
24 would not have been eligible for citizenship in the United  
25 States and therefore it would have applied only to orientals.

1           While the Court didnt make a great deal of this  
2 fact, I do think that there was a very important distinction  
3 between that case and the case that we are talking about here.

4           Finally --

5           Q       Well, in what respect do you think it makes  
6 a difference?

7           A       I think, Your Honor, that we have agreed  
8 thatthere is no doubt that the 14th Amendment applies to  
9 aliens, with, of course, the so-called "judicially-created"  
10 exceptions. I think it does apply and equal protection. It  
11 would therefore follow that you cannot discriminate among  
12 aliens because the judicially-created exceptions are between  
13 aliens and citizens.

14          Q       So you say that you think the discrimina-  
15 tion isn't on race or national origin, but on citizenship?

16          A       Correct, Your Honor. In our particular  
17 case here it applies to aliens, regardless of --

18          Q       Oh, you think it might make a difference  
19 in the test that would be required to a discrimination?

20          A       I think it certainly should, Your Honor,  
21 because if the 14th Amendment applies to all it would cer-  
22 tainly apply to say that you cannot discriminate among aliens.

23          Q       I mean you would have to have some com-  
24 pelling state interest?

25          A       I really think that it would go beyond



1 that, Your Honor. I don't think a compelling state interest  
2 is justified, particularly not in the language of this Court  
3 in Dandridge versus Williams. I rather doubt that there  
4 could be a compelling state interest to justify discrimination  
5 among aliens, as between one class of aliens and another class.

6 Q In other words, Pennsylvania couldn't give  
7 welfare to everybody except Mexicans?

8 A Correct, Your Honor.

9 Finally, this Court has intimated, I submit, in  
10 those cases, such as Tashahashi and Truax, that the cases in-  
11 volved the right to earn a livelihood. And the courts have  
12 gone one step further and said that if the right to enter and  
13 abide as granted to aliens under the Immigration and Naturali-  
14 zation Act, it would be meaningless if they didn't have the  
15 right to employment.

16 And I for one, Your Honors, am just old fashioned  
17 enough to believe that there is still a distinction in our law  
18 between the right to earn a livelihood and the right to re-  
19 ceive public largesse.

20 Q Could I be old fashioned enough to suggest  
21 that both of them involve the right to eat?

22 A I would accept Your Honor's statement com-  
23 pletely and I think, if I may at this time, just by departing  
24 a little bit, refer to a question which Your Honor asked in the  
25 previous case. I think in that respect, Your Honor, we get to

1 the question of responsibility. And whose responsibility it  
2 is, and of course I'm getting a little ahead in my argument,  
3 but if the Federal Government has the complete right to  
4 regulate aliens then of course I might answer Your Honor that  
5 the responsibility for these persons, if it lies anywhere,  
6 lies with the Federal Government, and not with the states.

7 Q Here is somebody who has been living in  
8 your state for 14 years and paid taxes and contributed just as  
9 much to the state as you did, but he can't make it.

10 Q Does this record show whether these parties  
11 or either of them ever paid any taxes or --

12 A Yes, Your Honor. I think that the record  
13 does disclose that both of them paid at least sales tax and  
14 income taxes within the Commonwealth of Pennsylvania.

15 Q And the person was employed for four years;  
16 wasn't it?

17 A Yes, Your Honor; four years.

18 Q So she paid all of the taxes.

19 A Yes, Your Honor.

20 Q Well, since you reminded me of the other  
21 question I asked, what's the interest of the State of Pennsyl-  
22 vania, other than money?

23 A The interest of the State of Pennsylvania,  
24 to be completely frank, Your Honor, is the conservation of  
25 assets for its citizens.

1 Q That's money; that's money.

2 A It is money; yes. It is not necessarily  
3 the state -- due to the fact that we can perhaps conserve  
4 assets for our citizens we were recently able to go to 100  
5 percent of the Federal level. Had we granted it to aliens --  
6 I'm not saying we couldn't have-- there is a possibility we  
7 perhaps couldn't have gone to that 100 percent.

8 Q But anyhow it's money?

9 A It is money; yes, Your Honor.

10 Q And that's all.

11 A That is correct, Your Honor.

12 Q Are you in here with just general assistance?

13 A Yes, Your Honor. That's completely state-  
14 financed general assistance program.

15 Q The Federal Government contributes nothing  
16 to this program?

17 A Absolutely nothing.

18 We do, by the way, in the course of our informa-  
19 tion we do in our Federal categories, we do grant assistance to  
20 aliens under --

21 Q Why do you do that?

22 A Well, honestly, Your Honor, it was a  
23 mistake. The Department of Welfare --

24 Q Which was a mistake: to cut them out or to  
25 let them have it?

1           A       The mistake was occasioned by the fact that  
2 when the Federal statute first came out our Department felt  
3 that they were required by that statute to grant assistance  
4 under the Federal categories. That appears in the transcript  
5 of the hearing before the lower court.

6           Going to the second phase of Appellees' argument,  
7 which, of course, was the contention that -- important in the  
8 lower court's decision, but it was alluded to there and of  
9 course was raised again before this Court on appeal, and that  
10 is the alien's right to travel for which position the  
11 Appellee placed great reliance on this Court's decision in  
12 Shapiro versus Thompson.

13           Now, in the beginning of that decision, Your  
14 Honors, is the fact that this Court found the right of citizens  
15 to travel derived from several provisions of the constitution,  
16 and from the very nature of the \_\_\_\_\_ himself. The Court  
17 did not, however, according to my understanding of that case,  
18 say the right was derived solely from the 14th Amendment,  
19 which of course, had been conceded applies equally to aliens,  
20 except for the judicially created exception which we are ad-  
21 vancing to this Court at this point with respect to the public  
22 interest doctrine.

23           We would further point out, Your Honors, that the  
24 right to enter and abide, we feel, by virtue of the decisions  
25 of this Court, are not on the same footing as the citizen's



1 right to travel.

2 In the Truax case, for example, this Court noted  
3 that the alien's right to enter and abide stemmed from Federal  
4 law and not from the 14th Amendment. And such right might,  
5 therefore, be retracted by a Federal statute.

6 It would seem to follow, therefore, that an  
7 infringement upon this right which we would deny was brought  
8 about by the statute here in question, might be invalid under  
9 the Federal statute; it might be invalid by virtue of the  
10 supremacy clause, but it certainly would not be invalid by  
11 virtue of the 14th Amendment's Equal Protection Clause.

12 We come, therefore, to the final issue raised by  
13 the brief, and that is whether this statute from Pennsylvania  
14 is an obstruction of Federal law dealing with immigration and  
15 naturalization; or, an intent on the part of the state to  
16 regulate aliens.

17 We concede that in the decision of this Court in  
18 Hines versus Davidowitz, the state can only do this within very  
19 narrow limits. Any regulations, Your Honors, under the  
20 decision of this Court in the Hines case, must be construed  
21 very, very strictly and within the very narrow limits.

22 However, as Judge Wood appropriately noted in his  
23 dissent in the lower court: if Pennsylvania had no general  
24 assistance program at all Federal laws dealing with aliens  
25 would not be obstructed. It is therefore difficult to see

1 how Federal laws are any more obstructed because the state  
2 decides to give welfare payments to its citizens.

3 Furthermore, insofar as attempting to regulate  
4 aliens is concerned, how can a statute which grants assistance  
5 to citizens be said to regulate aliens any more than a statute  
6 which would grant assistance to persons over 65 can be said  
7 to be regulating persons under 65?

8 And to take it one step further: let us assume  
9 that the statute grants assistance to all persons over 65,  
10 alien or citizen. Can an alien then come in and challenge  
11 the statute as being discriminatory in violation of the 14th  
12 Amendment and in violation of the supremacy clause because it  
13 attempts to regulate him?

14 We respectfully submit that to state that proposi-  
15 tion indicates its absurdity.

16 Appellees in their brief, assert that the state  
17 denial of general assistance to aliens may have some effect  
18 on the decision of an alien to settle in Pennsylvania, or it  
19 may cause them to remove elsewhere. Of course, the same thing  
20 might be said of Pennsylvania's six percent sales tax or its  
21 liquor tax, which is the second highest in the nation, or its  
22 cigarette tax, which is also somewhere near the highest.

23 No one, we submit, however, Your Honors, would  
24 seriously contend that these statutes are invalid as an attempt  
25 to regulate aliens because they might cause them to remove

1 elsewhere.

2 Furthermore, we would submit --

3 Q Well you might have a little different  
4 problem if the cigarette tax was imposed only if the purchaser  
5 of the cigarettes were an alien that were not imposed on a  
6 citizen of Pennsylvania. That's the analogy with this case;  
7 isn't it?

8 A It is, Your Honor, except that as I under-  
9 stand the Appellees' argument the test that they are trying to  
10 assert to ask this Court to determine whether or not we are  
11 violating the supremacy clause in regulating aliens is whether  
12 or not this statute does have some effect on their decision to  
13 locate elsewhere, or not to locate within the State of  
14 Pennsylvania. And any of these things could certainly have  
15 an effect on that decision.

16 We would also submit, Your Honors, that because  
17 of the Federal statute and the Federal scheme of intent, which  
18 is indicated by that statute and the requirement that aliens  
19 entering in this country be able to demonstrate their ability to  
20 earn a livelihood, we sincerely doubt that this factor was  
21 given much, if any consideration at the time of entry. That  
22 is the fact of whether or not Pennsylvania grants assistance to  
23 aliens or not.

24 And finally, Your Honors, I would point out, and  
25 I think it has come up in the Arizona argument: the Federal

1 statutes do not impose any duty on the states to provide  
2 assistance to aliens. In fact, even in the Federal assistance  
3 categories the statute leaves it open to the states and would  
4 not cause the Department of Health, Education, and Welfare to  
5 hold a state plan invalid where it does discriminate against  
6 aliens.

7 We would further submit in this regard that the  
8 statutory intent and scheme as set forth in the Federal  
9 statutes on immigration and naturalization, particularly in  
10 8 U.S.C. 1182(a) -- 1182(a)(7), 1182(8), 1182(15), 1183 and  
11 1251, would lead one to presume that the Congressional intent  
12 was to relieve both the states and the Federal Government of  
13 the burden of aliens who might become public charges.

14 We submit, therefore, that it is difficult to see  
15 how the State's decision could grant an affirmative benefit  
16 to citizens of the United States residing in Pennsylvania con-  
17 flicts with this scheme of Federal regulation of aliens.

18 We had an allegation which I think, Your Honors,  
19 that I have to specifically respond to in the brief, and that  
20 was that this statute, according to the Appellees' position,  
21 was enacted as a result of war hysteria.

22 I wanted to point out to the Court that in the  
23 lower court transcript which the Court has before it, there is  
24 only one minute quantity of proof and this was submitted by  
25 one man's opinion in writing on the scheme of assistance in



1 Pennsylvania, which said that this was enacted as a result of  
2 war hysteria. There is absolutely no legislative history to  
3 support that assertion. There is absolutely no other credible  
4 evidence to support the charge, except the opinion of the one  
5 author.

6 We submit, Your Honors, it would be just as  
7 logical and more in keeping with the presumption that the  
8 legislature has a proper motive in enacting legislation to  
9 assume that after the enactment of the Federal Social Security  
10 law of 1935 and after four years of trial and error basis, the  
11 states could see a vast area of persons who were not encom-  
12 passed within the Federal statutory scheme and they enacted a  
13 general assistance statute to take care of these particular  
14 persons.

15 We would not say that they did not at that time  
16 have the special public interest doctrine much in mind when  
17 they did not provide for aliens under that same scheme.

18 In summary, therefore, Your Honors, we would  
19 submit, and we will admit that these laws which create a  
20 distinction between aliens and citizens which have evolved in  
21 the formulation of the special public interest rules, are  
22 based upon the assumption that aliens hold allegiance to foreign  
23 nations.

24 We respectfully submit, however, that if the  
25 Court is ready to say that this distinction violates the

1 precept of the 14th Amendment we would also submit that this  
2 Court may in the very near future be ready to say that denial  
3 of the right to vote and the denial of the right to hold  
4 public office are also rights which may not be denied to  
5 aliens for the same reasons.

6 Q Would you think -- did Takahashi say --

7 A Did they say that, Your Honor?

8 Q Yes.

9 A In the Takahashi case the Court specifi-  
10 cally noted that there was such a doctrine as the special  
11 public interest doctrine. They denied --

12 Q But do you think the provision that only  
13 citizens and not aliens may be employed on public projects.  
14 Do you think that kind of a rule could survive Takahashi?

15 A No, Your Honor, for the reason that I  
16 expressed --

17 Q Well, neither Crane nor Heim survived  
18 Takahashi?

19 A Right, Your Honor. There is the right to  
20 earn a livelihood; I think the Court has specifically said and  
21 they spell out --

22 Q Do you think Crane has already been over-  
23 ruled?

24 A To the extent that a state may attempt to  
25 deny a person's right to earn a livelihood; yes. I still

1 submit there is a distinction between the right to earn a  
2 livelihood and the right to receive a public largesse.

3 Q Well, of course Crane didn't deal with  
4 welfare benefits, either. So it's no authority, even if it  
5 were still alive and even if it hadn't been overruled.

6 A Only to the extent that, Your Honor, that  
7 the Crane doctrine, as I understand it, was the first real  
8 enunciation of the so-called special public interest doctrine.

9 Q Well, it was preceded by Heim versus  
10 McCollum --

11 A Heim versus McCollum on the --

12 Q Heim versus McCollum on the same day.  
13 And they both relied on McCreedy; didn't they?

14 A Yes, Your Honor.

15 I agree completely, Your Honor, that this Court  
16 has certainly by its later decisions, said that the right to  
17 earn a livelihood may not be even --

18 Q Mr. Work, do you agree that you couldn't  
19 prevent an alien from working in Pennsylvania?

20 A I agree, Your Honor.

21 Q And you agree that you couldn't tax him  
22 a certain amount of money, restricted to aliens, a work tax  
23 on him?

24 A You mean different from other citizens, Your  
25 Honor?

1           No; I don't think you could, because that, again,  
2 would be attempting to regulate the right to earn a living.

3           Q       You couldn't put any additional tax on him  
4 for anything; could you?

5           A       I believe you are right, Your Honor; yes.

6           Q       Why not?

7           A       Again, I think that the special public  
8 interest doctrine, if it has vitality today, as I submit that  
9 it still does, it has been at least watered down, to use the  
10 term, by this Court to the extent that if it involves the  
11 right to earn a livelihood, this Court has said that is incon-  
12 sistent with the Federal rights granted to enter and abide.

13          Q       So that you can't discriminate against him  
14 in putting money into the treasury of the state?

15          A       That is correct, Your Honor.

16          Q       But you can discriminate against him on  
17 taking the money out?

18          A       It would presumably be so, Your Honor, for  
19 the same reasons, if I may submit, that he is denied the right  
20 to vote and that he is denied the right to hold public office.  
21 The taxes which the alien pays go to hold public elections;  
22 they go to print the ballots upon which the elections are held;  
23 they go to pay the officeholders who are elected to those  
24 offices --

25          Q       Except I'm not there yet.



1 A I beg Your Honor -- I'm sorry, Your Honor.

2 Q I don't have the right to vote before me.

3 I have the right for the man to share in the tax load that he  
4 contributed to equally with everyone else. That's all I see  
5 in this case. Is there something else here?

6 A Not in this case, Your Honor. I think  
7 there is, however, the logical extension of this case.

8 Q Oh, I think we could try this case without  
9 deciding that.

10 A I presume you could, Your Honor.

11 I have nothing further, Mr. Chief Justice.

12 Thank you.

13 MR. CHIEF JUSTICE BURGER: Thank you Mr. Work.

14 Mr. Stein.

15 ORAL ARGUMENT BY JONATHAN M. STEIN, ESQ.

16 ON BEHALF OF APPELLEES

17 MR. STEIN: Mr. Chief Justice and may it please  
18 the Court:

19 We have before us today a case of alien discrim-  
20 ination which is rooted in the prejudice and ill will of an  
21 earlier year in Pennsylvania. The fact that this was passed  
22 at a time of war hysteria and anti-alien feelings in Pennsyl-  
23 vania, it was made clear in a memorandum study commissioned by  
24 the state, by the welfare department, which is part of the  
25 record.

1 In addition, this law which was passed in 1939  
2 was passed within five days of the State Alien Registration  
3 Act, which this Court struck down in Hines v. Davidowitz.  
4 And, in a sense the motivations behind a citizenship require-  
5 ment are not unlike the motivations behind a residency require-  
6 ment as in Shapiro v. Thompson. Both basically rest in a  
7 basic distrust and dislike, perhaps a fear of the foreigner;  
8 of the out-of-state person.

9 Q Do you think the limitations the state  
10 places on voters and holding a public office is rooted in  
11 some of the same kinds of hostility?

12 A It may be, Your Honor, but I think the  
13 voting area and this political public office area is very much  
14 distinguishable from this area before the Court today. While  
15 the government has much wider latitude in acting to protect  
16 the political processes, the governmental processes and they  
17 don't have that latitude in the area which is before us today,  
18 of social or economic benefits which are based upon a classi-  
19 fication on aliens. That's the teaching of

20 That's the teaching of Takahashi, which says that  
21 a state is limited, is very much limited in making a classifi-  
22 cation based on alienage.

23 I might point out in response to the Commonwealth's  
24 argument that Takahashi wasn't an alienage case. That the  
25 provision of the Federal -- of the state law based upon a

1 Federal citizenship requirement does not mention any racial  
2 exclusion and footnotes both in Takahashi and Oyama point to  
3 Japanese and other groups which were affected by that pro-  
4 vision. Moreover, this Court had an opportunity in Takahashi  
5 to view this as a racial case, as a Japanese case; in fact,  
6 the option was made clear by the concurring opinion of Mr.  
7 Justices Rutledge and Murphy, who perhaps would have preferred  
8 to view it as an anti-Japanese case, but that's not the way  
9 the majority of the Court viewed the case.

10 The majority of the Court viewed the case and  
11 equated alienage with color as both being impermissible bases  
12 for classification both under the 14th Amendment and both  
13 under the Civil Rights Act.

14 I might add that --

15 Q Mr. Stein, is your fundamental position  
16 here on the Equal Protection Clause?

17 A Yes, it is.

18 Q If it is, why isn't it as much on a  
19 fortiorari, why isn't the Pennsylvania law in conflict with  
20 Section 1981?

21 A Well, we add, Your Honor, that it is in  
22 conflict both with the Equal Protection argument and those  
23 statutes that have put that clause, in effect, that Section  
24 1981 like the like the inception of 2000(d) in 42 USC, which  
25 promulgate with that principle of equality between citizens

1 and aliens.

2 We have -- the named plaintiffs in this case are  
3 aliens; are permanent resident aliens of Pennsylvania who have  
4 had a history of productive and sustained work before becoming  
5 ill and requiring public assistance. The classification es-  
6 tablished is one between two indistinguishable classes: needy  
7 residents of Pennsylvania on the one hand who are citizens;  
8 needy residents of the state who are not U. S. citizens and we  
9 maintain that on either of the two equal protection tests this  
10 classification must fall, either on the basis that there is  
11 simply no rational relationship to a constitutionally per-  
12 missible legislative purpose or on such an equally applicable  
13 test that the state must meet a heavy burden of justification  
14 in validating justifying this discrimination.

15 The latter test, we suggest, is applicable  
16 because we are dealing with a suspect criteria. Suspect  
17 because history has shown that when this criterion is used to  
18 base a classification it's often been master of simply  
19 irrational prejudice against that particular group.

20 I might add: in addition we are dealing with a  
21 group which is an insular minority, disenfranchised and which  
22 it's politically defenseless and can't rely upon the political  
23 processes for redress of grievances. This is an additional  
24 reason why we suggest that a special scrutiny test is appli-  
25 cable.



1 Q Isn't that a good argument for giving all  
2 those people the vote and the right to run for office so they  
3 can protect their interests?

4 A Well, we suggest, Your Honor, that that  
5 realm of political activity and that realm of holding public  
6 office and voting, does involve the government's attempts to  
7 protect the integrity of its processes. Perhaps --

8 Q Protect it from what?

9 A Well, you know, perhaps a concern about  
10 loyalty to another country. It may well be that that may not  
11 be that rational a basis. This Court in Oyama, in the con-  
12 curring opinion in Oyama Mr. Justices Murphy and Rutledge  
13 suggested that, assuming a priori the disloyalty of aliens  
14 cannot be done. But we are just suggesting now that because  
15 this is an area of political concern involving the integrity  
16 of the political processes that the government had much wider  
17 latitude to legislate to regulate in this particular area.

18 Q But as soon as you use a term like "protec-  
19 ting the integrity of the process," haven't you established  
20 an invidious category for the people against whom that wall is  
21 erected?

22 A Not necessarily. There are certain exigen-  
23 cies as certain wartime concerns where national securities may  
24 be not unrelated to voting and holding public office --

25 Q These aren't wartime, these measures that --

1                   A       That's right.

2                   Q       -- that have reference to voting and  
3 holding office are not war measures. Most states have had  
4 these since time immemorial; haven't they?

5                   A       Yes, but the -- but voting can involve  
6 questions of national security, of political questions which  
7 the government, in our view, has much greater latitude in  
8 regulating them than they do in the fishing license, welfare  
9 benefits scheme.

10                   What is really, I think at issue here in terms of  
11 what the basis of the Pennsylvania is is really the assumption  
12 that these aliens are less deserving than citizens. And it  
13 has been judicially recognized, both by the court below; both  
14 by the Purdy Fitzpatrick California Supreme Court opinion and  
15 in the concurring opinion in Oyama, that aliens have contri-  
16 buted their energies and their tax dollars to this country.  
17 They have often been long domiciled in this country with a  
18 history of productive contributing to the state and to the  
19 nation. They have established families and reared children.  
20 They have entered into the social and religious fabric of this  
21 nation and of course they have obligations to serve in the  
22 armed forces.

23                   Q       Can't you make exactly the same argument  
24 with respect to voting? Exactly the same argument?

25                   A       I think one could and that's why the -- and

1 that's why I would only suggest that the two are distinguish-  
2 able, but it may well be that certain voting rights, as my  
3 colleague from Arizona and Mr. Ching suggested, that voting  
4 privileges may be those privileges which are and should be  
5 extended to aliens. I'm not closing my mind to that --

6 Q Well, that's what I suspect, and I assume  
7 if this case is affirmed you will be back here next year with  
8 a voting case and I'd like to get your definitive answer to  
9 that, particularly if the office for which the voting case  
10 comes up is for local sheriff or city council.

11 A My answer there is that since there is wide  
12 latitude for state governments to regulate in the area of  
13 political concerns that right now aliens do not have that  
14 right to vote under the Equal Protection Clause.

15 Q Right now they don't have the right that  
16 you are arguing for as yet; do they?

17 A Well, Your Honor, in fact they do in terms  
18 of how the Equal Protection Clause has been interpreted in its  
19 application to aliens. This case in one sense presents a  
20 stronger factual pattern than does the Shapiro v. Thompson  
21 residency case; in terms of whether there is a rational basis  
22 for this classification.

23 In the residency case you had newcomers to the  
24 state; people living in the state less than one year. In our  
25 case you have people who have been in the state for many years,

1 who have clearly made contributions to the state and to the  
2 nation.

3 Q Yes, but at the same time haven't they  
4 chosen not to become naturalized?

5 A No, Your Honor; in many cases, as the  
6 record shows, many resident aliens cannot become naturalized  
7 simply because they can't pass the literacy test.

8 Q Well, then they have chosen not to become  
9 naturalized by becoming literate.

10 A Well, if that is a choice of volition, a  
11 question of volition I would say that for people, at least  
12 literacy is not always for everyone a voluntary act. I mean  
13 there are people who haven't been literate and can't speak  
14 English or they may be quite literate in Russian or Spanish,  
15 due to no fault of their own. And so that aspect --

16 Q Well, take the other case where let's  
17 assume could have become a citizen, was quite literate and  
18 just chose not to. What would you suggest then?

19 A I think that's really an irrelevant concern  
20 because the Equal Protection Clause does apply to aliens,  
21 irrespective to their desire to become naturalized, irrespec-  
22 tive of their literacy qualifications.

23 The Pennsylvania, in a sense, is saying that they  
24 are trying to save money for their own people. Well, but  
25 through this citizenship bar they are, in fact, denying



1 assistance to their own people, the residents of Pennsylvania.  
2 And for that reason we suggest that there is no rational  
3 basis to this classification.

4 The conservation of funds argument we maintain  
5 also comes down to the post hac rationalization for what has  
6 amounted to a quite casual and pointless discrimination. The  
7 Court below questioned the fiscal concern when they pointed  
8 out that about 65 or 70 people each year are denied general  
9 assistance in Pennsylvania, in a state where there are over  
10 700,000 people on assistance.

11 In addition, Pennsylvania, although saying that  
12 they are saving money for U. S. citizens and denying it to  
13 aliens, is giving money to aliens in the Federal categories.

14 Q But on your arguments don't we have to  
15 resolve the constitutional issues precisely as though 600,000  
16 of the 700,000 were aliens? Does it make any difference how  
17 many or how few aliens are involved?

18 A No, It doesn't, Your Honor. It only makes  
19 a difference as to the State's argument in suggesting a  
20 rational basis in a fiscal concern. The Court below said  
21 where is the fiscal concern really, when merely 65 or 70  
22 people are at issue?

23 Q How is that relevant?

24 A Well, I mean to say --

25 Q It's unconstitutional.

A Well, it is not relevant in the abstract to

1 the constitutional issue but in this case where the sole  
2 basis for justification resides in the conserving of state  
3 funds one has to scrutinize that solution and see it for what  
4 it is, which is, we suggest, a fiction in this case, because  
5 there is really no fiscal concern here. This was an argument  
6 which is a post hac rationalization for a discrimination made  
7 30-odd years ago, when prejudice and ill will against aliens  
8 was really the motivation for this statute.

9 Q But if you have in the State of Pennsylvania,  
10 setting aside, let us say arbitrarily \$600 million for this  
11 program and 600 of the 700,000 total eligible people were  
12 aliens would that not work a hardship to the reduction of the  
13 amount paid to the citizens if we accept your argument?

14 A Your Honor, the clear holding of this Court  
15 in Shapiro v. Thompson established that the saving of welfare  
16 costs, if that's what the state is concerned with --

17 Q Well, I'm not talking about the saving; I  
18 was talking about the sharing, the division of it.

19 A Well, I can't -- well, I don't think that  
20 the number is relevant to the constitutional question of  
21 whether the state can base a classification upon alienage,  
22 whether there are 60, whether there are 600 --

23 Q Shapiro didn't have anything to do with  
24 aliens, did it?

25 A Shapiro didn't have anything to do with

1       aliens did it?

2               A       No, Your Honor; there was a fundamental  
3       freedom there of interstate travel which established the basis  
4       for the compelling state interest test. We're suggesting in  
5       this case that the inherently suspect criterion of alienage  
6       would justify application of that test, but even if one  
7       doesn't apply that test, even the traditional test of a  
8       rational relationship to a constitutionally acceptable legis-  
9       lative purpose, this law fails.

10              In fact, Shapiro itself suggested that the  
11       residency requirement would seem to fail even on the test of  
12       the rational relationship test.

13              Q       If the alien receiving this benefit,  
14       spent six months of the year in some other country, his native  
15       country or any other country, do you -- what would you think  
16       would happen to his rights, the right that you argue for to  
17       receive that benefit?

18              A       I would not think he would have a right to  
19       receive welfare in Panama or Great Britain as the two named  
20       plaintiffs here did. Residents in the state, without being a  
21       durational residency requirement, would be a valid requirement  
22       because that cuts equally for U. S. citizens or for aliens and  
23       so that you know, the fact that a state can -- we maintain a  
24       state could and could validly set residence in the state as a  
25       bona fide constitutional requirement for receiving assistance.

1           Q     They could only receive the assistance for  
2 the days and months that they spent within the state; is that  
3 your limitation?

4           A     Well, if these people are in the state they  
5 would be eligible like other U. S. citizens in Pennsylvania  
6 to receive assistance, they couldn't go someplace else and  
7 ask for benefits when they are not residing in Pennsylvania.

8           The Commonwealth does give much leeway for  
9 support in Dandridge v. Williams, a recent decision of this  
10 Court. And that case is clearly distinguishable in this case;  
11 that case did not deal with inherently suspect criteria such  
12 as aliens. In fact the argument used of saving the welfare  
13 costs really cuts quite far so that we can justify a variety  
14 of discriminations, invidious discriminations which are clearly  
15 not permissible by the 14th Amendment.

16          I wish to further suggest that the -- I wish to point  
17 out that the distinguishing facts drawn on Takahashi, that  
18 earning a livelihood really is not a distinguishing factor in  
19 this case. Both Takahashi and both this case deal with access  
20 to the necessities of life.

21          In fact, there is a stronger argument in our case  
22 for that point because at least in Takahashi there was a bar  
23 to one aspect of employment. And conceivably those fishermen  
24 could have had access to some other occupation.

25          Q     Takahashi didn't support the -- did it?



1           A       Well, Crane, I think is quite -- on its  
2 own grounds. I think the underlying doctrine, the special  
3 public interest doctrine is something which Takahashi, at  
4 least very seriously questions, if not overrules. The special  
5 public interest doctrine itself which the state does rely  
6 upon really is not applicable to this case because there is no  
7 special public interest in tax dollars. Where you have aliens  
8 themselves contributing to the tax dollars, to that resource  
9 and a whole rationale of early cases of somehow a property  
10 interest among the members of the state just doesn't hold when  
11 those members of the state who are aliens contributed to that  
12 resource, of resources.

13           Q       Well, what do you think about a law of the  
14 United States which said that no alien may become a citizen  
15 who, at the time when he applies for citizenship, is a public  
16 charge?

17           A       Well, that is a different case precisely,  
18 because the Federal Government has plenary powers in that  
19 instance of regulating, express powers of the constitution of  
20 regulating immigration and naturalization.

21           Q       Well, what if the Congress also went on and  
22 said: "No welfare benefits shall be paid to anyone, to any  
23 alien until after he becomes a citizen, at which time he is no  
24 longer an alien?"

25           A       The constitution would grant that power to

1 Congress if Congress was employing their immigration and  
2 naturalization powers; if they did this as part of an immigra-  
3 tion and naturalization scheme so that they could justify  
4 the --

5 Q But you mean powers under the Equal  
6 Protection Clause?

7 A Through the Fifth Amendment the Equal  
8 Protection -- through the Due Process Clause --

9 Q Through the Due Process Clause -- isn't  
10 that the Federal counterpart --

11 A It is, and there obviously would be a  
12 balancing between the Equal Protection principles through the Due  
13 Process Clause and these plenary powers.

14 I would suggest that the Congress would probably  
15 have that power in terms of that balance between those --

16 Q Well, why can't it then say -- why can't it  
17 by the same token affirmatively permit a state to bar aliens  
18 from welfare benefits?

19 A Well, they -- this Court in Shapiro v.  
20 Thompson did state that Congress could not authorize states  
21 to deny Equal Protection to a class discriminated against and  
22 of course we do have in this instance, express immigration  
23 powers given to Congress. What might be reasonable and con-  
24 stitutional for Congress to do may not be constitutionally  
25 reasonable for the state to do.

1           The -- I might go into this but continuing my  
2 argument that the same scrutiny which the Equal Protection  
3 Clause does require of this legislation is also required be-  
4 cause this is an area that has been preempted by the Federal  
5 Government, and as Hines states, must be in that it confines  
6 the narrowest limits to state regulation.

7           There is clear conflict with Federal policy in  
8 law. There is a whole scheme, a very complex scheme of  
9 Federal regulation in this area which does exclude paupers  
10 from the country and does provide for deportation in a very  
11 limited case where the person becomes a public charge within  
12 five years from reasons which predated entry.

13           But, there is also a humane aspect to that pro-  
14 vision of the law that once you are legally admitted into a  
15 country you must -- and you have a right to enter and abide  
16 in a state you have a right to live under all equal privileges  
17 of citizens under nondiscriminatory laws.

18           The Pennsylvania doctrine in this case, irrespec-  
19 tive of whether the person has been here five years, irrespec-  
20 tive of what the cause of indigency was; in addition, the  
21 effects of their act, as was stipulated below, the effect of  
22 Pennsylvania's act is to discourage continued residence in  
23 Pennsylvania and force needy resident aliens out of Pennsyl-  
24 vania into other states that would be hospitable to them, to  
25 meet their needs.

1           Q       I suppose that by the same token residents  
2 of Scotland or Panama or elsewhere would be discouraged from  
3 coming to Pennsylvania in the first instance compared with  
4 other states which do not draw this line.

5           A       It well might be, although the record  
6 doesn't suggest that fact. And the record --

7           Q       Well, isn't it just as much true? It's an  
8 economic impulse.

9           A       Well, there may well be some aliens who  
10 might think that, although they would probably be people who  
11 would be excluded because the Federal law really almost en-  
12 sures -- and this is where the state interest is really en-  
13 sured by Federal law -- that those admitted into the country  
14 will be productive citizens.

15           The named plaintiffs in this case had Secretary  
16 of Labor approval for the jobs they had, so there is a very  
17 real screening process to prevent those people who states  
18 might consider a burden, from coming into the United States.

19           But this aspect of segregating poor aliens into  
20 other states merely flies in the face of our concept of the  
21 Federal Union. The Edwards v. California case established  
22 that interstate migration of poor people is an aspect of  
23 national concern which doesn't admit a diverse treatment of  
24 the states and this is precisely what Pennsylvania is doing  
25 by denying resident aliens their rights, the Federal privileges



1 of entrance and abode in Pennsylvania.

2 Q Well, does your argument mean that every  
3 state must have the same, must meet a certain standard of  
4 welfare payments?

5 A No. I think the --

6 Q Well, if Florida gives twice as much as  
7 Indiana, doesn't that fall right within the framework of your  
8 argument?

9 A Well, if the basis of their giving different  
10 payments is based upon alienage --

11 Q No; I'm just talking about the urge to go  
12 to Florida would be twice as great for people who are on  
13 relief as it is to go to Indiana? You're not talking about --  
14 you were addressing yourself to this right to travel, the  
15 movement argument, as I understood you.

16 A Well, yes, but as an aspect of a Federally-  
17 conferred privilege under Truax and Takahashi, which state  
18 clearly that the alien has the right to enter and abide, to  
19 live among the community and perhaps among his ethnic or  
20 religious fellows and can't be forced out of the state as what  
21 is happening here in Pennsylvania, where it's clear it's not  
22 speculation; it's a stipulated fact below that the poor aliens  
23 are being forced out of the state as a result of this require-  
24 ment.

25 I might further add, in terms of conflict with

1 Federal laws a number of the civil rights statutes have been  
2 cited and I don't think they require further elaboration at  
3 this point. But there are other conflicts of Federal law.  
4 Six months state residence is a requirement of naturalization  
5 to become a U. S. citizen and for that alien who is forced out  
6 of a particular state and who wishes to become naturalized,  
7 that six months period of naturalization is terminated and is  
8 interrupted.

9 I might also, in terms of embroiling ourselves  
10 with other nations, both Panama and Great Britain grant  
11 public benefits to aliens; to U. S. citizens in Panama and  
12 Great Britain and if either of these states were to retaliate  
13 against Americans they wouldn't retaliate against Pennsylvan-  
14 ians but --

15 Q What is the assistance in Panama? How  
16 much is it?

17 A Well, I believe Panama gives gives social  
18 security benefits and hospital benefits to aliens in the  
19 country.

20 Q Well, do they give welfare benefits?

21 A I don't think they do. Great Britain does,  
22 though, and U. S. citizens in Great Britain are eligible for  
23 supplementary benefits.

24 I'd like to say in conclusion that we are, as  
25 President Kennedy's book set forth: "a nation of immigrants,"

1 with a tradition and I guess the strengths of our history  
2 reside in the fact that when immigrants have come to our  
3 shores and to live among us they have been afforded equal  
4 treatment. This tradition has often required the protection  
5 and vigilance of this Court when such immigrants have been  
6 met with ill will and prejudice when they have come to this  
7 shore.

8 And Appellees stand before this Court today  
9 seeking this protection and respectfully request that the  
10 Court affirm the decision below.

11 Thank you.

12 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stein.

13 You have four minutes left, Mr. Work, if you  
14 wish it.

15 REBUTTAL ARGUMENT BY JOSEPH P. WORK, ESQ.

16 ON BEHALF OF APPELLANTS

17 MR. WORK: Mr. Chief Justice I have nothing  
18 further unless the Court has some specific questions.

19 MR. CHIEF JUSTICE BURGER: Thank you Mr. Work.

20 Q May I ask you one question?

21 A Yes, sir.

22 Q What do you do with the language of the  
23 14th Amendment itself, which draws a distinction in certain  
24 places, between citizens and aliens?

25 A I find nothing in the amendment itself,

1 Your Honor, which draws that distinction.

2 Q You do not? It says this: "All persons  
3 born or naturalized in the United States and subject to the  
4 jurisdiction thereof are citizens of the United States and  
5 of the state wherein they reside. No state shall make or  
6 enforce any law which shall abridge the privileges or immuni-  
7 ties of citizens of the United States, nor shall any state  
8 deprive any person of life, liberty or property without due  
9 process of law." "Not deny to any person within its jurisdic-  
10 tion the equal protection of the laws."

11 Doesn't that signify some difference?

12 A I think that there is some difference;  
13 however, Your Honor, if I understood the decisions of this  
14 Court correctly with respect to the Equal Protection Clause of  
15 the 14th Amendment it is my understanding that this Court had  
16 already said that the Equal Protection Clause did apply to  
17 aliens, as well as citizens.

18 Q Yes. Well, it was under the language of it.

19 A Right. The only distinction that I see,  
20 Your Honor, and the only, perhaps as I stated in the beginning  
21 my whole position in being here is based upon the fact that  
22 there are judicially-created exceptions to the overall applica-  
23 bility of the Equal Protection Clause, one of them being the  
24 special public interest doctrine.

25 Q What?



1                   A       The special public interest doctrine.

2                   Q       What do you mean by that?

3                   A       That the state has the right in the conser-  
4 vation of its assets for its own citizens to draw a distinc-  
5 tion between aliens and citizens.

6                   Q       But the amendment says in reference to any  
7 person they shall not be denied equal protection of the laws.

8                   A       I fully appreciate that, Your Honor.

9                   Q       And grants no authority it seems, to treat  
10 them differently than you are treating the other citizens of  
11 the state.

12                  A       I would, in all humility, say to His Honor,  
13 that if I were reciting the case at this time perhaps I would  
14 decide it differently, but it is my understanding of the  
15 decisions of this Court that they have said there are judi-  
16 cially-created exceptions to that specific thing.

17                  Q       As to aliens, but not as to other people  
18 who are permitted to live there under the laws of the United  
19 States.

20                  A       Right. But only as to aliens.

21                  Q       And you agree, do you not, that the Supreme  
22 Law of the United States says they have a right to live in  
23 Arizona like anybody else or Pennsylvania?

24                  A       Correct.

25                  Q       And be treated like other people.

1           A       To the extent that this Court has not drawn  
2 a distinction; yes.

3           MR. CHIEF JUSTICE BURGER: Thank you Mr. Work.  
4 Thank you, MR. Stein. The case is submitted.

5           (Whereupon, at 2:00 o'clock p.m. the argument in  
6 the above-entitled matter was concluded)