EQUALITY WITH A HUMAN FACE: JUSTICE BLACKMUN AND THE EQUAL PROTECTION OF ALIENS

*Harold Hongju Koh**

They say Justice Blackmun has changed. And perhaps he has. For after fourteen years on the Supreme Court, Harry Blackmun is no longer "projected as a mediocre Supreme Court backbencher"[1] or considered just another "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs."[2] Twenty-five years on the federal bench have given this notoriously humble and self-effacing man a

---

* Attorney-Adviser, Office of Legal Counsel, Department of Justice; B.A. Harvard, 1975; B.A. Oxford, 1977; J.D. Harvard, 1980; Law Clerk to Justice Blackmun, October Term, 1981. The views expressed in this essay are not necessarily those of the Department of Justice.

1. Neuborne, *Blackmun: Intellectual Openness Elicits Needed Respect for the Judicial Process*, Nat'l L.J., Feb. 18, 1980, at 18, col. 2.

2. *Cf.* Waltz, *The Burger/Blackmun Court*, N.Y. TIMES, December 6, 1970, § 6 (Magazine), at 61.

bold, independent, and increasingly distinctive judicial voice. As Court-watchers have begun to recognize, Justice Blackmun now raises that voice more and more frequently to speak for the politically powerless, the ignorant, and the inarticulate.[3]

The Justice himself likes to say it has always been so—that although he has not changed over the years, the Court has shifted gradually beneath him.[4] Without defending this proposition in every area of his jurisprudence, this essay describes one doctrinal area where, in my view, Justice Blackmun has not only been consistent, but consistently right: the line of equal protection cases involving state discrimination against resident aliens.[5]

To me, this line of cases calls into question two conventional wisdoms about Justice Blackmun that even his recent "revisionist" chroniclers have left unchallenged: first, that his voting patterns have steadily shifted over the years, while those of his colleagues have stayed largely the same;[6] and second, that in his opinions, "Justice Blackmun makes little attempt to propound a consistent theory of how the Constitution should be interpreted."[7]

The first part of this essay attempts to show that, in decisions regarding state discrimination against resident aliens spanning thirteen years, it has been Justice Blackmun who has cast his vote and used his voice in a consistent manner, even while the coalition of Justices that has voted with him has gradually eroded. This part's purpose is both historical and descriptive: to demonstrate, through a reexamination of these cases as the Court first saw them, how Justice Blackmun has influenced the development of a particular line of Supreme Court precedent. My aim is to establish that in this chain of cases, Justice Black-

---

3. *See, e.g.*, Jenkins, *A Candid Talk with Justice Blackmun*, N.Y. TIMES, Feb. 20, 1983, § 6 (Magazine), at 20; Aronow & Fiss, *The High Court: Illusion of Victory*, NATION, Dec. 18, 1982, at 647; Mann, *Blackmun: No Longer at Court Fringe*, L.A. Times, June 14, 1982, at 1, col. 1, 16, col. 2; Fiss & Krauthammer, *The Rehnquist Court*, NEW REPUBLIC, Mar. 10, 1982, at 14; Neuborne, *supra* note 1; Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983); Comment, *Justice Harry A. Blackmun: The Abortion Decisions*, 34 ARK. L. REV. 276 (1980).

4. *See* Barbash & Kamen, *Blackmun Says 'Weary' Court Is Shifting Right*, Wash. Post, Sept. 20, 1984, at A1, col. 3.

5. *See* Bernal v. Fainter, 104 S. Ct. 2312 (1984); Cabell v. Chavez-Salido, 454 U.S. 432 (1982); Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978); Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

6. *See, e.g.*, Note, *supra* note 3, at 717 n.6 (graphing over time the percentages of full-opinion decisions in which Justice Blackmun "has agreed with" various other Justices).

7. Jenkins, *supra* note 3, at 57.

mun has made a concerted effort—both with and without a Court majority—to address a recurring problem not through ad hoc decision-making, but rather, by constructing an equal protection theory of aliens' rights.[8]

In my view, this theory reflects Justice Blackmun's vision both of the rights possessed by resident aliens in this country and of the role played by judges in protecting those rights. The first part of this essay argues that Justice Blackmun laid the foundations of his theory at a time when it was by no means obvious how vigorously judges should protect the right of resident aliens to be treated as equals, or how rigorously judges should enforce the "equal protection of the laws" with respect to this hard-to-categorize, politically powerless, racially and ethnically diverse group of "persons." With each passing decision, Justice Blackmun's vision of aliens' rights has become fuller and more fervent even as the zeal of other Justices for protecting those rights has noticeably waned.

In its current form, Justice Blackmun's equal protection theory couples a rigorous judicial technique with a sensitive judicial attitude. In all but a narrow class of cases, his theory requires judges to apply the equal protection technique of strict scrutiny to state alienage classifications, conducting a searching historical and structural examination

---

8. *See* Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 299 n.96 ("Mr. Justice Blackmun has played the leading role in formulating the Court's approach" in the alienage cases.) [hereinafter cited as Rosberg, *Protection*]; Rosberg, *Discrimination Against the "Nonresident" Alien*, 44 U. PITT. L. REV. 399, 400 (1983) ("Justice Blackmun . . . has been the Court's standard-bearer in the alienage discrimination area . . . .") [hereinafter cited as Rosberg, *Discrimination*].

Of course, this is not the only constitutional doctrine of which Justice Blackmun has been a principal architect. *See also* Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n, 447 U.S. 557, 573 (1980) (Blackmun, J., concurring in the judgment); Friedman v. Rogers, 440 U.S. 1, 19 (1979) (Blackmun, J., concurring in part and dissenting in part); Bates v. State Bar, 433 U.S. 350 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975) (first amendment commercial speech doctrine); Commonwealth Edison Co. v. Montana, 453 U.S. 609, 638 (1981) (Blackmun, J., dissenting); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979); Washington Revenue Dept. v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1978); Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) (commerce clause analysis of state taxation). *See generally* Moore, *Justice Blackmun's Contributions on the Court: The Commercial Speech and State Taxation Examples*, 8 HAMLINE L. REV. 29 (1985).

For an account of how Justice Blackmun has influenced the Court's analytical method, as opposed to its substantive reasoning, *see* Schlesinger & Nesse, *Justice Harry Blackmun and Empirical Jurisprudence*, 29 AM. U. L. REV. 405, 406 (1980) (concluding that Justice Blackmun's opinions have consistently demonstrated how "the knowledgeable use of empirical data and statistical analysis can both assist the Court in reaching fair adjudicative results and clarify and add precision to its reasoning").

of those classifications in an effort to flush out discriminatory legislative motives. At the same time, Justice Blackmun's theory asks judges to approach their task with an attitude that combines a "communitarian" vision of aliens as valued participants in American society with a classically "liberal" view of aliens as persons with rights to be judged as individuals and treated as equals. Although the Burger Court has undeniably retreated from Justice Blackmun's broader vision of aliens' rights in recent years, the reasoning the Court currently brings to bear in state alienage cases still reflects some of the most fundamental aspects of his equal protection theory.

I cannot fully discuss Justice Blackmun's view of the equal protection of aliens' rights without comparing it to other theories that have recently commanded the Court's attention. In recent years, one critique of the Justice's theory has become so popular that it seems to be evolving into another conventional wisdom about his work. A group of commentators has concluded that an equal protection approach to aliens' rights suffers from incurable "doctrinal incoherence,"[9] "has not been a successful experiment,"[10] and should therefore be abandoned in favor of a theory based on federal preemption.[11] The second part of this essay

---

9. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1064 (1979).

10. Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1070, 1091 (1979). Even commentators who share Justice Blackmun's sympathetic attitude toward aliens have intimated that "[t]hese equal protection cases probably do not represent the Supreme Court at its analytical best." Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 196 (1983).

11. *See* Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond, Plyler v. Doe*, 44 U. PITT. L. REV. 329, 334 (1983); Choper, *Discrimination Against Aliens, reprinted in* J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1981-1982, at 5 (1983) [hereinafter cited as Choper, *Discrimination*]; Choper, *Alienage: A Suspect Classification, reprinted in* J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1978-1979, at 11 (1983) [hereinafter cited as Choper, *Alienage*]; Perry, *supra* note 9; Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 YALE L.J. 940 (1980) [hereinafter cited as YALE Note]; Note, *supra* note 10. *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 65 (1969) (previously making a similar argument).

These commentators locate the constitutional norm that requires states to grant resident aliens equal treatment in the supremacy clause of article VI, not the equal protection clause of the fourteenth amendment. *Compare* U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ." *with* U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

sets forth why I believe a federal preemption theory cannot and should not supplant those equal protection principles Justice Blackmun so hopefully prescribed in his early Court decisions, and whose recent dilution he has so passionately opposed.[12]

In my view, any pure "preemption" theory of "aliens' rights" ultimately becomes a contradiction in terms: in John Hart Ely's wry words, "sort of like 'green pastel redness.' "[13] For aliens, no less than citizens, "take their rights seriously."[14] Almost without exception, aliens come to this country *to secure* rights that are unavailable to them in their native lands—rights of free speech, free thought and religion, and equal educational and employment opportunities. In search of these rights, they leave their homes and their homelands. To enjoy these rights, they pay a price of hardship, sacrifice, and the pain and embarrassment of living their lives as outsiders. Because that price is so dear, aliens treat the rights they have here as special, an integral part of what makes them human.

At bottom, any theory of federal preemption addresses not these human concerns, but rather, *institutional* ones: "how to allocate constitutional *power* as between two levels of government when each seeks to deal with the same area of private conduct."[15] Yet the common thread running through the Burger Court's alienage decisions has been that aliens have sought something more than institutional arrangements or reallocations of governmental power. They have asserted a *right* to be treated as equals.[16] Since 1971, Justice Blackmun has spoken, first for the Court, and as it has shifted away from him, against it, in an effort to give that right meaning.[17]

Despite its explanatory power, any preemption theory ultimately

---

12. *See, e.g.*, Toll v. Moreno, 458 U.S. 1, 19 (1982) (Blackmun, J., concurring); Cabell v. Chavez-Salido, 454 U.S. 432 (1982) (Blackmun, J., dissenting); Ambach v. Norwick, 441 U.S. 68 (1979) (Blackmun, J., dissenting). This part also explains why I believe the Justice's theory to be superior to the various equal protection theories of aliens' rights currently held by other members of the Court. *See infra* Part II.A.

13. J. ELY, DEMOCRACY AND DISTRUST 18 (1980) (describing the concept of "substantive due process").

14. *Cf.* R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

15. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-28 at 391 (1978) (emphasis added).

16. *See id.* § 16-1 at 993 (describing this right). *See also* R. DWORKIN, *supra* note 14, at 227 (defining the right to treatment as an equal as "the right . . . to be treated with the same respect and concern as anyone else").

17. Because, in some respects, aliens *do* differ from citizens, I agree that it would not make constitutional sense to insist that they be treated equally with respect to everything. To the extent that a fuller incorporation of preemption analysis into Justice Blackmun's equal protection theory would clarify what rights states may constitutionally deny to resident aliens, Part II.B tentatively suggests how that theory might perhaps be revised.

lacks the "human face" that must underpin any fully descriptive doctrine of aliens' constitutional rights. In contrast, the notion that equality must have a human face lies at the very heart of Justice Blackmun's equal protection theory of aliens' rights. By reflecting his abiding concern not just with the constitutionality of institutional arrangements, but more fundamentally, with the real-life impact of those arrangements on human lives, Justice Blackmun's opinions in the alienage decisions express more eloquently than any tribute just how fully Harry Blackmun's humanness has infused his view of the Constitution.

I. FROM *Graham* TO *Bernal*: JUSTICE BLACKMUN'S EQUAL PROTECTION THEORY OF ALIENS' RIGHTS

A. The World Before Graham

When Justice Blackmun arrived at the Supreme Court in June of 1970, neither he nor the Court's current membership had had much experience in adjudicating aliens' rights. Of Justice Blackmun's 221 reported opinions for the Eighth Circuit since 1959, only one, a deportation case, had involved an aliens' rights issue.[18] Although the Warren Court had, during those same years, passed through the heyday of

18. *See* Patsis v. INS, 337 F.2d 733 (8th Cir. 1964), *cert. denied*, 380 U.S. 952 (1965).

Even in those days, however, Judge Blackmun showed the sensitivity to aliens' concerns that would later characterize his equal protection opinions on the Court. Patsis, a Greek citizen temporarily admitted to the United States in 1936 as a steamship crewman, had jumped ship, assumed a false name, and lived in the U.S. for seven years; in 1943, he was taken into custody and was deported four years later. Within seventeen months, he had returned aboard another steamship, jumped ship again, and illegally remained for another fourteen years. In 1962, however, Patsis was once again apprehended. At his deportation hearing, Patsis sought suspension of deportation and retroactive admission on the ground that he had already lived here for twenty-five years, making it an extreme hardship for him to return to Greece. The Special Inquiry Officer found Patsis deportable and rejected the various grounds offered to support a discretionary suspension of his deportation.

The INS opposed Patsis' petition for review to the Eighth Circuit on the ground that under § 244(f) of the Act, 8 U.S.C. § 1254(f) (1961), Congress had made discretionary suspension of deportation unavailable "to an alien who . . . entered the United States as a crewman." Although Judge Blackmun agreed that, as applied, this provision "would end [Patsis'] case," he nevertheless conducted a detailed examination of Patsis' other claims "because deportation is so drastic a penalty and can be the equivalent of banishment or exile . . . and because we do not wish to give less than the utmost consideration to this alien." 337 F.2d at 739 (citations omitted).

"With some reluctance on our part" and conceding that "there are elements of hardship in Patsis' case," Judge Blackmun ultimately denied relief. 337 F.2d at 742. In passing, he reviewed and analyzed the "legislative veto" provisions of the Immigration and Nationality Act, 8 U.S.C § 1254(b), (c). *See* 337 F.2d at 742. Ironically, as Justice Blackmun, he would vote nineteen years later to strike § 1254(c)(2) and to cancel another alien's deportation in a case destined to become famous for other reasons. *See* INS v. Chadha, 103 S. Ct. 2764 (1983) (declaring legislative vetoes unconstitutional).

what has become known as "substantive equal protection,"[19] it had never attempted to apply equal protection analysis to state alienage classifications. The formal recognition of aliens as a "discrete and insular minority" was destined to be a Burger Court invention.

We sometimes forget how different the universe of equal protection looked back in March of 1971, when *Graham v. Richardson*[20] came to the Court. In the seventeen years since *Brown v. Board of Education*,[21] the most straightforward equal protection cases had already come and gone. The Court had declared race and national origin to be "suspect" classifications properly subject to strict judicial scrutiny[22] and had deemed the rights to vote, to interstate travel, and to appeal in criminal cases to be "fundamental interests" whose burdening by legislative classifications similarly warranted heightened review.[23]

Harder cases, however, were yet to come. In 1971, the Court was just beginning to decide whether to extend heightened scrutiny to classifications based on wealth,[24] gender,[25] and illegitimacy;[26] it would be years before it would grapple with "quasi-suspect" classes or techniques of "intermediate" scrutiny.[27] More than a year would elapse before Professor Gunther would announce to the world that the judicial scrutiny triggered by suspect classifications and fundamental interests,

---

19. *See* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 (defining the term); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 2 (1977) [hereinafter cited as Karst, *Foreword*]. *See also* Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167.

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

21. 347 U.S. 483 (1954).

22. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Hernandez v. Texas, 347 U.S. 475, 478-80 (1954).

23. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Shapiro v. Thompson, 394 U.S. 618 (1969); Griffin v. Illinois, 351 U.S. 12 (1956).

24. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (invalidating state filing fee charges for indigents seeking access to civil court, but grounding its holding in the due process, rather than the equal protection, clause); James v. Valtierra, 402 U.S. 137 (1971).

25. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971).

26. *See, e.g.*, Labine v. Vincent, 401 U.S. 532 (1971).

27. The Court was still years away from deciding whether age is a suspect classification. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976) (per curiam). Similarly, years would pass before the Justices would settle upon intermediate scrutiny for gender classifications, *see* Craig v. Boren, 429 U.S. 190, 197-99 (1976), and even then, only after a serious flirtation with strict scrutiny. *See* Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion). Nor would the Court swiftly arrive at its "not toothless" standard for review of illegitimacy classifications. *See* Trimble v. Gordon, 430 U.S. 762 (1977). *See generally* Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912 (1981).

though " 'strict' in theory," was "fatal in fact."[28] More than two years would pass before the Court itself would halt the expansion of the fundamental interests branch of the equal protection doctrine and fully embrace the two-tier approach to equal protection review.[29] In short, as the Court heard argument in *Graham v. Richardson*, it was by no means apparent how the Justices would adapt the Warren Court's "new" equal protection analysis to state laws placing peculiar burdens upon resident aliens. Indeed, it was not even certain that the Court would begin its inquiry by asking whether such restrictions deny those "persons" the "equal protection of the laws."

B. Graham: *The Seeds of Justice Blackmun's Theory*

In *Graham*, lawfully admitted resident aliens from Mexico, Scotland, and Panama challenged Arizona and Pennsylvania provisions conditioning welfare benefits either upon American citizenship or a durational residency requirement imposed only on aliens. Looking back at *Graham* as the Justices first saw it, one realizes that the Court could easily have chosen not to treat it as an equal protection case at all. The alien appellees pressed their equal protection claim as only the fourth of four arguments against the statutes, and that claim filled only five pages of their brief.[30] Even accepting *Graham* as an equal protection case, the Justices could conceivably have viewed it as one about welfare benefits or durational residency requirements, rather than the rights of aliens.[31] Indeed, one might have thought Justice Blackmun was hinting

---

28. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *See also* Karst, *Foreword supra* note 19, at 2 (up to this point, law review commentators had avoided "crystalliz[ing] the doctrine [of equal protection into] a rigid two-tier formula, with 'strict scrutiny' for some cases and a passive 'rational basis' review for all others").

29. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28, 55 (1973) (rejecting an equal protection challenge to inter-district school financing inequalities).

30. The aliens argued, first, that the state durational residency requirements were preempted because they conflicted with the United Nations Charter and the Charter of the Organization of American States; second, that the state laws infringed on congressional power to regulate immigration and naturalization; and third, that the state laws violated the Civil Rights Act of 1870, 42 U.S.C. § 1981, and the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). *See* Appellees' Brief, Graham v. Richardson, 403 U.S. 365 (1971).

31. The Warren Court's last major equal protection decision, Shapiro v. Thompson, 394 U.S. 618 (1969), had also involved both, and had struck down state laws conditioning eligibility for welfare benefits on durational residency requirements as an unconstitutional infringement on the fundamental right to interstate travel. In 1971, the Burger Court had not yet shown signs of cutting back on *Shapiro*. *See* Kurland, *1971 Term: The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181, 261 (discussing two cases decided the Term after *Graham* "quickly and summarily" rejecting attempts to get around the *Shapiro* rule). Nor, when *Graham* was argued, had

as much when he opened his opinion for the Court with the words: "These are welfare cases."[32]

Within a few pages, however, it became clear that the case would be an equal protection landmark. Recalling that resident aliens, no less than citizens, are persons "entitle[d] . . . to the equal protection of the laws of the State in which they reside,"[33] Justice Blackmun laid the verbal cornerstone of his equal protection theory:

> [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority (see United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938)), for whom such heightened judicial solicitude is appropriate.[34]

By invoking what Justice Powell has called "the most celebrated footnote in constitutional law,"[35] Justice Blackmun became the first member of the Court "since Justice Stone to indicate in an Opinion of the Court that 'discreteness and insularity' entitle a minority to special constitutional protection."[36] Applying heightened scrutiny to the statutes before him, Justice Blackmun concluded that the states' concern for its own fiscal integrity and desire to preserve limited welfare benefits for its own citizens were not sufficiently compelling state interests to justify discriminating against aliens.[37]

In hindsight, a number of commentators have found the first component of Justice Blackmun's equal protection theory, *Graham*'s recognition of alienage as a suspect classification, "surprising," not only because the case apparently could have been resolved solely on federal

---

the Court finished expressing its distaste for durational residency requirements. *See* Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating durational residency requirements for state voting).

32. 403 U.S. at 366. Indeed, Professor Kurland's year-end summary of the 1970 Term categorized *Graham* with other decisions about "the welfare state," rather than under the rubric of "equal protection." *See* Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 SUP. CT. REV. 265, 313.

33. 403 U.S. at 371 (citing Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)). *Cf.* Plyler v. Doe, 457 U.S. 202, 210 (1982) (holding that undocumented aliens are also "persons").

34. 403 U.S. at 372.

35. *See* Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 & n.4 (1982).

36. Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 7-8 (1978). As if to dispel any doubt as to what he was saying, only a few pages later the Justice rejected the states' assertion that strict scrutiny was not warranted because aliens did not enjoy the fundamental right to travel. He reiterated that "[t]he classifications involved in the instant cases . . . are inherently suspect and are therefore subject to strict judicial scrutiny *whether or not a fundamental right is impaired.*" 403 U.S. at 376 (emphasis added).

37. 403 U.S. at 374.

preemption grounds,[38] but also because it came "at a time when the Court elsewhere was attempting to limit the sweep of the equal protection clause—refusing to name new suspect classifications, or to create new 'fundamental rights.' "[39] What makes *Graham* even more surprising in the cold light of subsequent developments, is that Justice Blackmun succeeded in bringing state classifications that discriminate against resident aliens under strict judicial scrutiny without provoking a dissent.[40]

C. Sugarman: *Defining "Political Community"*

It did not take long, however, before that unanimity began to crumble. On consecutive days of its January 1973 argument session, the Court heard *Sugarman v. Dougall*[41] and *In re Griffiths*,[42] two challenges to state provisions broadly discriminating against aliens. In *Sugarman*, a class of permanent resident aliens challenged a New York law that flatly prohibited aliens from employment in the state competitive civil service. Now writing for eight Justices, Justice Blackmun held that the statute violated the equal protection clause.[43]

In support of its citizenship requirement, New York claimed an "interest in establishing its own form of government, and in limiting

---

38. In Part III of *Graham*, Justice Blackmun concluded that once the federal government has admitted aliens under its broad powers to determine the terms and conditions of their entry and residence, those "aliens . . . have a right to enter and abide in any State in the Union 'on an *equality of legal privileges with all citizens* under non-discriminatory laws.' " 403 U.S. at 378 (emphasis added). Because "the state statutes at issue . . . impose auxiliary burdens upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependency on public assistance," the Justice concluded, they conflicted with Congress' broad declaration "that as long as [lawfully admitted resident aliens] are here they are entitled to the *full and equal* benefit of all state laws for the security of persons and property." 403 U.S. at 378-79 (emphasis added) (citation omitted). Because Part III's preemption analysis would have sufficed to invalidate the challenged state laws, one commentator has called *Graham*'s "conclusion that alienage is a suspect classification . . . gratuitous to begin with." *See* Hutchinson, *supra* note 19, at 187-88.

39. Note, *supra* note 10, at 1074 (footnote omitted). *See also* Rosberg, *Protection*, *supra* note 8, at 298 ("In almost every conceivable way 1971 was an unlikely time for the Court to take that . . . step."); Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, at 1105 n.72 (1982) (Justice Blackmun's finding that aliens as a class are a discrete and insular minority was "an amazing assertion").

40. Justice Harlan did not join Part II of the *Graham* opinion, concurring only in the judgment and those parts of the opinion discussing preemption. *See* 403 U.S. at 383.

41. 413 U.S. 634 (1973).

42. 413 U.S. 717 (1973).

43. Justice Rehnquist, who had just joined the Court, was the only dissenter, filing the same dissent in both *Sugarman* and *Griffiths*. *See* 413 U.S. at 649. In *Sugarman*, unlike *Graham*, Justice Blackmun did not reach the aliens' preemption claim. *Compare id.* at 646, *with supra* note 38.

participation in that government to those who are within 'the basic conception of a political community.' "[44] Without denying the weight of that interest, Justice Blackmun concluded that "in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose."[45]

By so saying, he crystallized the second element of his equal protection theory: the requirement of searching structural review. Rejecting the state's suggestion that he view its citizenship requirement for the competitive service in isolation, the Justice instead insisted upon "[v]iewing the *entire* constitutional and statutory framework in the light of the State's asserted interest."[46] Based on that stringent structural examination, the Justice found the statute wanting because "[t]he citizenship restriction sweeps indiscriminately."[47]

In one sense, *Sugarman* did little more than fulfill an historic promise the Court had made to resident aliens many years earlier.[48] In another sense, however, *Sugarman* clearly shattered the mold formed by traditional equal protection cases. Before *Sugarman*, the Court had subjected all legislative classifications to unitary standards of equal protection review. Because it had concluded that race and national origin are never morally relevant bases for state classification,[49] the Court

---

44. 413 U.S. at 642 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).

45. 413 U.S. at 643.

46. *Id.* (emphasis added). *See also id.* at 640 ("The present case concerns only § 53 of the Civil Service Law. The section's constitutionality, however, is to be judged in the context of the State's broad statutory framework and the justifications the State presents.").

47. *See also id.* at 642-43 (Under New York law, aliens could hold high elective and appointive "positions that would seem naturally to fall within the State's asserted purpose," but not occupations such as " 'sanitation man, class B,' . . . typist, and . . . office worker," all jobs "with respect to which the State's proffered justification has little, if any, relationship.").

48. Nearly ninety years before, the Court had held that the equal protection clause bars states from administering facially neutral laws in such a way as to exclude aliens from carrying on "harmless and useful occupation[s otherwise open to citizens], on which [aliens] depend for a livelihood." Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886). About thirty years later, the Court had confidently declared that "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Truax v. Raich, 239 U.S. 33, 41 (1915).

Viewed in this light, history compelled *Sugarman*'s result. Justice Blackmun's opinion simply recognized that in the modern administrative state, where public sector positions now comprise a significant percentage of all available jobs, a broad statutory exclusion of aliens from the competitive civil service would seriously undercut these precedents by barring "permanent resident aliens . . . *as a class* from the common *public* occupations of the community." Cabell v. Chavez-Salido, 454 U.S. 432, 449 (1982) (Blackmun, J., dissenting) (emphasis in original).

49. After *Sugarman*, however, the Court began to recognize controversial exceptions to this

had subjected legislation drawn along racial or nationality lines to a fatally strict standard of scrutiny, while affording classifications based on other, morally relevant, criteria a tolerant "rational basis" perusal.

Sugarman broke from that tradition by recognizing a novel *dual* standard for judicial review of those state legislative classifications that discriminate against resident aliens. Recognizing that alienage is generally an irrelevant basis for legislative classification, that dual standard required judges to subject nearly all state classifications drawn on alienage lines to heightened scrutiny. At the same time, however, *Sugarman* conceded that "[a] restriction on the employment of noncitizens, narrowly confined, *could have particular relevance*" to the State's responsibility to preserve the basic conception of its political community.[50] "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives," Justice Blackmun declared, because "alienage itself is a factor that reasonably could be employed in defining 'political community.' "[51]

And when does a state "define its political community?" According to the Justice, whenever it exercises its "historical power to exclude aliens from participation in its democratic political institutions"—the right to vote or to hold certain public offices—or its "constitutional responsibility for the establishment and operation of its own government."[52] Thus, a state may " 'prescribe the qualifications of its officers and the manner in which they shall be chosen,' "[53] including not only "persons holding state elective" offices, but also persons holding "important nonelective executive, legislative, and judicial positions, for officers who 'participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.' "[54]

Subsequently, *Sugarman*'s critics have leveled three charges against it: that by its "political community" dicta, it unwisely planted the seeds for the future destruction of its holding; that its dual standard

---

rule, affirmative action being the most obvious. *See* Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.) ("In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.").

50. 413 U.S. at 649 (emphasis added).
51. *Id.* at 648-49.
52. *Id.* at 648.
53. *Id.* at 647 (citation omitted).
54. *Id.* (citations omitted).

was inherently self-contradictory; and that, when all is said and done, it really was "not *equal protection* doctrine" after all.[55] With all due respect, these charges prove only what we already know: that when all is said and done, *Sugarman* was not the *same old* equal protection doctrine.

Read in its textual and historical context, *Sugarman*'s dicta clearly did not intend to create a broad exception to its holding permitting resident aliens to seek public employment in New York's competitive civil service.[56] Only two pages earlier, Justice Blackmun had finally buried the hoary "special public-interest doctrine," under which the turn-of-the-century Court had broadly deferred to the states' sovereign power to favor their own citizens over aliens, as well as citizens of other states, in the distribution of public resources.[57] By simultaneously reaffirming that a state retains authority to preserve certain uniquely political opportunities for its citizens, the Justice could not have intended to create a broad *new* class of public goods that states could withhold from resident aliens. Rather, his stated purpose was to authorize a limited exception to strict scrutiny for a narrow category of cases in which alienage would be a relevant basis for classification, namely, political functions like the vote, state elective office, and certain "important nonelective" offices "that go to the heart of representative government."[58]

A second charge leveled against *Sugarman* by critics of opposing stripes is that its two standards of equal protection scrutiny rested on

---

55. Perry, *supra* note 9, at 1062 (emphasis in original); Perry, *supra* note 11, at 330.

56. Indeed, writing about this language years later, Justice Blackmun emphasized that "[a]s originally understood, the *Sugarman* exception was exceedingly narrow." Cabell v. Chavez-Salido, 454 U.S. at 456 (Blackmun, J., dissenting).

57. Under this doctrine, the Court had upheld state laws restricting alien inheritance of real property, Hauenstein v. Lynham, 100 U.S. 483 (1879); denying aliens the right to possess firearms for the taking of wild game, Patsone v. Pennsylvania, 232 U.S. 138 (1914); excluding them from employment on public works projects, Heim v. McCall, 239 U.S. 175 (1915), and Crane v. New York, 239 U.S. 195 (1915); barring them from owning and acquiring land, 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), and Frick v. Webb, 263 U.S. 326 (1923); and most bizarre of all, denying them licenses to maintain pool or billiard rooms, Ohio *ex rel.* Clarke v. Deckebach, 274 U.S. 392 (1927). *See generally Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1401-04 (1983) [hereinafter cited as *Developments*].

After questioning the "contemporary vitality of the special public-interest doctrine" in *Graham*, 403 U.S. at 374, Justice Blackmun decisively discarded it in *Sugarman*, noting its unconstitutional roots in the discredited "right-privilege" distinction. 413 U.S. at 643-45. *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

58. *Sugarman*, 413 U.S. at 647.

contradictory premises. Many years after *Sugarman*, Justice Rehnquist argued that aliens cannot be a suspect class deserving of heightened judicial solicitude because courts tolerate their total and systematic exclusion from the political process—a condition that under *Carolene Products* footnote four should theoretically trigger strict scrutiny.[59] Reasoning from the opposite premise—that resident aliens undeniably form a suspect class—others have argued that states should not be allowed to exclude those aliens even from participation in the political process, given that those states cannot deny traditional suspect classes the most "fundamental" of equal protection interests, the right to vote.[60]

Without pressing either premise to its logical extreme, in *Sugarman* Justice Blackmun treated the two tiers of judicial scrutiny of alienage classifications as coexisting in a kind of dynamic tension.[61] He resolved both the seeming internal inconsistency within a dual standard of review and his apparent departure from traditional equal protection doctrine by recognizing that a state's authority to exclude aliens from its core political processes will necessarily guarantee that aliens as a class will be politically powerless. The very fact of their political powerlessness, in *Carolene Products*' terms, suggests that they should be treated as a "discrete and insular minority" entitled to "more searching judicial inquiry" for all other purposes.[62]

---

59. *See* Toll v. Moreno, 458 U.S. 1, 41 (1982) (Rehnquist, J., dissenting). *Cf.* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) ("prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"). *See generally supra* sources cited in notes 13 and 35 (discussing this language).

60. *See* Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092, 1106 & n.58 (1977) [hereinafter cited as Rosberg, *Aliens*]. *But see* Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1528 (1979) (noting the "circularity of using the fact of political exclusion to justify stringent scrutiny of that very exclusion"); L. TRIBE, *supra* note 15, § 16-22 at 1053 (same).

61. *See* Toll v. Moreno, 458 U.S. at 21 (1982) (Blackmun, J., concurring) ("the Court always has recognized that aliens may be denied use of the mechanisms of self-government, and *all* of the alienage cases have been decided against the backdrop of that principle") (emphasis in original). *Cf.* Note, *supra* note 60, at 1532 n.93 ("the recognition of some sphere of political activity from which aliens can be excluded, though at first glance a departure from *Graham*, can be viewed as an implicit premise of that decision").

62. *See* Toll v. Moreno, 458 U.S. at 23 (Blackmun, J., concurring) ("[T]he fact that aliens constitutionally may be—and generally are—formally and completely barred from participating in the process of self-government makes particularly profound the need for searching judicial review of classifications grounded on alienage."). *Accord* Note, *supra* note 60, at 1531. *Cf.* Martin, *supra* note 10, at 198 & n.118 (noting the arguments lodged against a dual standard but concluding that the *Sugarman* "exception has survived because of the Court's intuition that that excep-

A similar response can be made to those who charge that the dual standard was unnecessary, and that Justice Blackmun could have retained a unitary standard for judicial review of alienage classifications had he only chosen to "characterize the restriction of political functions to citizens as a compelling state interest."[63] There are strong arguments why such an approach would have been "fundamentally inconsistent . . . with our ordinary approach in determining which state interests are compelling."[64] Moreover, tragic historical precedents counseled against treating aliens as a nominally "suspect" class whose rights a state could override by claiming that it was "strictly necessary" to facially noncompelling governmental interests.[65]

Finally, the preemption theorists seek to indict *Sugarman* on a third ground: that its dual standard of review cannot really be an equal protection doctrine because it explicitly recognizes that alienage, unlike race or nationality, will *sometimes* be a morally relevant basis for legislative classification. Such a result, they argue, "cannot be satisfactorily explained as an application of the principle that no person is by virtue of a morally irrelevant trait inferior to another," the principle they claim animates the equal protection clause.[66] In my view, the defect identified by the preemption theorists lies not in *Sugarman*, but in their own unduly rigid doctrinal notion of what constitutes equal protection.

If, as Justice Blackmun argued some years later, the "dual aspect of alienage doctrine is unique, it is because aliens constitute a unique class."[67] Aliens were the first class the Court had ever encountered whose distinguishing trait is sometimes, but not often, a morally relevant basis for classification. Thus, the relevant question is not *whether* alienage is a morally relevant basis for classification, but *when* it is, and under what circumstances. *Sugarman*'s bifurcated scrutiny answered

---

tion is somehow bound up importantly with the very idea of political community").

63. *Developments*, *supra* note 57, at 1409; Foley v. Connelie, 435 U.S. 291, 303 n.1 (1978) (Marshall, J., dissenting).

64. Rosberg, *Aliens*, *supra* note 60, at 1135. *See also id.* at 1109-35 (analyzing why concerns about fraud, bloc voting, lack of political awareness, and disloyalty are not state interests so "compelling" as to justify denying aliens the franchise).

65. *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding harsh wartime restrictions on persons of Japanese descent, a concededly suspect class, on the ground that the wartime emergency constituted a "compelling" national interest). *See generally* Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L. J. 489 (1945).

66. Perry, *supra* note 9, at 1062.

67. Toll v. Moreno, 458 U.S. 1, 22 (1982) (Blackmun, J., concurring). *Accord* Rosberg, *Discrimination*, *supra* note 8, at 400 ("Alienage is no garden-variety suspect classification. . . .").

this question by expressly permitting "alienage [to] be taken into account when it is relevant—that is, when classifications bearing on political interests are involved," while barring legislatures from considering that trait in all other circumstances because " '[t]he distinction between citizens and aliens . . . ordinarily [is] *irrelevant* to private activity.' "[68]

Thus, *Sugarman* did not thoughtlessly depart from existing doctrine, but rather, "reflected the Court's considered conclusion that for most legislative purposes there are simply no meaningful differences between resident aliens and citizens."[69] By imposing strict scrutiny on nearly all state alienage classifications, *Sugarman* charged judges to scrutinize both the history of a state's citizenship requirement and its fit with the state's asserted interest in light of the state's entire statutory and constitutional framework. Only such a probing structural examination could establish whether a legislature had in fact made a reasoned and specific judgment to exclude aliens from a particular job because of its importance to the community's self-governance—in which case alienage would be a relevant reason for their exclusion—or whether the state had simply excluded aliens from those jobs, along with others bearing no relation to the political community, on an unthinking and haphazard basis.[70] Viewed this way, *Sugarman* was quintessentially an equal protection case. Its heightened review of most state alienage classifications served the same goal as close scrutiny of classifications based on race and nationality, namely, " 'flushing out' unconstitutional [legislative] motivation[s]"[71] and "ensuring that [such] unconstitutional motivations do not in fact account for statutory classifications."[72]

At least as originally understood, *Sugarman*'s decision to afford states somewhat broader discretion to define their "political community" did not offend this equal protection goal. The "political commu-

---

68. Toll v. Moreno, 458 U.S. at 22 (Blackmun, J., concurring) (emphasis in original) (quoting Ambach v. Norwick, 441 U.S. 68, 75 (1979)).

69. 458 U.S. at 20. *Cf.* Perry, *supra* note 11, at 333 (conceding that on its face, a "person's mere status as an alien seems to be a morally irrelevant factor").

70. *Cf.* Cabell v. Chavez-Salido, 454 U.S. at 454 (Blackmun, J., dissenting) ("Under the *Sugarman* standard, a state statute that bars aliens from political positions lying squarely within the political community nevertheless violates the Equal Protection Clause if it excludes aliens from other public jobs in an unthinking or haphazard manner.").

71. J. ELY, *supra* note 13, at 146.

72. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 131. *See also* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 104-05 (motivation and impact play an important role in the Court's decision to hold certain criteria suspect).

nity" exception did not authorize judges to disregard unconstitutional state motives, but rather, assumed that when states make citizenship a qualification for those who may participate in governing political institutions, they act not out of an invidious desire to discriminate *against* aliens, but from a constitutionally sanctioned desire to effectuate state self-governance and give state citizenship meaning.[73] Thus, to the extent that "[m]odern equal protection jurisprudence" ultimately "operates as a limitation on the reasons—sometimes treated as 'motives'—that are permitted to underlie statutory classification,"[74] a narrow "political community" exception to strict scrutiny in alienage cases still fits comfortably within it.[75]

D. Griffiths: *Cabining* Sugarman's *Exception*

In *In re Griffiths*,[76] which came down on the same day as *Sugarman*, Justice Blackmun joined six other Justices in confirming the narrowness of *Sugarman*'s "political community" exception.[77] Griffiths, a Dutch law school graduate who had married an American and lived in the United States for eight years, was denied permission to take the Connecticut bar examination solely because she was not a United States citizen. Finding that Connecticut's citizenship requirement did not withstand strict scrutiny, Justice Powell denied that a lawyer's powers as an "officer of the court" to sign subpoenas, administer oaths, take depositions, acknowledge deeds, and command the assistance of local police officers, "place[d her] so close to the core of the political process as to make [her] a formulator of government policy."[78]

Looking back at *Griffiths*, three aspects of its opinions are particularly striking. First, despite the dissenters' expansive rhetoric about the breadth of a lawyer's power and discretion (which foreshadowed rhetoric later employed by the Court to describe the power and discretion of

---

73. *See Sugarman*, 413 U.S. at 648.

74. Sunstein, *supra* note 72, at 131 (citations omitted). *See also id.* at 128 (arguing that the Court's modern equal protection decisions, including those involving alienage, focus primarily on the question of unconstitutional motives).

75. As I argue in Part II, however, a broader version of the "political community" exception does not. *See infra* note 250.

76. 413 U.S. 717 (1973). Justice Powell wrote for the Court in *Griffiths*, with Chief Justice Burger joining Justice Rehnquist's dissent as well as filing his own. *See id.* at 730 (Burger, C.J., dissenting). As in *Sugarman*, the *Griffiths* Court did not reach the alien's preemption claim. *Compare id.* at 718 n.3, *with supra* note 43.

77. *See* Nyquist v. Mauclet, 432 U.S. 1, 11 (1977) (Blackmun, J., for the Court) (*Griffiths* "reflects the narrowness of the [*Sugarman*] exception"); Cabell v. Chavez-Salido, 454 U.S. at 456 (Blackmun, J., dissenting) (same).

78. 413 U.S. at 729.

police officers, schoolteachers, and deputy probation officers),[79] *Griffiths* rejected the conclusions that such powers made a lawyer an officer " 'who acts by and with the authority of the State' "[80] and that a lawyer's actions constituted "*execution* . . . of broad public policy" sufficient, in *Sugarman*'s words, to place her among "important nonelective . . . officers who . . . perform functions that go to the heart of representative government."[81] Second, the Court pointedly refrained from accepting three arguments that the dissenters would later resurrect and build into majority opinions: regarding Griffiths' putative disloyalty,[82] lack of familiarity with the law,[83] and status as a "nondeclarant" alien.[84]

Third and most significant, the *Griffiths* Court understood strict judicial scrutiny to require the same searching historical and structural examination that Justice Blackmun had applied to the New York statute in *Sugarman*. Rather than viewing Connecticut's citizenship requirement in isolation, Justice Powell's opinion examined it in the light of both the history of state efforts to deny aliens the right "to earn a livelihood in their chosen occupations"[85] and Griffiths' own right to an *individualized* determination of her fitness.[86] In both respects, the

---

79. *See Griffiths*, 413 U.S. at 731 (Burger, C.J., dissenting) (describing lawyers' "enormous power" and "broad monopoly" over various forms of compulsion unavailable to others); *Sugarman*, 413 U.S. at 663 (Rehnquist, J., dissenting) (recounting "the tremendous responsibility and trust that our society places in the hands of lawyers").

80. *Griffiths*, 413 U.S. at 728 (quoting Brief for Appellee State Bar Examining Committee of Connecticut at 5).

81. *See supra* text accompanying note 54 (emphasis added).

82. *Compare Griffiths*, 413 U.S. at 726 n.18 (noting Griffiths' "willingness and ability to subscribe" to loyalty oaths to both the state and federal constitutions and finding "no merit in the contention that only citizens can in good conscience take an oath to support the Constitution"), *with id.* at 733 (Burger, C.J., dissenting) ("[W]e ought not . . . force the States to accept any national of any country simply because of a recital of the required oath. . . .").

83. *Compare id.* at 725 (Griffiths' alien status did not detract from her familiarity with state law or her overall fitness to practice law), *with id.* at 733 (Burger, C.J., dissenting) (a state may reasonably "conclude that persons owing first loyalty to this country will grasp these traditions and apply our concepts more than those who seek the benefits of American citizenship while declining to accept the burdens of citizenship in this country"), *and Sugarman*, 413 U.S. at 662 (Rehnquist, J., dissenting) ("It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect 'government' to treat us.").

84. *Compare Griffiths*, 413 U.S. at 718 n.1 (noting, but according no significance to, Griffiths' status as a nondeclarant alien, eligible for naturalization, who had chosen not to declare her intent to be naturalized), *with Sugarman*, 413 U.S. at 650 (Rehnquist, J., dissenting) (arguing that Griffiths' nondeclarant status undercut her equal protection claim, since by deliberately choosing not to become a citizen, her status "was not . . . one with which [she was] forever encumbered").

85. *See Griffiths*, 413 U.S. at 718-22.

86. *See id.* at 725 ("Nor would the possibility that some resident aliens are unsuited to the

Court's opinion sharply contrasted with the dissents, which uncritically relied on untested assumptions about the state's reasons for debarring aliens, as well as the dissenters' personal preconceptions about the unfitness of aliens as a class to practice law.[87]

E. Flores de Otero: *Federal Preemption Redux*

Three years passed before Justice Blackmun would write for seven Justices in the Court's next plenary state alienage case, *Examining Board of Engineers v. Flores de Otero*.[88] Like *Griffiths*, *Flores* involved the right of resident aliens to engage in a lawful private profession, civil engineering. Not surprisingly, the Court straightforwardly applied the standards of *Sugarman* and *Griffiths* to strike down the Puerto Rican statute under review.[89] In a departure from those "pure" equal protection decisions, however, *Flores* recalled *Graham* by partially supporting its holding with federal preemption arguments.[90]

While other factors may have accounted for preemption's return,[91] *Flores*' historical context suggests that three contemporaneous decisions discussing the relationship between discrimination against aliens and the federal government's plenary power over immigration, naturalization, and foreign affairs may have influenced Justice Blackmun to restore the dormant preemption element to his theory of aliens' rights.[92]

---

practice of law be a justification for a wholesale ban. . . . Connecticut has wide freedom to gauge on a case-by-case basis the fitness of an applicant to practice law.").

87. *See, e.g.*, *Griffiths*, 413 U.S. at 730 (Burger, C.J., dissenting) (permitting aliens to become members of the bar "seems to me a denigration of the posture and role of a lawyer as an 'officer of the court' ").

88. 426 U.S. 572 (1976). Citing his *Sugarman* dissent, Justice Rehnquist dissented in part in *Flores*, while Justice Stevens took no part in the consideration or decision of the case. *See id.* at 606. Citing only *Griffiths*, the Court had two years earlier summarily affirmed a decision invalidating Indiana's citizenship requirement for licensed real estate salesmen. Again, only Justice Rehnquist had dissented, citing his *Sugarman* dissent. *See* Indiana Real Estate Comm'n v. Satoskar, 417 U.S. 938 (1974). *See also* Perkins v. Smith, 426 U.S. 913 (1976), discussed *infra* note 116.

89. *See* 426 U.S. at 601-02.

90. *Compare id.* at 602, 605, *with supra* note 38.

91. One may have been the Court's apparent ambivalence as to whether the fifth amendment's due process clause, the fourteenth amendment's due process clause, or the fourteenth amendment's equal protection clause properly applied to Puerto Rico. *See* 426 U.S. at 601.

92. Less than three weeks earlier, Justice Blackmun had joined the Court's unanimous opinion in Mathews v. Diaz, 426 U.S. 67 (1976), and Justice Rehnquist's dissent in Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). In apparent contradistinction to *Sugarman* and *Graham*, both cases had suggested that, in light of the paramount power of the President and Congress over immigration, naturalization, and foreign affairs, the fifth amendment's due process clause affords the federal government greater leeway than the fourteenth amendment affords the states to deny resident aliens access to *federal* civil service employment and *federal* Medicare benefits. *See gen-*

To justify its citizenship requirement for private civil engineers, Puerto Rico alleged, *inter alia*, an interest in preventing the uncontrolled influx into its engineering ranks of Spanish-speaking aliens whom the federal government had already admitted to the United States. Puerto Rico could not claim this interest, Justice Blackmun declared, because it is "at odds with the Federal Government's primary power and responsibility for the regulation of immigration."[93]

Thus, *Flores* added yet another element to Justice Blackmun's still-evolving equal protection theory. The Court had now settled that, generally speaking, individual aliens deserve an individualized determination of fitness for the jobs they seek. Moreover, the Court had established that because alienage is a suspect classification, judicial review of alienage restrictions entails stringent structural and historical examination of a state's citizenship requisites to flush out impermissible legislative motives. This examination may be relaxed only in that narrow class of cases involving a state's *bona fide* efforts to define its "political community." To these settled principles, *Flores* added a notion that was both new and old: that in appraising a state's justifications for discriminating against resident aliens, a court may find some state motives inherently impermissible because only the federal government may properly assert them.[94]

F. Mauclet: *Aliens as Valued Contributors to Society*

That Court support for aliens' rights had gradually eroded became dramatically apparent the following Term in *Nyquist v. Mauclet*.[95]

---

erally Rosberg, *Protection*, *supra* note 8 (drawing the parallels among these cases). *See also infra* Part II.B.

Less than four months earlier, Justice Blackmun had also joined Justice Brennan's opinion for eight participating Justices holding that the federal government's exclusive power over immigration and naturalization did not invalidate California's efforts to regulate employment of undocumented aliens. *See* De Canas v. Bica, 424 U.S. 351 (1976). *De Canas* found the California statute permissible because Congress clearly intended states to pass measures in this area mirroring federal objectives, so long as those statutes also furthered legitimate state interests. *See* Plyler v. Doe, 457 U.S. 202, 225 (1982) (Brennan, J., for the Court) (subsequently interpreting *De Canas*); Toll v. Moreno, 458 U.S. 1, 13 (1982) (Brennan, J., for the Court) (same).

93. 426 U.S. at 605. In language that evoked Part III of *Graham*, the Justice declared that "[o]nce an alien is lawfully admitted, a State may not justify the restriction of his liberty on the ground that it wishes to control the impact or effect of federal immigration laws." *Id. Cf. supra* note 38.

94. In *infra* Part II.B, I suggest that this notion may provide the channel through which preemption analysis can most sensibly be incorporated into Justice Blackmun's equal protection theory of aliens' rights.

95. 432 U.S. 1 (1977).

Now writing for a slender five-to-four majority, Justice Blackmun declared unconstitutional a New York statute that barred resident aliens who had neither applied for citizenship, nor declared their intent so to apply, from receiving financial assistance for higher education.[96]

The dissenters marshalled two principal arguments in favor of deference to the New York statute. First, they asserted that the law had not discriminated against aliens *per se*, but rather, had discriminated *among* them by distinguishing "between aliens who prefer to retain foreign citizenship and all others."[97] Second, they claimed that the New York legislature had not denied the plaintiffs the equal protection of the laws because it had drawn its classification based on a trait—*intent* to become a citizen, as opposed to citizenship itself—which they were not powerless to change.[98] Justice Blackmun's majority opinion dispatched both arguments so quickly that one commentator has decided that "the Court did not take [the dissenters' position] very seriously."[99] In my view, however, a careful reading of *Mauclet* reveals it as the fullest elaboration to date of Justice Blackmun's equal protection theory of aliens' rights. The main difference between the majority and dissenting opinions—a difference that would persist in later years as voting alignments shifted—lay in Justice Blackmun's explicit assumption, stated at the outset of his opinion, that resident aliens as a class and these individual aliens in particular had something important *as aliens* to contribute to American society.[100]

The dissenters' first claim—that New York was not discriminating against aliens but was merely classifying among them—ignored the fact that, on its face, New York's statute was "directed at aliens and . . . only aliens are harmed by it."[101] By denying higher educational assistance to all aliens who did not intend to use their education as citizens, the statute discriminated against all aliens except those who,

---

96. In so holding, the Justice rebutted not only the now-expected dissents from the Chief Justice and Justice Rehnquist, *see id.* at 12 (Burger, C.J., dissenting), *id.* at 17 (Rehnquist, J., dissenting), but also a surprising one by *Griffiths*' author, Justice Powell, which was joined by the Chief Justice and Justice Stewart, another new dissenter. *See id.* at 15 (Powell, J., dissenting).

97. *See id.* at 15 (Powell, J., dissenting).

98. *See id.* at 20 (Rehnquist J., dissenting).

99. *See* Choper, *Discrimination*, *supra* note 11, at 8.

100. *See* 432 U.S. at 4 (quoting *Griffiths*, 413 U.S. at 722): "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *Cf. Sugarman*, 413 U.S. at 645 (same). One of the alien appellees in *Mauclet* was a Frenchman who was the father and husband of United States citizens; the other was an outstanding Canadian student who had registered for the United States draft. *See* 432 U.S. at 4-5.

101. 432 U.S. at 9. *See also id.* ("The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.") (footnote omitted).

after exposure to the statute's coercive influence, pledged to relinquish their alien status.[102] Similarly, the dissenter's second claim—that the statute did not violate equal protection because it classified on the basis of a trait that was not immutable—rested on the implicit assumption that New York had a legitimate interest in encouraging nondeclarant aliens to alter their status in the first place.[103] Although the dissenters supported this claim with assertions that New York's statute furthered valid state interests in providing aliens with an incentive to become naturalized and in educating the state's electorate, Justice Blackmun decisively rejected both interests. Under the federal preemption element of his theory, as set forth in *Graham* and revived in *Flores*, the Justice declared New York's motive of encouraging aliens to become citizens invalid because only the federal government could advocate such a rationale.[104] Furthermore, he rejected the state's claimed interest in educating its electorate, which necessarily assumed that New York had an interest in educating resident aliens only if they would become, or promise to become, citizens.

That assumption, Justice Blackmun pointed out, made no sense in light of New York's declared purpose in enacting the financial assistance statute in the first place: " 'to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations,' . . . and [to develop] fully a 'reservoir of talent and future leadership,' . . . purposes that would be served by extending aid to resident aliens as well as to citizens."[105] The state's "laudable objective" of educating its electorate "hardly would be frustrated by including resident aliens, as well as citizens, in the State's assistance programs."[106] A just construction of the equal protection clause, he suggested, must recognize that even an alien who never becomes natu-

---

102. *See id.* at 8 n.10.

103. Justice Rehnquist first made this "mutability" argument in his *Sugarman* dissent, where he asserted that the status of alienage, unlike race, nationality, or illegitimacy, cannot be suspect because it can be altered, at least after awhile, by the alien's own affirmative acts. *See Sugarman*, 413 U.S. at 650 (Rehnquist, J., dissenting). *Accord Mauclet*, 432 U.S. at 20 (Rehnquist, J., dissenting). *See also* 432 U.S. at 15 (Powell, J., joined by Burger, C.J., and Stewart, J., dissenting) (agreeing that the New York statute did not discriminate against a suspect class).

104. 432 U.S. at 10. *Compare id.* ("Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."), *with supra* notes 38 and 93.

105. *See* 432 U.S. at 10 n.13 (quoting 1961 N.Y. Laws, c. 389, § 1 (a)-(c)). Justice Blackmun also pointed out that New York had denied neither the crucial role of higher education in enabling individuals to make a contribution to society nor the relatively "insubstantial" cost of including the aliens in the class entitled to financial assistance. *See* 432 U.S. at 8 n.9, 11-12 n.15.

106. 432 U.S. at 11.

ralized may still contribute measurably to American society by using his or her education to parent, teach, or lead American citizens, or to play a personal nonpolitical role in community life.[107]

By so suggesting, Justice Blackmun unveiled his broader social vision of both the role of the resident alien in American society and the function of the equal protection clause in furthering that role.[108] That vision shared, in a way that the dissenters' did not, Professor Karst's perception that "for most purposes aliens are entitled to be regarded as respected participants in our national society, even though they lack citizenship in the narrow sense" of being able to vote or hold high public office.[109] Even if they do not and never will belong to a state's *political* community, they may nonetheless become valued and valuable community members because "we are a community in much more than the political sense."[110]

Justice Blackmun's opinion in *Mauclet* thus displayed a social vision that differed fundamentally from that held by both the dissenters and the state: a vision of aliens as valued contributors to American society perhaps best described as "communitarian."[111] Under that vision, citizens inhabit the heart of our political and social community, "[b]ut permanent resident aliens, members in the next wider circle of concentric communities that make up the nation . . . are entitled by virtue of that membership alone to enter fully into virtually all aspects

---

107. *Id.* at 12. ("Although an alien may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role—in other areas of import to the community.").

108. One commentator has described "social vision" as

> the world the judge or Justice 'sees'—his assumptions and perceptions regarding institutions and individuals as social actors. Social vision lies close to the heart of judicial decisionmaking: the images and perceptions invoked in service of doctrinal formulations signify neither random dicta nor surplusage irrelevant to a kernel 'holding,' but central ingredients and catalysts in the process of judicial decisionmaking.

Note, *supra* note 3, at 718 (citing H. Steiner, Justification and Social Vision in Modern Tort Law of Accidents 41 (June 1982) (unpublished manuscript on file in Harvard Law School Library)). "Because it responds to the demands of pure politics and pure law, legal doctrine, although often consisting of highly specific, substantively limited norms, nevertheless reveals broad legal and political visions of the world." Comment, *Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision*, 23 HARV. INT'L L.J. 71, 72-73 (1982).

109. Karst, *Foreword*, *supra* note 19, at 46.

110. *Id.* (footnote omitted). *See also id.* at 25. *Accord* Martin, *supra* note 10, at 201 ("our notions of membership in the national community are more complex and multi-layered than can be captured in the concept of citizenship alone").

111. *See, e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 4, 54-73 (1984); Martin, *supra* note 10. For a more extensive discussion of the emergence of the "communitarian" concept in both political philosophy and immigration law, *see infra* text accompanying notes 245-46.

of community life."[112]

After *Mauclet*, the prospects seemed bright for the ultimate realization of Justice Blackmun's communitarian vision.[113] The impact of his equal protection theory of aliens' rights, erected between *Graham* and *Mauclet*, was felt nationwide. Between 1971 and 1977, a caravan of lower federal and state court decisions applied strict scrutiny to alienage classifications and dramatically transfigured the range of public and private opportunities available to resident aliens.[114] One would not have guessed that from *Mauclet* to the present day Justice Blackmun would not speak for the Court again in an alienage case.

G. Foley: *The Retreat Begins*

After *Mauclet*, it briefly appeared that the Court had reached an equilibrium regarding state discrimination against resident aliens. Generally speaking, the lower courts applied strict scrutiny to invalidate a wide range of state alienage restrictions that fell outside the political

---

112. Martin, *supra* note 10, at 202.

113. *See* Choper, *Alienage*, *supra* note 11, at 13 ("I think it is fair to say, that as of 1977, it appeared that virtually any state statute discriminating against aliens would be subject to strict scrutiny.").

114. *See, e.g.*, Mendoza v. City of Miami, 483 F.2d 430 (5th Cir. 1973) (municipal civil service employment); Yuan Jen Cuk v. Lackner, 448 F. Supp. 4 (N.D. Cal. 1977) (health and medical aid); Kulkarni v. Nyquist, 446 F. Supp. 1269 (N.D.N.Y. 1977) (physical therapy licenses); Cheng v. Illinois, 438 F. Supp. 917 (N.D. Ill. 1977) (notaries public); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (three-judge court), *vacated and remanded*, 436 U.S. 901 (1978), *reconsidered*, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 454 U.S. 432 (1982) (probation officers); C.D.R. Enters. v. Board of Educ., 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd sub nom.* Lefkowitz v. C.D.R. Enters., 429 U.S. 1031 (1977) (employees of contractors for state public works); Surmeli v. New York, 412 F. Supp. 394 (S.D.N.Y.), *aff'd* 556 F.2d 560 (2nd Cir. 1976), *cert. denied*, 436 U.S. 903 (1978) (physicians); Wong v. Hohnstrom, 405 F. Supp. 727 (D. Minn. 1975) (pharmacists); Taggart v. Mandel, 391 F. Supp. 733 (D. Md. 1975) (notaries public); Jagnandan v. Giles, 379 F. Supp. 1178 (N.D. Miss. 1974), *aff'd*, 538 F.2d 1166 (1976), *cert. denied*, 432 U.S. 910 (1977) (state university tuition fees for in-staters); Ramos v. Civil Serv. Comm'n, 376 F. Supp. 361 (D.P.R. 1974), *vacated as moot*, 426 U.S. 916 (1976) (civil servants); Arias v. Examining Bd. of Refrig. and Air Cond. Technicians, 353 F. Supp. 857 (D.P.R. 1972) (refrigeration and air conditioning technicians); Mohamed v. Parks, 352 F. Supp. 518 (D. Mass. 1973) (municipal employment); Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd*, 413 U.S. 902 (1973) (state social service workers and teachers); Younus v. Shabat, 336 F. Supp. 1137 (N.D. Ill. 1971) (tenured city college faculty); Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1971) (state employees); *In re* Parks, 484 P.2d 690 (Alaska 1971) (attorneys); Raffaelli v. Commissioner of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264, 101 Cal. Rptr. 896 (1972) (attorneys); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) (public works employees); *In re* Estate of Fernandez, 335 So. 2d 829 (Fla. 1976) (letters of administration); Herriott v. City of Seattle, 81 Wash. 2d 48, 500 P.2d 101 (1972) (en banc) (municipal transit operators).

community exception.[115] Around this same time, however, in two summary decisions, the Court marked the narrow contours of that exception by upholding state decisions denying aliens the rights to vote and to sit on grand and petit juries.[116] The Court's March 1978 decision in *Foley v. Connelie*[117] disrupted that equilibrium.

In *Foley*, the Court held by a 6-3 vote that New York could lawfully bar resident aliens from serving as state troopers because that position fell within the "execution of public policy" prong of the *Sugarman* exception. Unlike the lower court's opinion, which had applied strict scrutiny to find the state's citizenship requirement justified by a substantial and compelling interest and the least drastic means to achieve that goal,[118] the Chief Justice's opinion for five Justices eschewed application of strict scrutiny and upheld the statute under rationality review.

The most distressing thing about *Foley* was not its holding, which could have been limited closely to the facts of the case, but the breadth of the language and reasoning in the Court's opinion. The new Court majority, which included a new convert, Justice White, went to great lengths to write into law three views that earlier decisions had decisively rejected: that *Graham* and its progeny had invalidated state restrictions on resident aliens principally because those laws had impinged on "fundamental personal interests";[119] that states may

---

115. *See supra* cases cited in note 114.

116. In Skafte v. Rorex, 430 U.S. 961 (1977), the Court dismissed for want of a substantial federal question an appeal from a Colorado Supreme Court decision upholding the exclusion of aliens from voting in a local school board election, citing to *Sugarman*'s "political community" dicta. In Perkins v. Smith, 426 U.S. 913 (1976), decided ten days before *Flores*, the Court summarily affirmed a three-judge district court opinion that had upheld the exclusion of aliens from grand and petit juries on the ground that the citizenship requirement was justified by a compelling governmental interest. *See* 370 F. Supp. 134 (D. Md. 1974) (three-judge court). *Accord* United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975); Rubio v. Superior Court, 24 Cal. 3d 93, 593 P.2d 595, 154 Cal. Rptr. 734 (1975) (state jury duty); State v. Thigpen, 35 Conn. Supp. 98, 397 A.2d 912 (Super. Ct. 1978) (state grand jury service).

Although decided summarily, both *Skafte* and *Perkins* were, of course, rulings on the merits which did not necessarily endorse the reasoning of the lower court opinions. *See* Mandel v. Bradley, 432 U.S. 173, 176 (1977) (per curiam); Hicks v. Miranda, 422 U.S. 332, 343-44 (1975).

117. 435 U.S. 291 (1978).

118. *See* Foley v. Connelie, 419 F. Supp. 889, 898 (S.D.N.Y. 1976) (three-judge court).

119. *See Foley*, 435 U.S. at 295 & n.4. In *Mauclet*, the Chief Justice has argued in dissent that the statute at issue did not violate equal protection because it did not seek to deprive aliens of a "fundamental personal interest," such as their ability to earn a livelihood, but only the "largesse" of state scholarships and loans. *See Mauclet*, 432 U.S. at 14 (Burger, C.J., dissenting). Rejecting that claim in a footnote, *see* 432 U.S. at 8 n.9, Justice Blackmun recalled *Graham*'s directive that strict scrutiny applies to alienage classifications regardless of whether a fundamental interest is impaired. *See supra* note 36. By so saying, the Justice simply underlined a point previ-

reasonably presume that citizens will "be more familiar with and sympathetic to American traditions" than aliens;[120] and that public jobs that involve no broad public policymaking responsibilities, but do demand some measure of judgment and discretion, constitute functions that lie at the "heart of representative government."[121] Furthermore, as Justice Stevens pointed out in dissent, another of the Court's "unarticulated" premises seemed to be one that *Griffiths* had already rejected, *i.e.*, that aliens as a class retain "a foreign allegiance which raises a doubt concerning trustworthiness and loyalty so pervasive that a flat ban against employment of any alien in any law enforcement position is thought to be justified."[122]

With unusual candor, one Justice who joined the *Foley* opinion conceded "that it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions."[123] In a cryptic opinion concurring only in the Court's result, Justice Blackmun agreed that the State of New York had vested its state troopers with powers and duties so basic to the function of state government that the State could rationally conclude that those duties should be executed only by citizens.[124]

I vigorously disagree with Justice Blackmun's position in *Foley* and fervently wish he had not voted that way. But I do not think, as some others do,[125] that his vote in *Foley* necessarily clashed with the views set forth in his prior opinions. When Justice Blackmun first included the words "execution . . . of public policy" in the political community exception, he undoubtedly envisioned that *some* nonelected public jobs entailed powers and duties so basic to the function of local government that a state could validly reserve them for its own citizens,

---

ously made in *Sugarman*: that resident aliens are entitled to equal treatment with respect not just to those few personal interests that the Constitution explicitly or implicitly deems to be "fundamental," but with respect to *all* public opportunities available to citizens except for those few that fall within a state's political community. *See supra* text accompanying notes 52-54, 56-58, 73-75.

120. *Compare Foley*, 435 U.S. at 299-300, *with supra* note 83.

121. *Compare Foley*, 435 U.S. at 296-300, *with* text accompanying *supra* notes 78-81. *See also Foley*, 435 U.S. at 303 (Marshall, J., dissenting) (arguing that firemen and sanitation workers "execute the public policy" no less than policemen); *id.* at 310 (Stevens, J., dissenting) ("to state the premise [that the police function is at the heart of representative government] is to refute it").

122. 435 U.S. at 308 (Stevens, J., dissenting). *Compare with* text accompanying *supra* note 82.

123. *See* 435 U.S. at 300 (Stewart, J., concurring). He added that he had joined the Court's opinion "only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred)." *Id.*

124. *Id.* at 302 (Blackmun, J., concurring in the result).

125. *See, e.g.*, Choper, *Alienage*, *supra* note 11, at 15.

even though those jobs did not directly involve policy formulation or review. A number of years later, he defined the crucial requisites of such a job as whether "the public employee in that position exercises plenary coercive authority and control over a substantial portion of the citizen population . . . without intervening judicial or executive supervision;" to make this test even more rigorous, he placed the burden on the state to "show that it has historically reserved a particular executive position for its citizens as a matter of its 'constitutional prerogativ[e]' " and that "citizenship 'bears some rational relationship to the special demands of the particular position.' "[126]

Had the *Foley* Court adopted a test like Justice Blackmun's, it conceivably could have kept the "execution or public policy" prong of the political community exception narrow, since few nonelected public occupations possess all four of the elements contained within his definition: extensive officially sanctioned coercive authority, largely unsupervised discretion to exercise that authority, broad jurisdiction over many citizens, and an extensive state practice of reserving that occupation for state citizens. Such a stringent test would have produced *Foley*'s result, while providing a more rigorous basis for the Court's apparent intuition that police officers—like judges and jurors, but unlike nearly any other public employee one can name—uniquely fall within the political community because their unusual powers make them living, breathing embodiments of the coercive and protective power of the government by which we as citizens consent to be governed.[127]

In retrospect, *Foley*'s result did not loosen the carefully maintained narrowness of the political community exception nearly as much as *Foley*'s majority opinion, which Justice Blackmun did not join. The Court's opinion stepped away from the original purposes of the exception and subtly shifted its focus. Rather than conducting an historical inquiry into whether a state had traditionally reserved a particular nonelective office for its citizens as a matter of constitutional prerogative, out of a conscious desire to give greater meaning to state citizenship,[128] *Foley* invited judges to engage in abstract, result-oriented in-

126. Cabell v. Chavez-Salido, 454 U.S. at 457 (Blackmun, J., dissenting) (citations omitted).

127. *See* Ambach v. Norwick, 441 U.S. 68, 83 (1979) (Blackmun, J., dissenting) ("Police . . . [are] clothed with authority to exercise an almost infinite variety of discretionary powers that could seriously affect members of the public."); L. TRIBE, *supra* note 15, at 98 (1979 Supp.) ("[T]he police officer's job is unique because the power to arrest and give various other orders entails a drastic interference with the privacy and liberty of all people in their daily lives."); Choper, *Discrimination*, *supra* note 11, at 9.

128. *See supra* text accompanying notes 56-58, 73-75.

quiries into whether particular public jobs involved *some* measure of discretion or carried out *some* aspect of public policy. Because almost any public occupation fits the latter description,[129] *Foley*'s avowedly limited expansion of *Sugarman*'s exception proved to be only the thin edge of a much larger wedge.

H. Ambach: *From "Political Community" to "Significant Government Function"*

Holding their breath after *Foley*, several commentators hopefully suggested that perhaps it had been an aberration.[130] *Ambach v. Norwick*,[131] decided the next Term, proved that it had not. Scottish and Finnish schoolteachers, both married to American citizens, challenged a New York law which denied permanent public schoolteacher certifications to nondeclarant aliens, the same group involved in *Mauclet*. After a three-judge district court had invalidated the statute under strict scrutiny, five Justices, speaking through Justice Powell, applied rational basis review and reversed.

Although the Court dutifully recited *Sugarman*'s "political community" dicta,[132] Justice Powell swiftly recast the inquiry into whether teaching is a "significant government function," namely, a state function "so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."[133] This restatement allowed the Court to conclude that the function of "[p]ublic education, like the police function, 'fulfills a most fundamental obligation of government to its constituency.' "[134] Not coincidentally, this mode of analysis also permitted the Court to avoid the obvious distinction with *Foley*—that unlike policemen, teachers do not exercise largely unsupervised, officially sanctioned coercive authority

---

129. *See* Cabell v. Chavez-Salido, 454 U.S. at 440-41 n.7 ("almost every governmental official can be understood as participating in the execution of broad public policies").

130. *See, e.g.*, L. TRIBE, *supra* note 127, at 98; Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671, 690 (1978) ("[Foley. v.] *Connelie* should be viewed as a marginal case and any extension of its holdings to other types of government employees should be viewed with suspicion, unless, of course, *Sugarman* is to be overruled entirely.").

131. 441 U.S. 68 (1979).

132. *See id.* at 74.

133. *Id.* at 76 n.6, 73-74.

134. *Id.* at 76 (quoting *Foley*, 435 U.S. at 297). The Court based this finding on schoolteachers' high "degree of responsibility and discretion to fulfill the government's basic obligation to provide public education," teachers' "direct, day-to-day contact" with their students, their discretion over those students, their status as role models, and their unique opportunity to influence student attitudes about government and the political process. *See* 441 U.S. at 75, 78-79.

over large portions of the population—and to avoid the obvious precedent of *Griffiths*. Completing the turnabout from *Griffiths* and *Mauclet*, the majority concluded that New York was entitled to question the qualifications[135] and loyalty[136] of aliens as a class, particularly where they "have chosen to classify themselves" by refusing to declare their intent to become citizens.[137]

Justice Blackmun's dissent for himself and his allies, Justices Brennan, Marshall, and Stevens, took a strikingly different approach. That approach revealed both the continuity of Justice Blackmun's vision of aliens' rights, and the extent to which the majority's vision had come to diverge from it. Not surprisingly, Justice Blackmun's first inquiry was both historical and structural.[138] He focused next on the individual aliens before the Court, and their right to an individualized determination of fitness for their desired jobs.[139] He next underscored the intended narrowness of the political community exception, noting the logical impossibility of drawing "functional" distinctions between the social importance of lawyers, whom *Griffiths* placed outside that exception, and teachers, whom *Ambach* placed within it.[140] His final inquiry,

---

135. *Compare* 441 U.S. at 81 n.14 (New York may assume "that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified [to be schoolteachers] than are those who have elected to remain aliens") (emphasis in original), *with Griffiths*, as discussed *supra* in text accompanying note 83.

136. *Compare* 441 U.S. at 80-81 (noting aliens' "primary duty and loyalty" to a foreign country), *with id.* at 85 (Blackmun, J., dissenting) (noting plaintiffs' willingness to subscribe to oaths to support the state and federal constitutions), *and Griffiths*, as discussed *supra* in text accompanying note 82.

137. 441 U.S. at 80. *Compare with Mauclet*, as discussed *supra* in text accompanying notes 101-02.

138. He began by observing that the citizenship requirement for schoolteachers was one of at least thirty-seven imposed by New York statutes that had "their origin in the frantic and overreactive days of the First World War when attitudes of parochialism and fear of the foreigner were the order of the day." 441 U.S. at 82. *Cf. Griffiths*, as discussed *supra* in text accompanying notes 85-87. Moreover, the citizenship requirement's sweep, like that of the law invalidated in *Sugarman*, was both internally inconsistent and indiscriminate. As in *Sugarman*, the bar on alien teaching purported to be total at the same time as other parts of New York's statutory scheme permitted aliens to teach in private schools, to sit on local school boards, and to teach in public schools in special situations or pursuant to special regulations. *See* 441 U.S. at 86. *Cf. Sugarman*, as discussed *supra* in text accompanying notes 46-47.

139. *See* 441 U.S. at 85 nn.4-5 (both appellees were long-time teachers who had "received and excelled in educational training that the State of New York itself offers": one was a *summa cum laude* college graduate and an "A" graduate student, the other was a *cum laude* college graduate with a Master's degree in Early Childhood Education).

140. *See* 441 U.S. at 88 ("One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values. Are the attributes of an attorney any the less?").

as in *Mauclet*, was into the contribution that these aliens could make to their students even if they never chose to become naturalized and the irrationality of denying those aliens the opportunity to make their contribution.[141]

A single sentence in his *Ambach* dissent encapsulated these varied strands of Justice Blackmun's communitarian vision of aliens' rights:

> The route to "diverse and conflicting elements" [in our society] and their being "brought together on a broad but common ground," which the Court so emphasizes . . . is hardly to be achieved by disregarding some of the diverse elements that are available, competent, and contributory to the richness of our society and of the education it could provide.[142]

In America's open society, Justice Blackmun intimated, citizenship is an aspiration, a voluntary goal, not a roadblock. Whether United States citizenship remains something that noncitizens will aspire to, he suggested, will depend on how equally our society is willing to treat aliens and how openly it admits them as community members before they have crossed the threshold into full political participation. Measured by this standard, he concluded, New York's exclusion of aliens from the profession of teaching " 'seems repugnant to the very heritage the State is seeking to inculcate.' "[143]

I. Cabell: *Rushing Headlong from* Graham

Cabell v. Chavez-Salido,[144] the Court's next encounter with state restrictions on resident aliens, came to the Court clothed in an air of inevitability. Three Spanish-speaking permanent resident aliens, all of whom were residents of Los Angeles County willing to swear loyalty to the state and federal constitutions, had applied for jobs as Spanish-speaking deputy probation officers. They were denied employment solely because of a California statute that excluded all noncitizens from so-called "peace officer" positions, a statutory category that included

---

141. *See* 441 U.S. at 81 ("It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language."). ("Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America?"). *Id.* at 87.

142. *Id.* at 88 (citations omitted).

143. *Id.* at 90 (quoting Norwick v. Nyquist, 417 F. Supp. 913, 922 (S.D.N.Y. 1976)).

144. 454 U.S. 432 (1982).

deputy probation officers.[145] Over Justice Blackmun's impassioned dissent for himself and his three *Ambach* colleagues, Justice White (writing for a slim majority that included the newly arrived Justice O'Connor) upheld the statute against the aliens' fourteenth amendment challenge.

At first glance, *Cabell*'s outcome seemed wholly predictable. Since the Court had already held that states could deny resident aliens the opportunity to be police officers or public schoolteachers, it seemed to follow *a fortiori* that a probation officer, a hybrid police officer-teacher, would fit neatly between those two occupations inside the *Sugarman* exception. Surprisingly, *Cabell*'s majority did not dispose of the case in this cursory manner, instead taking the opportunity to restate and expand upon *Ambach*'s "governmental function" exception. In the process the Court further loosened *Sugarman*'s stringent standard of alienage review.[146]

Cabell's majority opinion is less intriguing for what it said than for all the things it did not say. Read in isolation, *Cabell* gave no clue that the Court would hold, only months later, that Texas could not deny *undocumented* alien schoolchildren a state-provided public education and that Maryland could not deny *nonimmigrant* aliens in-state status when charging university fees and tuition.[147] Since *Graham* had for-

---

145. *See* CAL. GOV'T CODE ANN. § 1031(a) (West 1980) (requiring that all "peace officers" be United States citizens). *See also* CAL. PENAL CODE ANN. § 830.5 (West 1980) (designating deputy probation officers as "peace officers").

146. After reviewing the long line of Court decisions regarding state discrimination against aliens, Justice White declared that *Sugarman* had actually introduced a two-step test for evaluating such discrimination. The first inquiry was not whether the statutory classification was precisely drawn and necessary to meet a legitimate and substantial state goal, but whether it was "substantially overinclusive or underinclusive." 454 U.S. at 440. "Under this standard, the classifications used need not be *precise; there need only be a substantial fit.*" *Id.* at 442 (emphasis added). The second inquiry was whether the particular public job sought fell within the "execution of public policy" prong of the "political community" exception, with the focus not on "the breadth of the policy judgments required of a particular employee," but rather, on a nebulous evaluation of "the importance of the function as a factor giving substance to the concept of democratic self-government." *Id.* at 440-41 n.7.

Having loosened both the standard of scrutiny and the scope of the "political community" exception, the Court found that the California statute passed both of its tests. The majority found the statute "sufficiently tailored to withstand a facial challenge," *id.* at 444, and that the deputy probation officer function gives substance to the concept of democratic self-government. The Court based its debatable second conclusion on the fact that deputy probation officers have some unsupervised discretion to exercise coercive force over a limited number of probationers and to act as an actual and symbolic "extension" of judicial and executive authority over them. *Id.* at 442, 444-47.

147. *See* Plyler v. Doe, 457 U.S. 202 (1982); Toll v. Moreno, 458 U.S. 1 (1982). As defined in the Immigration and Nationality Act, a permanent resident, or "immigrant," alien is a person

mally held only resident aliens to be a suspect class, this trilogy of cases created the anomaly[148] that permanent residents, rather than undocumented or nonimmigrant aliens, were the big losers of the 1981 Term.[149]

Nor can one find in *Cabell* any inkling that had the case come to the Court five years earlier, it would easily have come out the other way. As Justice Blackmun's dissent pointed out, when the aliens first filed their suit, the California citizenship requirement for peace officers swept almost as indiscriminately as the one struck down in *Sugarman*.[150] After reviewing the statute's legislative and litigation history, which the Court's opinion largely omitted,[151] Justice Blackmun

---

admitted with entitlement to work and live anywhere in the country, who becomes eligible for naturalization after five years. *See* 8 U.S.C. § 1101(a) (1982). A "nonimmigrant" alien, such as a student or diplomat, usually cannot work while here, is authorized to remain only for a fixed period, and cannot be naturalized no matter how long he or she remains. *See id.* § 1101(a)(15). An undocumented alien is just that—an excludable alien without documents entitling him or her to reside or work in this country for any period. *See* 8 U.S.C. at §§ 1182(a)(26), 1201(a)(2).

148. This anomaly was compounded by *Plyler*'s apparent holding that undocumented aliens are *not* a suspect class. *See* 457 U.S. at 217 n.19. One possible reading of *Plyler*, however, is that heightened judicial review was required because minor *children* of undocumented aliens, like illegitimates, form a semi-suspect subclass that cannot be totally denied an important, if not fundamental, interest such as education. *See id.* at 216-24.

149. The anomaly is partially explained by the fact that the four *Cabell* dissenters, joined by Justice Powell, formed the *Plyler* majority, and with the further addition of Justice White, formed the *Toll* majority. In *Toll*, Justice Rehnquist, joined by the Chief Justice, filed a lengthy dissent which revisited *Graham* and its progeny and concluded that *Foley*, *Ambach*, and *Cabell* had all undermined *Graham*'s holding that resident aliens are a suspect class. *See* 458 U.S. at 25-49 (Rehnquist, J., dissenting). Justice Blackmun responded with a blistering concurrence which labeled that dissent "wholly irrational," *id.* at 20 (Blackmun, J., concurring), and predicted that Justice Rehnquist's dissent was destined to join his earlier dissent in *Sugarman* as "lifeless words on the pages of these Reports." *See id.* at 24 (quoting Justice Rehnquist's dissent in *Toll*, *id.* at 48).

150. *Cabell*, 454 U.S. at 451 n.4. (Blackmun, J., dissenting). In addition to requiring citizenship for probation and police officers, California's "peace officer" statute, as originally drafted, excluded aliens from more than seventy common occupations of the community, including county coroners, fish and game wardens, cemetery sextons, toll-takers, racetrack investigators, state supreme court and court of appeal bailiffs, messengers at the state treasurer's office, dental inspectors, furniture and bedding inspectors, and many others. *See id.* at 450-51 (Blackmun, J., dissenting).

151. That review revealed that the California legislature had originally created the "peace officer" class as an umbrella category, then thrown a variegated collection of jobs into it for an array of "reasons totally unrelated to logic." *Id.* at 451. Correctional officers, for example, apparently won "peace officer" status after they had successfully lobbied for the better group insurance benefits that accompanied that status. *See id.* at 451-52 & n.5 (citing Hetherington v. State Personnel Bd., 82 Cal. App. 3d 582, 600, 147 Cal. Rptr. 300, 311 (1978) (Reynoso, J., dissenting)). In 1961, without reconsidering on a case-by-case basis which "peace officer" positions rationally required citizenship, the state legislature had suddenly and without explanation adopted a citizenship requirement for all of them. Only five years before the aliens filed their suit, California's

argued that the California statute, like that stricken in *Sugarman*, should be invalidated because it "represent[ed] just such an unthinking and haphazard exercise of state power."[152]

Cabell was curiously silent regarding yet another issue: the real-life impact of its decision on individual aliens. Except for a routine statement of the facts, the Court did not examine the practical consequences of its twin holdings that a state's statutory citizenship requirement need only "substantially fit" the state's asserted interest and that deputy probation officers engage in an important governmental function. As in *Ambach*, Justice Blackmun's dissent took precisely the opposite course, focusing immediately and insistently upon the actual human impact of the Court's decision.[153]

The Justice demonstrated that the Court's abandonment of strict scrutiny was not solely a matter of academic concern. As a practical matter, the Court's "novel standard of review condone[d] a legislative classification that excludes aliens from more than 70 public occupations [including dental inspector, messenger, parks department employee, and volunteer fire warden] although citizenship cannot be even rationally required for a substantial number of them."[154] Exposing the limited nature of a probation officer's actual coercive authority, discretion, and symbolic value as a representative of the state,[155] Justice Blackmun systematically reviewed and dispatched every available state argument against hiring the appellees for that position: lack of job qualifications or educational background,[156] lack of familiarity with local law,[157] po-

---

Attorney General had formally opined that the statute was unconstitutional. *See* 454 U.S. at 451-52. Shortly after *Mauclet*, a three-judge district court had relied on this history to strike the statute as "grossly overbroad," and had reinstated that holding even after the Supreme Court had vacated and remanded its opinion following *Foley* and *Ambach*. *See* 454 U.S. at 452 (citing 490 F. Supp. at 985-87). *See also supra* note 114.

152. *Compare* 454 U.S. at 454 (Blackmun, J., dissenting), *with Sugarman*, as discussed *supra* in text accompanying notes 46-47, 69-72. *Cf.* L. TRIBE, *supra* note 15, § 16-30 at 1086 ("[I]t seems sound to resist upholding . . . a substantial discrimination on a basis that did not occur to those responsible for the injury or on a basis that was not within their purview.").

153. *Cf.* Note, *supra* note 3, at 725 & n.50 (giving other examples of recent Blackmun opinions exemplifying his "more open-ended, aggressively inquiring approach to 'real world' problems before the Court—'an intense, almost tangible, concern that justice be done' ") (citations omitted).

154. *See* 454 U.S. at 455 (Blackmun, J., dissenting).

155. *See id.* at 458-62.

156. *See id.* at 448 nn.1 & 2 (describing the appellees' extensive education in California and high performance on qualifying examinations).

157. *See id.* at 462 (noting that the appellees had lived in California for much of their lives).

tential disloyalty,[158] or state desire to encourage naturalization.[159] In the end, Justice Blackmun concluded "that California's exclusion of these [aliens] from the position of deputy probation officer stems solely from state parochialism and hostility toward foreigners who have come to this country lawfully."[160] Thus, his searching historical and structural scrutiny had accomplished what the majority's later inquiry had failed to do: it had flushed out the state's unconstitutional motive.

In the end, Justice Blackmun's dissent in *Cabell*—his last opinion in a case involving state discrimination against resident aliens—sounded all the themes of his fully realized equal protection theory. As in *Sugarman* and *Griffiths*, he reaffirmed that strict judicial scrutiny of alienage classifications means not accepting a state's claim of constitutional motive at face value, but rather, engaging in a relentless, wide-ranging examination of that classification to uncover the kind of unexplained discrepancy of treatment that evidences unthinking discrimination.[161] As in *Griffiths* and *Ambach*, he stressed an alien's right to an individualized determination of his fitness for employment, free from unsubstantiated stereotypes about his lack of qualifications, loyalty, or familiarity with the law.[162] As in *Sugarman*, *Mauclet*, and *Ambach*, he underscored the narrowness of the political community exception, and the need for a rigorous test to prevent "*Sugarman*'s exception [from] swallow[ing] *Sugarman*'s rule."[163] As in *Flores* and *Mauclet*, he blended preemption analysis into his equal protection theory to conclude that there are certain motives towards aliens, such as an interest in urging their naturalization, which states simply may not claim.[164]

Finally, as in *Mauclet* and *Ambach*, he invoked a communitarian vision of resident aliens as valuable participants in American society, capable of making unique contributions to the life of the community.[165]

---

158. *See id.* at 448, 462 (noting the appellees' willingness to take loyalty oaths).

159. *See id.* at 463 (asserting that the desire to encourage naturalization is an exclusively federal interest).

160. *Id.*

161. *See id.* at 461 (finding it "constitutionally absurd" that under California law "a criminal defendant may be represented at trial and on appeal by an alien attorney, have his case tried before an alien judge and appealed to an alien justice, and then have his probation supervised by a county probation department headed by an alien," but "cannot be entrusted to the supervised discretion of a resident alien probation officer.") *Cf. supra* text accompanying note 70.

162. *Compare* 454 U.S. at 462-63, *with supra* notes 83-87, 139.

163. *See* 454 U.S. at 458.

164. *Compare supra* note 159, *with supra* text accompanying notes 93-94, 104.

165. *See* 454 U.S. at 462 (the Court cannot "deny that the sight of foreign-born individuals not merely following, but encouraging others to follow, our laws is [a] . . . powerful symbol of respect for our society's social norms").

Charging that the Court had subverted that vision, he closed with an ironic observation reminiscent of his closing remark in *Ambach*: that states and courts who carelessly invoke the rhetoric of democratic self-government to deny noncitizens their opportunity to make a contribution to community life subtly denigrate the value of the very citizenship to which those aliens aspire.[166]

J. Bernal: *The Pendulum Returns?*

After *Cabell*, one could not have been blamed for expecting that the *sub silentio* evisceration of *Sugarman*, through an expansive reading of the "governmental function" exception, would be but a matter of time.[167] *Bernal v. Fainter*,[168] decided last Term, has at least temporarily allayed that concern. Bringing the Court almost full circle, *Bernal*'s voting alignment nearly paralleled *Sugarman*'s: Justice Blackmun joined Justice Marshall's majority opinion for all Justices except Justice Rehnquist, holding that Texas could not constitutionally deny resident aliens the opportunity to become notaries public.

While the decision may have caused some resident aliens to sigh in relief, if only because it was their first victory in one of these cases in seven years, *Bernal* is scarcely an occasion for dancing in the streets. Not only did the Fifth Circuit ruling reversed by the Court conflict with the holding of every state or federal court that had previously considered the constitutionality of a similar statute,[169] *Bernal*'s facts were extraordinarily unsympathetic to the state.[170] Moreover, on its facts, the case was all but controlled by the Court's earlier holding in *Griffiths*.[171]

---

166. *See id.* at 463 ("I find it ironic that the Court invokes the principle of democratic self-government to exclude from the law enforcement process individuals who have not only resided here lawfully, but who now desire merely to help the State enforce its laws.").

167. *See, e.g.*, Rosberg, *Discrimination*, *supra* note 8, at 400.

168. 104 S. Ct. 2312 (1984). In a one-sentence opinion Justice Rehnquist declared that he was dissenting for the reasons stated in his dissent in *Sugarman*. *See id.* at 2321 (Rehnquist, J., dissenting).

169. *See id.* at 2316 n.4.

170. Petitioner Bernal, a Mexican citizen who lived in this country for 23 years, was a paralegal for Texas Rural Legal Aid who required notary qualification to administer oaths to migrant farm workers and to notarize their statements for use in civil litigation. Before coming to Texas, Bernal held a commission as a notary in Indiana. *Id.* at 2315 n.1. At oral argument, the state's attorney conceded that there were already perhaps as many as 300,000 notaries in Texas. *Id.* at 2318 n.12. Unlike the statute at issue in *Ambach*, the Texas statute exempted neither declarant aliens nor private employees from its purview.

171. A notary's authority to sign writs and subpoenas, administer oaths, acknowledge deeds, and take depositions were precisely those acts which the Court had already held that alien lawyers

Nevertheless, *Bernal*'s reasoning contained some hopeful signs that Justice Blackmun's equal protection theory of aliens' rights retains adherents among the Justices. Although nominally applying *Cabell*'s "substantial fit" test, Justice Marshall in fact engaged in a searching historical and structural examination of the Texas citizenship scheme of the kind that Justice Blackmun had consistently advocated.[172] Emphasizing the resident alien's right to an individualized determination of fitness, Justice Marshall noted the absence of any record evidence regarding a lack of familiarity with state law.[173] Moreover, Justice Marshall sought to reaffirm the narrowness of the "political community" exception[174] by declaring that the operational test of whether a position "executes broad public policy" is whether its occupant "would necessarily exercise broad discretionary power over the . . . execution of public policies importantly affecting individuals" or is "invested with . . . broad discretion in the execution of public policy that requires the routine exercise of authority over individuals," a standard reminiscent of the more rigorous test for the *Sugarman* exception proposed by Justice Blackmun's dissent in *Cabell*.[175]

Perhaps the best one can say about *Bernal* is that it shows that Justice Blackmun's theory of aliens' rights has won a partial victory at the Court. With the exception of Justice Rehnquist and possibly the Chief Justice, all of the Justices still accept strict scrutiny of alienage classifications as appropriate when nonelective jobs without obvious political, discretionary, or coercive attributes are at issue. The fact that the Court granted certiorari to reverse in *Bernal* shows that even its current membership will not condone the exclusion of resident aliens from ministerial positions simply because a state alleges that those jobs are necessary to the execution of public policy.

---

could exercise in *Griffiths*. *See id.* at 2319-20. Thus, the Court could not have accepted Texas' position without creating "a curious anomaly: an alien admitted to practice law in Texas could draft contracts, wills, deeds and other important legal documents, but could not notarize them." Brief for Petitioner at 13, Bernal v. Fainter, 104 S. Ct. 2312 (1984).

172. *See* 104 S. Ct. at 2318 n.12, 2319 n.14 (reviewing history of both the citizenship requirement and state notaries' exercise of their purported coercive powers); *id.* at 2318 nn.8-12 (finding the statute not over-inclusive because Texas does not require its court reporters, who perform the same functions as notaries, or its secretary of state, who supervises their licensing, to be citizens). That *Cabell* sustained a state statute that produced an equally absurd result, *see supra* note 161, suggests that the *Bernal* Court actually applied a standard of review far stricter than that prescribed in *Cabell*.

173. *See* 104 S. Ct. at 2320.

174. *See id.* at 2317 n.7 ("We emphasize, as we have in the past, that the political-function exception must be narrowly construed. . . .").

175. *See id.* at 2318-19. *Cf. supra* text accompanying note 126.

Although *Foley*, *Ambach*, and *Cabell* have all now exploited, and in the process widened, *Sugarman*'s loophole, in each case the Court went to great lengths to declare that state restrictions on resident aliens' rights generally remain subject to strict scrutiny.[176] Moreover, so long as *Griffiths* remains good law, it limits the extent to which the "execution of public policy" prong can logically be extended to relax strict scrutiny of state citizenship restrictions on private jobs. Thus, even if *Bernal* represents only a finger in the dike, its analysis reveals that the legacy of Justice Blackmun's equal protection theory still endures, notwithstanding the Court's unfortunate retreat from his broader communitarian vision of aliens' rights.

II. Comparing Justice Blackmun's Theory With Its Rivals

Is the "constitutional doctrine regarding alienage-based classifications [really] better understood in terms, not of equal protection, but of federalism?"[177] If so, did Justice Blackmun lead the Court astray by taking it down the equal protection, rather than the preemption, road after *Graham*?[178] Did the Justice's post-*Foley* protests about the expansion of *Sugarman*'s exception miss the "real" point: that equal protection has nothing to do with aliens after all?

Diligent law review readers might well conclude that these questions have already been answered in the affirmative.[179] So many recent commentaries have hailed federal preemption as the unseen solution to the "glaring doctrinal anomaly"[180] in the Court's alienage jurisprudence that preemption and equal protection have been described as "vying for predominance in the field of alienage."[181] On the scholarly battlefield, as well as before the Court itself,[182] there are signs that equal protection has perhaps become the underdog.

As Part I demonstrated, Justice Blackmun's theory of aliens' rights is now an underdog even among the various equal protection the-

---

176. *See Foley*, 435 U.S. at 294; *Ambach*, 441 U.S. at 75; *Cabell*, 454 U.S. at 438.

177. Perry, *supra* note 11, at 334.

178. *See supra* notes 38, 40, 43 & 76.

179. *See, e.g.*, sources cited *supra* note 11.

180. Choper, *Discrimination*, *supra* note 11, at 16.

181. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 Cinn. L. Rev. 3, 24 (1983).

182. In Toll v. Moreno, 458 U.S. 1 (1982), the Court relied on preemption analysis to invalidate a state restriction on nonimmigrant aliens; *see supra* notes 147 & 149, observing that "[c]ommentators have noted . . . that many of the Court's decisions concerning alienage classifications . . . are better explained in preemption than equal protection terms." 458 U.S. at 12 n.16 (citing Perry, *supra* note 9, and Note, *supra* note 10).

ories currently held by members of the Court. As a continuing believer in an equal protection approach to aliens' rights,[183] I briefly sketch out in this part why I believe Justice Blackmun's equal protection theory of aliens' rights to be superior both to rival equal protection theories on the Court and to the preemption approach favored by so many commentators.[184]

A. Comparing Equal Protection Theories of Aliens' Rights

The way a government—any government—treats its alien inhabitants, be they permanent residents, nonimmigrants, or undocumented aliens, has moral, political, and constitutional dimensions. Generally speaking, constitutional law has tended to leave the moral dimension of the alienage problem to political philosophy and the political dimension to immigration policy.[185] Perhaps for that reason, outside the realms of political philosophy and immigration law, surprisingly little attention has been devoted to what it means to be an alien. Although "[a]liens and citizens are usually two sides of the same coin,"[186] constitutional attention has focused almost exclusively on the citizenship side of the coin.[187] To this day, the Court itself continues to define aliens less by

---

183. Happily, I am not alone. *See, e.g.*, J. ELY, *supra* note 13, at 161-62; Note, *supra* note 60, at 1520-21 n.34; *Developments*, *supra* note 57, at 1418.

184. In a forthcoming article, I plan to develop the arguments sketched here into a more comprehensive equal protection analysis of federal and state discrimination against undocumented, nonimmigrant and resident aliens.

185. Two exceptional recent efforts to rethink the alienage problem in all of its dimensions are Schuck, *supra* note 111, and *Developments*, *supra* note 57.

186. Aleinikoff, *Aliens, Due Process and "Community Ties:" A Response to Martin*, 44 U. PITT. L. REV. 237, 257 (1984).

187. *See e.g.*, A. BICKEL, THE MORALITY OF CONSENT 54 (1975); C. BLACK, *supra* note 11, at 51-66; Karst, *Foreword*, *supra* note 19; Bickel, *Citizenship in the American Constitution*, 15 ARIZ. L. REV. 369 (1973).

As Justice Rehnquist pointed out in his *Sugarman* dissent, *see* 413 U.S. at 651-52, and as Justice Powell reiterated for the Court in *Ambach*, *see* 441 U.S. at 75, numerous provisions of the Constitution specifically refer to "citizens." *See* U.S. CONST. art. I, § 2, cl. 2; § 3, cl. 3 (Representatives and Senators must be citizens); art. II, § 1, cl. 5 (President must be "a natural born Citizen"); art. IV, § 2, cl. 1 (privileges and immunities of "citizens of each state."); amend. XI (suits against states by citizens of another state); amend. XIV, § 1 (state citizenship and privileges and immunities of United States citizenship); amend. XV (right of citizens to vote); amend. XXIV (abolition of poll tax requirement for voting); *id.* amend. XXVI (eighteen year-old vote).

Nowhere, however, does the Constitution use the term "alien." *But cf.* U.S. CONST. art. I, § 8, cl. 4 (Congress has the power "[t]o establish a uniform Rule of Naturalization"); art. III, § 2, cl. 1 (federal judicial power extends to suits involving citizens of the United States "and foreign States, Citizens or Subjects"); amend. XI (federal judicial power does not extend to suits brought against a state "by Citizens or Subjects of any Foreign state").

what they are than by what they are not.[188]

Aliens are, by definition, outsiders. "The very word, 'alien,' calls to mind someone strange and out of place, and it has often been used in a distinctly pejorative way."[189] As Professor Schuck has observed, "by calling them 'aliens,' our law affirms that they remain strangers, objects of our vigilance, our suspicion, and perhaps even our hostility."[190] At the same time, however, it cannot be disputed that, comparatively speaking, "[a]s a Nation we exhibit extraordinary hospitality to those who come to our country."[191] Once aliens enter this country, whether legally or illegally, they acquire a surprising array of individual "rights," both to fend off interference from the government and to participate in the life of the national community.[192]

All aliens, regardless of their immigration status, thus acquire a broad panoply of individual rights against the government simply by virtue of their presence in the United States. The question with which Justice Blackmun and the Court have struggled for the past thirteen years is whether the fourteenth amendment's guarantee of the "equal protection of the laws" affords any additional rights to permanent resident aliens, a particular subclass of those "persons" who have chosen to

---

188. *See, e.g.*, Cabell v. Chavez-Salido, 454 U.S. at 439-40 ("Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.").

189. Rosberg, *Protection*, *supra* note 8, at 303.

190. Schuck, *supra* note 111, at 1.

191. *Foley*, 435 U.S. at 294. *See* Johnson v. Eisentrager, 339 U.S. 763, 770 (1950). Even the Reagan Administration's comparatively restrictive immigration and refugee policy has as its first principle that the United States shall continue its tradition as a land that welcomes people from other countries. *See* 17 WEEKLY COMP. PRES. DOC. 829, 829-30 (July 30, 1981). *See also* Hiller, *Immigration Policies of the Reagan Administration*, 44 U. PITT. L. REV. 495, 500 (1983). A number of the United States' immigration laws, including its "naturalization requirements[,] are among the most lenient in the world. Even before immigrants acquire American citizenship, their children born in this country are automatically citizens at birth." Rosberg, *Protection*, *supra* note 8, at 302. *Cf.* Haberman, *Koreans in Japan: Forever Aliens in an Alien Land*, N.Y. Times, Aug. 31, 1984, at 2, col. 2 (even Koreans who are born in Japan of parents who were born in Japan are officially regarded as foreigners, must register as alien residents, and must be fingerprinted every five years).

192. Under federal immigration laws, aliens exercise procedural and substantive rights in seeking asylum and naturalization, and in fending off exclusion and deportation, that are far broader than they would possess in many other countries in the world. *See generally Developments*, *supra* note 57, at 1334-1400; Lopez & Lopez, *The Rights of Aliens in Deportation and Exclusion*, 20 IDAHO L. REV. 731 (1984) (enumerating these rights); Aleinikoff, *Political Asylum in the Federal Republic of Germany and the Republic of France: Lessons for the United States*, 17 U. MICH. J.L. REF. 183 (1984) (contrasting relatively open United States asylum policies with more restrictive ones that exist in West Germany and that are likely to be promulgated in France).

develop stronger community ties here.[193] Asked in a less abstract way, what should a court do when asked by a permanent resident alien to require the state in which he lives to afford him a public benefit that it affords to citizens of other states as well as to its own citizens? Part I's analysis of *Graham* and its progeny suggests that the Court's current membership would answer that question in three different ways.

The consistent expositor of one position, Justice Rehnquist, joined perhaps by the Chief Justice, has urged that "[c]itizenship mean[s] something, a status in and relationship with a society which is continuing and more basic than mere presence or residence."[194] To impose strict scrutiny on state alienage restrictions, and thereby to require states to afford a permanent resident alien virtually everything that they afford their own citizens and citizens of other states would "obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship."[195] Judges, these Justices would say, should construe the fourteenth amendment to permit states to deny resident aliens any public good, so long as " 'any state of facts reasonably may be conceived to justify it' " doing so.[196]

A moment's reflection recognizes that a logical chasm divides the uncontestable premise—that we want the status of citizenship to be "meaningful"—from the far more controversial conclusion—that states may deny resident aliens anything, so long as they can articulate a reason. On examination, this is an all-or-nothing theory, under which citizens have access to all of a state's benefits, while aliens who may have equally strong state ties may be denied any access to these benefits if they are unwilling to bear citizenship's "burdens."[197] While this reasoning may be superficially appealing on a wholly abstract level,[198] it fails

---

193. "By becoming a permanent resident alien, a person has said to a community, 'I hereby commit myself to live here indefinitely and to become part of your community.' " Aleinikoff, *supra* note 186, at 242.

194. *Sugarman*, 413 U.S. at 652 (Rehnquist, J., dissenting).

195. *Foley*, 435 U.S. at 295 (Burger, C.J., for the Court) (quoting *Mauclet*, 432 U.S. at 14 (Burger, C.J., dissenting)).

196. *Sugarman*, 413 U.S. at 658 (Rehnquist, J., dissenting) (citation omitted) ("In my view, the proper judicial inquiry is whether any rational justification exists for prohibiting aliens from employment in the competitive civil service and from admission to a state bar."); *Griffiths*, 413 U.S. at 733 (Burger, C.J., dissenting) ("[t]here is . . . a reasonable, rational basis" for excluding aliens from the bar).

197. *See supra* note 83 (quoting *Griffiths*, 413 U.S. at 733 (Burger, C.J., dissenting)).

198. *See, e.g.*, Perry, *supra* note 9, at 1061 ("Acts of government favoring citizens over aliens are analogous to acts by the head of a family favoring family members over others: such acts presuppose the greater desert, for certain purposes, of those inside, and thus imply the lesser desert of those outside, the family.").

to reflect the realities of resident alien life in this country: that aliens *already* bear virtually all of the societal burdens borne by citizens,[199] plus the stigma of being outsiders, but lack the option of lightening those burdens through the political process.[200]

Even to dub this first approach a theory of aliens' "rights" would be overly generous, for under this theory a state could treat all the public benefits it offers as "privileges" attendant upon state citizenship. It could then make those privileges available not only to its own citizens, but also to citizens of other states, while withholding them from permanent resident aliens who may be among its longest standing residents. A glance back at precedent reveals that this approach would entail even broader judicial deference to a state's sovereign power to allocate its property and resources than the Court recognized in the now-interred "special public-interest doctrine."[201]

Based on their track record from *Foley* onward, Justices White, Powell, and O'Connor would probably subscribe to a second, less deferential view: that the fourteenth amendment requires states to afford permanent resident aliens benefits that can be roughly termed "economic," but permits states to deny those aliens benefits that can be described as "political," so long as such exclusions are accomplished by rules that are "not substantially overinclusive or underinclusive."[202] This approach has two principal advantages over the first. It at least recognizes that aliens have rights, if only "economic" ones, and it at least attempts to tie a state's asserted motive for discriminating against

---

199. *See supra* note 100.

200. *See* J. ELY, *supra* note 13, at 161 ("Hostility toward 'foreigners' is a time-honored American tradition. Moreover, our legislatures are composed almost entirely of citizens who have always been such."). *See also Foley*, 435 U.S. at 308-09 (Stevens, J., dissenting) ("The widespread exclusion of aliens from [public employment] positions today may well be nothing more than a vestige of the historical relationship between nonvoting aliens and a system of distributing the spoils of victory to the party faithful."); A. BICKEL, *supra* note 187, at 46-47; J. HIGHAM, STRANGERS IN THE LAND (1973) (both describing the history of discrimination against aliens in this country).

201. *See supra* note 57. Long before Justice Blackmun discarded that doctrine in *Sugarman*, its validity had been called seriously into question by Truax v. Raich, 239 U.S. 33 (1915) (invalidating a state statute requiring all employers of more than five workers to exclude aliens from at least eighty percent of those positions) and Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (invalidating a state statute barring lawfully resident aliens from obtaining offshore fishing licenses). Significantly, both of those decisions had rested on intertwined preemption and equal protection analyses. *See* Note, *supra* note 60, at 1516-17 n.5.

202. *See supra* note 147 (discussing *Cabell*). Given his votes with the *Foley*, *Ambach*, *Cabell*, and *Bernal* majorities, the Chief Justice might also fairly be included in this group. Whenever the Chief Justice has written separately, however, he has tended to align himself with Justice Rehnquist's view challenging the notion that alienage is a suspect classification. *See* his dissents in *Mauclet*, 432 U.S. at 412, and *Griffiths*, as discussed *supra* in notes 79-87.

aliens—its desire to preserve certain *political* benefits for its citizens—to the principal reason why resident aliens and citizens are not identically situated, namely, that unlike citizens, aliens do not belong to a state's "political community."

As *Foley* and its progeny have illustrated, however, this theory, too, has serious flaws; it permits states to discriminate against aliens with respect to political benefits *carelessly* or because of unthinking stereotypes about aliens' classwide disloyalty, lack of qualifications, or unfamiliarity with the societal rules necessary to fill particular positions;[203] and it permits states to discriminate against aliens *invidiously*, so long as their avowed purpose is to preserve "political" roles for their citizenry.[204]

Contrary to its claim of fealty to broad "economic/political" distinctions drawn in *Sugarman*, this second theory plainly offends *Sugarman*, which established an extremely narrow range of permissible bases upon which states may lawfully discriminate against resident aliens.[205] Because state legislatures have traditionally passed laws disadvantaging aliens simply because they are aliens, *Sugarman* directed courts to scrutinize classifications drawn on alienage closely, in search of impermissible legislative *motives*.[206] Because in many cases this second approach instead sanctions a relaxed review of alienage classifications whenever allegedly "political" goods are at issue, it misunderstands the whole point of the Court's early alienage decisions: that whether or not permanent resident aliens form a "suspect class," as that term has traditionally been used in the race and nationality context, the fourteenth amendment requires courts to treat all legislative

---

203. *See supra* text accompanying notes 120-23, 135-41, 150-52. *See also* Rosberg, *Aliens*, *supra* note 60, at 1109-35 (challenging each of these stereotypes); J.ELY, *supra* note 13, at 162 (observing that exaggerated stereotyping of aliens by legislators is not likely to be "ameliorated by any substantial degree of social intercourse between recent immigrants and those who make the laws").

204. *Ambach* and *Cabell* make the "economic/political" distinction enshrined by this second approach something of a false dichotomy, because those cases placed two occupations that do not intuitively strike us as "political," schoolteachers and deputy probation officers, on the "political" side of the line. If courts should view this nebulous "economic/political" distinction as a proxy for a line roughly drawn between private and public roles, *Cabell*'s test can be manipulated to exclude aliens from all positions or benefits having significant "public" or noneconomic attributes. The extreme malleability of *Cabell*'s test was illustrated in Vargas v. Strake, 710 F.2d 190 (5th Cir. 1983), the decision ultimately reversed by the Court in *Bernal*, where the Fifth Circuit read *Cabell* to authorize alien exclusion from notary public positions because those positions allegedly serve "political," as opposed to economic, goals.

205. *See supra* text accompanying notes 73-75.

206. *See supra* text accompanying notes 69-72.

distinctions based on alienage as highly suspicious *classifications*.[207]

That point is embodied in the third view of alien's rights on the Court, which Justice Blackmun has shaped and which Justices Brennan, Marshall, and Stevens apparently share.[208] As we have seen, this view construes the fourteenth amendment to permit states to deny resident aliens only the right to vote, to hold public office, and to hold important nonelective positions that involve the shaping or implementation of significant public policies. In all other respects, resident aliens have the same rights against the state as do citizens. In my view, Justice Blackmun's theory is superior to its competitors as an *equal protection doctrine*, even though those other approaches apparently now jointly command a majority of the Court.

As I have argued in Part I, *Sugarman*'s two-tiered review, as originally understood, served the same goals as the equal protection analysis developed by the Court in other areas, namely, flushing out unconstitutional legislative motives, and ensuring that they do not account for statutory classifications.[209] By requiring judges to focus on actual legislative motives, individualized determinations of fitness, and the history and structure of state exclusions of resident aliens, Justice Blackmun's theory prescribed a judicial role that guards against state discrimination against resident aliens based on careless or unthinking stereotyping. By narrowly reading the "political community" exception, his theory further sought to ensure that states will implement their constitutionally valid objectives for classifying on the basis of alienage—to effectuate state governance and to give meaning to state citizenship—by laws that evince reasoned and specific judgments to exclude aliens from particularly important political positions.

Even apart from the greater ability of Justice Blackmun's theory to root out impermissible legislative motive, I find it preferable to its competitors in a deeper sense as well: because its conception[210] of "citi-

---

207. *See* Toll v. Moreno, 458 U.S. at 20-21 (Blackmun, J., concurring):

> In combination, these factors—disparate treatment accorded a class of 'similarly circumstanced' persons who historically have been disabled by the prejudice of the majority—led the Court to conclude that alienage classifications 'in themselves supply a reason to infer antipathy, . . . and therefore demand close judicial scrutiny. This understanding . . . is at the heart of the Court's modern alienage decisions. . . .

Id. at 20-21 (citations omitted). *See also* Rosberg, *Discrimination*, *supra* note 8, at 403 (suggesting that courts should put "less emphasis on the suspect nature of the class and more on the suspect nature of the classification").

208. Except for *Foley*, these four Justices have voted together in every state alienage case in which all have participated.

209. *See supra* text accompanying notes 69-75.

210. *See* R. DWORKIN, *supra* note 14, at 134-46 (distinguishing between a "concept" and a

zenship" accords more fully than that of its competitors with the conception of citizenship that, in my view, animates the fourteenth amendment itself.[211] Justice Blackmun's theory of aliens' rights embodies a conception of "citizenship" which denotes not merely a legal status,[212] but rather, a societal value encompassing broader notions of an individual's participation, responsibility, and respect for the participation of others in society.[213] Although permanent resident aliens are not "citizens" in the narrow legal sense of being able to vote or hold public office,[214] they may nevertheless partake of citizenship values by other forms of community participation.[215] Even if they cannot vote, resident aliens may engage in other forms of political participation, such as campaigning, participating in political demonstration or debate, contributing to political causes, or even parenting and educating future presidential and vice-presidential candidates. To the extent that resident aliens also pay taxes, serve in the armed forces, support the economy, and add to society's racial, ethnic, and religious diversity, they are "citizens" of this country in the broad sense of being participating community members, even if not in the narrower legal sense.[216]

Justice Blackmun's theory is truer to the fourteenth amendment's conception of citizenship because it recognizes, in a way that the com-

---

specific "conception" of the concept). *See also id.* at 135 ("When I appeal to [the concept of] fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it.").

211. *See supra* note 11 (quoting U.S. CONST. amend. XIV, § 1).

212. *See* A. BICKEL, *supra* note 187, at 54.

213. The idea that "[t]he substantive core of the [fourteenth] amendment, and of the equal protection clause in particular, is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by organized society as a respected, responsible, and participating member" is fully developed in Karst, *Foreword*, *supra* note 19, at 4.

214. Professor Rosberg has demonstrated that nothing about being an alien is inherently incompatible with political participation. Historically, aliens in fact had the right to vote in nearly half of the states and territories in the first 120 years of the Republic, and were not finally excluded from voting in all national, state, or local elections until 1928. *See* Rosberg, *Aliens*, *supra* note 60, at 1093-1100.

215. "Voting and officeholding are not, after all, the only forms of participation in society's decision." Karst, *Foreword*, *supra* note 19, at 25.

216.

> The legal concept of 'citizenship' is the formal solution to the problem of membership. Yet the problem defies easy solution through rigid categorization: a unitary concept of citizenship cannot embrace the diversity of forms that membership may take. The returning resident alien who possesses significant ties to the nation by virtue of having lived and worked and become a part of the social community is in many respects similar to the native-born American citizen. Formally an alien, functionally a citizen, the resident alien is likely to share more of the classic attributes of citizenship than of alienage.

Developments, *supra* note 57, at 133-34.

peting theories do not, that "[t]o be a citizen is not merely to be a consumer of rights, but to be responsible to other members of the community . . . Participation in the community's political life [is] not only a right but an obligation."[217] Tolerance of the participation of *others* in community life is a value as fully embodied in the notion of citizenship as participation itself.[218] Thus, citizens act more truly as citizens when they accord a stranger in their midst "a generous and ascending scale of rights as he increases his identity with our society,"[219] than when they limit the participation of aliens in community life. Viewed in this light, states and courts that invoke "citizenship" as a reason to deny permanent residents such rights subvert the very concept they invoke by using it as a barrier, rather than as an invitation, to participation. Similarly, states and courts that call on the image of "community" as a reason to exclude, rather than include, individuals who seek membership in it spite their own objective—to give meaning to membership in that community—and thereby cheapen the very value they aim to preserve.[220]

B. Preemption: The Road Not Taken?

Even accepting Justice Blackmun's equal protection theory over other equal protection theories held at the Court, how does it compare to an alternative theory based on federal preemption? At first blush, there is something coldly compelling about a preemption analysis of aliens' rights. That analysis begins with the textual proposition that both the Constitution[221] and a multitude of federal statutes[222] draw certain distinctions between citizens and aliens. Furthermore, the Court's recent decisions regarding federal discrimination against aliens[223] have settled that the federal government, although bound by a fifth amendment equal protection constraint once thought to be identi-

---

217. Karst, *Foreword*, *supra* note 19, at 9.

218. Tolerating the participation of others is inherent in the idea of belonging to a community. As Michael Sandel has observed, when individuals belong to a community, their community bonds move them to admit "that to some I owe more than justice requires or even permits, not by reason of agreements I have made but instead in virtue of those more or less enduring attachments and commitments which taken together partly define the person I am." M. SANDEL, *supra* note 111, at 179.

219. Johnson v. Eisentrager, 339 U.S. 763, 770 (1950).

220. *Cf. supra* text accompanying notes 142-43, 166.

221. *See supra* note 187.

222. *See* Mathews v. Diaz, 426 U.S. at 78-80 nn.12-13 (listing statutes).

223. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Mathews v. Diaz, 426 U.S. 67 (1976), discussed in *supra* note 92. *See generally* Rosberg, *Protection*, *supra* note 8.

cal to that imposed upon the states,[224] may discriminate against aliens in ways plainly forbidden to the states by the fourteenth amendment's equal protection clause. Moreover, the Court has usually described the federal government's powers over immigration,[225] foreign commerce,[226] and foreign affairs[227] as inherent incidents of national sovereignty over which the federal government has "plenary" and "exclusive" authority under constitutional and international law.[228] As a result, preemption theorists have concluded that only *federal policy*, not the equal protection clause, may compel a state to accord aliens equal treatment.[229] State and local discrimination against resident aliens, they argue, is unconstitutional under the supremacy clause only when it is explicitly or implicitly proscribed by federal action.[230]

---

224. *See* Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."); Bolling v. Sharpe, 347 U.S. 497, 500 (1954) ("[I]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government" than it imposes on the states).

225. *See* U.S. CONST. art. I, § 8, cl. 4 (Congress' exclusive power to prescribe a uniform rule of naturalization). *See also* Fiallo v. Bell, 430 U.S. 787, 792 (1977); Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); Hines v. Davidowitz, 312 U.S. 52, 62-68 (1941).

226. *See* U.S. CONST. art. I, § 8, cl. 3 (Congress' exclusive power to regulate commerce with foreign nations). *See also* Board of Trustees v. United States, 289 U.S. 48, 56 (1933).

227. *See* U.S. CONST. art. II, § 2, cls. 1-2 (President's commander-in-chief and treaty-making powers); *id.* at § 3 (President's power to receive ambassadors and ministers). *See also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 316-17 (1936) (federal government's exclusive authority over conduct of foreign relations).

228. *See, e.g.*, Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892):

> It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

Id. (citations omitted). *But see* Nafziger, *A Commentary on American Legal Scholarship Concerning the Admission of Migrants*, 17 U. MICH. J.L. REF. 165 (1984); Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804 (1983) (arguing that the premise that a nation has a sovereign right to exclude all aliens is incorrect as a matter of international law).

229. Preemption theorists rely heavily on the Court's statement in Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948), that because of the federal government's exclusive power over aliens, "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits." *See generally* Note, *supra* note 10; YALE Note, *supra* note 11. They further invoke *Graham*'s alternative holding that state laws discriminating against aliens' receipt of welfare benefits are preempted by a federal policy favoring the right of aliens to "enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminatory laws.' " *Graham*, 403 U.S. at 378 (citation omitted). *See supra* note 38.

230. One preemption advocate has proposed the following test:

> State laws that disproportionately burden aliens are preempted by the predominant federal interest in alienage, unless the state regulation is expressly authorized by Congress, or alternatively, can be analogized to a federal regulation from which an implicit au-

Practically speaking, it is unclear whether and to what extent a preemption analysis of state burdens on resident aliens would yield different results than an equal protection analysis.[231] Nevertheless, a pure preemption analysis leads to a very different analysis of *federally* imposed burdens, because it recognizes no independent constitutional norm constraining federal government discrimination against aliens. In effect, a preemption theory leaves aliens' rights to equal treatment solely in the hands of the federal policymakers, for whatever those policymakers would deem wise, a preemption theory would necessarily deem constitutional.

A pure preemption analysis fails to recognize that some of the legal norms that animate our Constitution are structural, while others are substantive. The supremacy of the federal government over the states with regard to matters of national interest, embodied in article VI's supremacy clause, exemplifies a structural norm.[232] An individual's right to be treated as an equal—sometimes described as the right to be treated by government "with the same respect and concern as anyone else"[233] or "with equal regard as a person"[234]—exemplifies a substantive norm, which has been located in the fourteenth amendment's equal protection doctrine and the fifth amendment's due process clause.[235]

---

thorization by Congress can be inferred.

YALE Note, *supra* note 11, at 941.

231. Preemption commentators disagree on how *Foley* and its successors would have come out under a preemption analysis. Note, *supra* note 10, at 1090, apparently approves the results in *Foley* and *Ambach*. YALE Note, *supra* note 11, would uphold *Foley* because an exclusion of aliens from state trooper jobs is analogous to federal exclusion of aliens from the FBI, *see id.* at 955, but would reverse *Ambach* because the federal government has issued no mandate excluding aliens from teaching. *See id.* at 956. Perry, *supra* note 9, at 1064-65, would uphold *Foley* on the ground that the federal government has excluded aliens from all civil service positions, a conclusion that would also apparently call for reversal of *Sugarman*. Choper, *Discrimination*, *supra* note 11, at 33-34, equivocates on how the Court would have resolved its recent cases under supremacy clause analysis.

232. *See* L. TRIBE, *supra* note 15, § 5-1 at 224.

233. R. DWORKIN, *supra* note 14, at 227.

234. L. TRIBE, *supra* note 15, § 16-1 at 993.

235. Hot debate currently rages over whether the formal notion of equality—that persons who are alike should be treated alike—is a substantive norm. *Compare* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) *and* Westen, *To Lure the Tarantula from Its Hole: A Response*, 83 COLUM. L. REV. 1186 (1983), *with* Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983). Everyone seems to agree, however, that "[i]t does not follow that because the idea of equality is empty, the principle of equal protection is empty, too; the idea of equality and the principle of equal protection are different concepts." Perry, *supra* note 11, at 333. *See also* Westen, *supra*, 95 HARV. L. REV. at 568 (implying that the equal protection concept has substance); Sunstein, *supra* note 72, at 129-30 & n.10 and sources cited therein.

A pure preemption theory, based solely on a structural norm, lacks substantive content. For that reason, it cannot serve as a theory of individual "rights" at all. While telling us *which level* of government has the final say in regulating the activities of resident aliens, it tells us nothing about *what rules* that level of government must follow when conducting its regulation. It gives judges no guidance on how they should view state discrimination against resident aliens in situations where the federal government has not spoken clearly about the policy at issue.[236] Nor does its only axiom—that states may discriminate against resident aliens when the federal government says they can—recognize any apparent limit on the types of discrimination against aliens which the federal government can expressly authorize.[237]

Not only does this axiom conflict with the Court's doctrine recognizing some constitutional limits on the federal government's power to discriminate against aliens,[238] it effectively subordinates fourteenth amendment equal protection doctrine governing discrimination against resident aliens to the vagaries of federal immigration policy. Furthermore, to the extent that federal policy determines what states may do, and considerations akin to the political question doctrine limit judicial review of those federal policies toward aliens agreed upon by the President and Congress,[239] a pure preemption analysis shrinks the role of judges in questioning the motives underlying discrimination against aliens by *either* level of government.

At the heart of Justice Blackmun's equal protection theory, by contrast, lies a substantive norm that constrains *all* government discrimination against resident aliens, whether state or federal: the notion that such an alien has a right "to be treated by the organized society as

---

236. This may explain the divergence of views among the preemption theorists regarding the outcomes described *supra* in note 231.

237. *Cf.* Choper, *Discrimination*, *supra* note 11, at 34 (if the Court had come out differently in *Foley*, *Ambach*, and *Cabell*, "then, given the use of a Supremacy clause analysis, if Congress disagreed with the result and believed that the Court had gone too far in denying the ability of states to limit such positions to citizens, then Congress could turn around and pass a statute to authorize that very kind of discrimination").

238. *See* Hampton v. Mow Sun Wong, 426 U.S. at 103 ("When the Federal Government asserts an *overriding national interest* as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest.") (emphasis added). *See also* Rosberg, *Protection*, *supra* note 8, at 288; Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. REV. 541 (1977) (explaining what this test means).

239. *See* Mathews v. Diaz, 426 U.S. at 81-82 ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.").

a respected, responsible, and participating member."[240] Because Justice Blackmun recognizes that aliens are politically powerless, for most legislative purposes are indistinguishable from citizens, and historically "often have been the victims of irrational discrimination,"[241] his theory charges judges to play an important role in preserving that right.

Under his theory, when state, as opposed to federal, discrimination against resident aliens is at issue, judges must apply strict scrutiny to flush out unconstitutional legislative motives, deferring only in those few circumstances where judicial deference is necessary to preserve a state's constitutional prerogative to give meaning to state citizenship. When the federal government discriminates against resident aliens, however, his theory concedes that judges have less to say, not because federal alienage discrimination is any less offensive to the substantive norm guiding the court's review, but because the countervailing considerations insulating that federal conduct from judicial review are significantly greater.[242]

A detailed discussion of why an equal protection approach to aliens' rights is superior to a preemption approach must await a more ambitious essay than this. In the end, I prefer an equal protection approach to a preemption approach, not simply because it clearly separates what is constitutional from what federal policymakers happen to think is wise, but more fundamentally, because it answers, in a way that preemption reasoning does not, the moral and philosophical claims that resident aliens make against their state governments. Aliens pro-

---

240. Karst, *Forward*, *supra* note 19, at 4. *See also supra* text accompanying notes 210-20.

241. *See* Toll v. Moreno, 458 U.S. at 20 (Blackmun, J., concurring). *See also supra* note 207.

242. The Court has permitted more limited judicial review of federal discrimination against aliens because of considerations similar to those underlying the political question doctrine, *see supra* note 239; and because "there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State," Hampton v. Mow Sun Wong, 426 U.S. at 100. Similar considerations may compel judges to apply less-than-strictest scrutiny when discrimination occurs against nonimmigrant or undocumented aliens already within the country, or against aliens of all origins seeking initial entry into the country. *See generally* Martin, *supra* note 10; Aleinikoff, *supra* note 186 (both arguing that the government owes less in the way of due process to these aliens than to permanent residents because of their lesser ties to our national community).

Just because these considerations may prevent judges from playing the same aggressive, inquiring role with respect to federal alienage discrimination that they play with respect to state discrimination does not mean that federal discrimination violates no substantive norms. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1225 n.40 (1978) ("Any invocation of the political question doctrine logically involves the premise that there is a constitutional norm which is applicable to the controversy at hand, but which cannot or should not be enforced by the federal judiciary.").

testing official discrimination rarely protest that they have been discriminated against by the wrong level of government, or that the President and Congress have not authorized the states to discriminate against them.[243] Instead, they have argued that they have not been treated by the state to which they pay taxes, whose economy they support, whose schools their children attend, and in whose cultural life they share, with the equal regard and dignity that the state shows to others who do the same. At bottom, Foley's request to be a police officer, Norwick's plea to teach schoolchildren, and Chavez-Salido's effort to become a deputy probation officer were all pleas for participation; their complaint was that, for reasons unrelated to their qualities as *individuals*, they had not been treated as members of the community to which they thought they belonged.

Viewed through lenses other than those provided by constitutional law, the claims asserted by these aliens may be seen as traditionally "liberal," in the sense that they seek to enforce individual rights against the government,[244] as well as "communitarian,"[245] in the sense that by asserting them, aliens call on their fellow members of society to recognize their role as participants in it. In *Foley*, *Ambach*, and *Cabell*, the new Court majority turned a deaf ear to these claims. A pure preemption analysis would have heard them only if the federal government

---

243. The Court has, however, sometimes *answered* their claims that way. *See, e.g.*, Toll v. Moreno, 458 U.S. at 10 (upholding nonimmigrant aliens' claim on preemption grounds without reaching their due process and equal protection arguments); Hampton v. Mow Sun Wong, 426 U.S. at 113-14 (upholding resident aliens' claim against the federal government on the ground that the Civil Service Commission was not the proper agency to take into account the national interests alleged).

244. *See* R. DWORKIN, *supra* note 14, at xi ("Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or do, or not a sufficient justification for imposing some loss or injury upon them.").

245. The concept of "communitarianism" has recently emerged with surprising force in both political philosophy and immigration law. For recent writings in the philosophical realm, *see, e.g.*, M. SANDEL, *supra* note 111; M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 31-63 (1983); R. UNGER, KNOWLEDGE AND POLITICS (1975); Fried, Book Review, 96 HARV. L. REV. 960, 965-66 (1983); Walzer, *From Contract to Community*, NEW REPUBLIC, Dec. 13, 1982, at 35; Walzer, *The Distribution of Membership*, in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1 (P. Brown & H. Shue eds. 1981). For recent writings in the immigration context, *see* Schuck, *supra* note 111; Martin, *supra* note 10; Aleinikoff, *supra* note 186; Lopez, *Undocumented Mexican Migration: In Search of Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 695-702 (1981); *Developments*, *supra* note 57, at 1303-08 (labeling this concept the "participation model"). "Although rejecting traditional liberalism's emphasis upon [a nation's] consent as the basis for legal obligations to strangers, [in the realm of immigration law] communitarianism echoes liberalism's emphasis upon universal rights based upon individuals' essential and equal humanity." Schuck, *supra* note 111, at 4.

had not rejected similar ones. Justice Blackmun's equal protection theory not only heard, but sought to address, those claims. For that reason, his theory is both liberal and communitarian in spirit, and more sensitive to human concerns than any of its competitors.[246]

It remains to be asked what role, if any, exists for preemption analysis *within* Justice Blackmun's equal protection framework. While a detailed discussion of that question, too, must await a more ambitious essay, I believe that preemption analysis could be incorporated more fully into Justice Blackmun's existing theory to give it even greater explanatory power. *Flores, Mauclet, Ambach,* and *Cabell* all demonstrated that Justice Blackmun's theory already accommodates preemption reasoning to the extent that it recognizes certain motives that only the federal government may assert.[247] Thus, federal preemption currently functions within Justice Blackmun's equal protection framework as an independent check on impermissible state legislative motives.[248]

In my view, Justice Blackmun's equal protection theory has room to accomodate a more explicit, expanded use of preemption analysis. A court could blend preemption arguments into its equal protection analysis to narrow the range of legitimate state motives that may be in-

---

246. Justice Blackmun's theory is traditionally "liberal" because it invests an individual resident alien's assertion of a *right* to be treated as an equal with legal, as well as political and moral, force. *See supra* note 244. It is "communitarian" in the parlance of modern political philosophy, because it views aliens not merely as individuals possessing rights *against* American society, but also as having bonds and allegiances with it "as members of this family or community or nation or people." M. SANDEL, *supra* note 111, at 179. It is "communitarian" as that term is used by immigration law scholars, because it recognizes "that the government owes legal duties to all individuals who manage to reach America's shores, even to strangers whom it has never undertaken, and has no wish, to protect." Schuck, *supra* note 111, at 4.

247. In *Flores* and *Mauclet*, Justice Blackmun identified two objectives that a state has no business asserting: an interest in preventing resident aliens who have already been lawfully admitted into the country from entering the state, and an interest in encouraging naturalization. *See supra* text accompanying notes 93-94, 104. One can imagine a host of other "overriding national interests" which the federal government might conceivably assert in support of a classification discriminating against aliens, which a court should not accept if raised by a state.

Other examples of exclusive federal interests that the Court has already identified include: conducting foreign policy and setting naturalization standards, *see* Plyler v. Doe, 457 U.S. at 211 n.19; discouraging unlawful immigration, *see* Mathews v. Diaz, 426 U.S. at 85; preserving federal fiscal resources, *see* 426 U.S. at 83; imposing auxiliary burdens upon a lawfully admitted alien's residence in the United States; *see* Graham v. Richardson, 403 U.S. at 378; and providing the President with a bargaining chip for use in negotiating with other countries, *see* Hampton v. Mow Sun Wong, 426 U.S. at 104.

248. Another check is provided by equal protection "ends scrutiny," sometimes described as the requirement "that the goal the state is arguing [for] possesses some degree of substantiality," J. ELY, *supra* note 13, at 147, or that the state assert a "*legitimate* governmental interest." United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 534 (1973) (emphasis in original).

voked to justify an alienage classification.[249] At the same time, such a mixed approach would necessarily recognize the federal government's greater freedom to classify based on alienage, not because alienage is something other than a suspect classification, or because federal discrimination against aliens does not offend the constitutional norm of equal treatment, but because the federal government has power that states lack to define who aliens are and to invoke unique overriding national interests in support of alienage classifications. Thus, if properly incorporated into Justice Blackmun's equal protection analysis, preemption reasoning could give his theory even greater doctrinal coherence without ousting either the substantive norm or the protective judicial role that play such a large part in his analysis.[250]

III. CONCLUSION

Any fully descriptive theory of aliens' rights must wear a human

---

249. This is what I understand the Court to have been doing in *Plyler*, where it declined to hold that a state statute discriminating against undocumented aliens was preempted, *see* 457 U.S. at 202 n.8, but nevertheless factored the consistency of the state's interest with federal objectives into the equal protection balance. *See id.* at 224-26. The Court's earlier decisions in *Graham*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), and Truax v. Raich, 239 U.S. 33 (1915) all intertwined preemption and equal protection analysis in a similar way. *See supra* notes 38, 201.

250. Judges applying a mixed preemption-equal protection theory would still be obliged to view state alienage classifications as suspect, and to subject them to searching ends and means scrutiny unless they determined that the purpose of the classification was to define a state's political community, in which case more relaxed review would be appropriate. Preemption analysis would help to keep this "political community" exception narrow, however, because states could only properly claim, in support of their decision to preserve particular jobs for their citizens, a desire to give meaning to state, as opposed to federal, citizenship.

Under a mixed preemption-equal protection approach, a state could extend its "political community" only as far as necessary to further its interest in making *state* citizenship meaningful. Thus, a state would have to identify that class of political opportunities integral to *state* citizenship. By definition, those opportunities would have to be ones the state could justify withholding not only from resident aliens, but also from citizens of other states, who similarly would not qualify as "members" of its political community. The Court has held, in the interstate privileges and immunities context, that states may only withhold a narrow class of political opportunities from other states' citizens, including voting in state elections, qualifications for state elective office, and provision of certain services and benefits. This list closely resembles the short list of political opportunities that Justice Blackmun set out when he originally stated the "political community" exception. *Compare* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978) *with supra* text accompanying notes 52-54.

Significantly, a mixed approach would not permit a state to claim an exclusively federal interest as a valid motive for excluding aliens from political roles, even under relaxed review. Furthermore, when confronting *federal* laws classifying on the basis of alienage, a judge's role would be more limited, but he could still reject as impermissible certain motives already identified as invalid in the state discrimination context, such as stereotypical assumptions about alien disloyalty, unfamiliarity with national customs, or classwide unfitness for particular jobs.

face. A preemption theory rests on a particular governmental level's claim of supremacy over the regulation of a particular group's conduct. By its very nature, such a theory is destined to be cold, impersonal, and incomplete. Even if that theory could generally guarantee resident aliens equal treatment at the hands of state governments, it could not listen for, much less answer, the moral and personal concerns that motivate aliens to bring before the courts their pleas for equal treatment and fuller membership in the American community.

To those who know him, it is hardly surprising that Harry Blackmun's equal protection theory of aliens' rights should wear such a warm and human face. It is equally characteristic that the Justice's theory should be such a hard-working, relentless one, which steadfastly refuses to let judges off the hook. Judges applying his equal protection theory may not accept a state's justifications of its alienage classifications at face value; they must dig deeply into the history of the state's exclusion of resident aliens and insistently question the logic of that exclusion in light of the other forms of alien participation that the state permits. Justice Blackmun's theory forces judges to re-examine their own preconceptions about the qualities of resident aliens as a class, to ask whether the individual aliens before the court are being treated fairly on their merits, and to wonder whether state governments are treating noncitizens in ways that further, rather than spite, the concept of citizenship as membership in a moral community. By so doing, his theory ensures, in a way that preemption theory cannot, that the human concerns of resident aliens who protest exclusion from participation in some facet of community life will not be overlooked.

***

I must close on a personal note. On the morning *Cabell v. Chavez-Salido* was to be announced, the Justice told my co-clerks and me that he wanted to announce his dissenting opinion from the bench, an event that rarely happens more than once a Term. We crowded into the courtroom to watch. The opinion of the Court set forth in abstract and philosophical terms its interpretation of the fourteenth amendment, which authorized California to bar the alien appellees from deputy probation officer jobs. As the Court's opinion was being announced, I glanced about the courtroom at the spectators—largely tourists gathered to glimpse the American judicial process, perhaps for the only time in their lives. Few, if any, seemed to understand what was being said. I looked at Justice Blackmun, studying his notes on the bench. In the vastness of the courtroom, he seemed small and insignificant.

After the Court's opinion had been announced, Justice Blackmun began to speak. His expression was grave; his voice, rich and deep, filled the room. He described the appellees, American-educated, Spanish-speaking, lawful residents of Los Angeles, each of whom had a "modest aspiration—to become a Los Angeles County 'Deputy Probation Officer, Spanish-speaking.' "[251] He described how each had expressed his willingness to swear loyalty to the state and federal governments, and how they had demonstrated their fitness for the jobs they desired by competitive examination. His voice rising, emotional, the Justice described how California had denied them those jobs "solely, *solely* because they were not citizens." The statute sustained by the Court, he argued, had violated their rights to equal treatment and an individualized determination of fitness.

As the Justice spoke, I noticed that the spectators had become still, and were listening intently. For them, the case had suddenly become real; the Supreme Court had become a human institution. The concept of equal treatment for aliens had suddenly acquired a human face. I thought I saw some of the Justices who had voted in favor of the Court's opinion shifting uncomfortably in their seats. I wondered if they, too, suddenly understood in their hearts what the real-life impact of their decision might be. Justice Blackmun, I felt, had understood all along.

---

251. *Cabell*, 454 U.S. at 448 (Blackmun, J., dissenting).