January 19, 2022

Dear Readers,

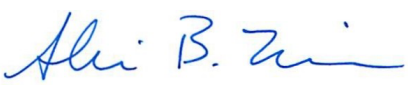
Many thanks in advance for reading this work-in-progress. This piece, which focuses on efforts to expand noncitizen economic and political rights in the 1970s, grew out of a book project that focuses on the history of immigrant civil rights in the nineteenth and twentieth centuries. In prior articles, I have examined the property rights of noncitizens in the nineteenth century as well as the interactions of property law and immigration law in the modern era. In my research for the book, it became clear to me that there is still much to understand about this unique civil rights movement in the 1970s, including the distinct way that the Supreme Court shifted the relationship between noncitizens and state power. In this piece, I aim to help fill the gap in our knowledge about the litigants and lawyers who pushed the courts to acknowledge the rights of those who fall outside the bounds of formal citizenship.

This piece has a companion article (also a work-in-progress), that looks more closely at the Supreme Court's jurisprudence, drawing heavily on archival material. That piece talks in more detail about the rationale of the key decisions and the role of individual justices in reshaping the jurisprudence pertaining to noncitizen civil rights during this time.

Apologies in advance that I wrote most of the body of the article without simultaneously entering all of my citations. The footnotes are still very much unfinished, but I am happy to answer any questions you may have about my sources.

I look forward to our conversation.

All the best,



# THE CIVIL RIGHTS OF IMMIGRANTS AND THE LOST PROMISE OF THE 1970S

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## ABSTRACT

*The Supreme Court's decision in Graham v. Richardson in 1971, declaring noncitizens to be a "discrete and insular minority" under the Equal Protection clause, catalyzed an extraordinary era of litigation in support of the civil rights of noncitizens. Immigrants and their attorneys succeeded in overturning hundreds of discriminatory laws through court challenge or legislative lobbying, drawing directly on a tradition of Black civil rights advocacy. They transformed the doctrine of equal protection, convincing courts that aliens should be protected from invidious state discrimination. Yet this sea change in doctrine was brought up short just a few years later, when the Court backtracked from expansive protection and reasserted state power to discriminate. This article documents the largely unexamined role of noncitizens and their attorneys in this remarkable transformation and explains how and why this was only a partially successful civil rights revolution, with noncitizens remaining outside the fold of robust constitutional protection. The interplay between ideology, advocacy and social change made this era both a watershed moment and a failed effort for full inclusion of noncitizens in the American polity.*

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## INTRODUCTION

In 1971, a young attorney named Anthony Ching achieved a remarkable victory: he persuaded the Supreme Court, on behalf of his Mexican immigrant client Carmen Richardson, that it was unconstitutional for states to discriminate against noncitizens in the distribution of public welfare. Up until that point, courts across the country, including the Supreme Court, had largely acquiesced in allowing states to discriminate against noncitizens in land ownership, employment, and other activities under a theory of a state's "special public interest" in preserving resources for "the people of the state," or in furtherance of the state's police powers. Although the Supreme Court had struck down a California restriction on commercial fishing licenses in 1948, signaling a shift towards greater protection for noncitizens, that precedent had little effect

on state laws.[1] By the time Ching brought his client's case to the Court, there were still thousands of restrictions based on alienage spanning every state in the union. Ching knew this legacy firsthand: he was not able to become an attorney after graduating from law school in Arizona until he became a naturalized citizen, since the stated barred noncitizens from practice. Ching's victory in *Graham v. Richardson* not only cast serious doubt on the "special public interest" doctrine but also declared aliens to be a "discrete and insular minority" under the Equal Protection clause, meaning that state laws that discriminated against them would face the highest level of judicial scrutiny.

*Graham* initiated an extraordinary era of litigation in support of the civil rights of noncitizens. Over the next several years, a disparate group of litigants, attorneys and advocacy organizations achieved a set of remarkable victories in the courts, transforming a doctrine that had been fairly settled for decades. Victories at the district court level, in addition to more wins at the Supreme Court, overturned hundreds of discriminatory laws across the country and left thousands more essentially unenforceable.

To date, few scholars have studied this movement; it has remained largely unknown and unexamined. Our lack of familiarity with this civil rights story stands in stark contrast to other important rights stories of the era. Much has been written about the shifts in conceptions of race and sex discrimination at this time, but little attention has been paid to this parallel, and sometimes intersecting, fight for noncitizen rights against state discrimination.

Although this particular story of constitutional change has received little attention from historians or legal scholars, it represents a pivotal chapter in the history of immigrant rights in the United States. It also sheds new light on our understanding of the history of the Equal Protection clause. This article draws on original historical research into the noncitizen litigants, their attorneys, and the organizations assisting them to bring to light their significant accomplishments. In the process, the article highlights the magnitude of the shift in thinking about noncitizens that this litigation occasioned.

At the same time, it seeks to explain why, in the end, this rights revolution was only a partial one. By the end of the 1970s, the Supreme Court had scaled back the expansive protection announced in *Graham* by creating new limiting doctrines that carved out significant zones of state power to discriminate. Litigants suffered a series of setbacks. The doctrine that remains is a strange outlier in equal protection today, a "two-step test" that treats noncitizens as a "discrete and insular minority" only in certain instances and allows rational basis review in others.

The shift in the doctrine — from the sweeping strict scrutiny analysis in *Graham* to the return

[1] Takahashi.

to rational basis in *Foley v. Connelie* (1978), *Ambach v. Norwick* (1979) and later cases — had much to do with ideology, politics, and the particular personalities on the Supreme Court, as I explore in another piece.[2] But equally significant was the shape and structure of the litigation and the choices made by advocates. This was a different kind of civil rights struggle, one that triggered profound questions not only about state power vis-a-vis individual rights but also about the core meanings of citizenship itself. Advocates struggled to find a way to theorize the place of aliens in the constitutional framework of American democracy. They succeeded initially by reasoning by analogy: they explicitly compared anti-alien exclusionary laws to those suffered by Black Americans and, to a lesser extent, women. They tried to press the case of noncitizens into the mold of Black civil rights struggles. But analogizing to race had hidden pitfalls.[3] The noncitizen civil rights litigation presented a potentially much more radical premise than even the fights for racial justice, since it stoked fears that expanding rights for noncitizens would diminish the importance of citizenship.

Ironically, arguments for noncitizen inclusion were especially challenging to make during this civil rights era, when the category of citizen had taken on greater weight and meaning in decisions by the Warren Court (see, for example, Justice Warren's assertion in *Perez v. Brownell* that citizenship was of paramount importance since it was "nothing less than the right to have rights.")[4] While noncitizens and their attorneys were successful in overturning decades of precedent and transforming equal protection doctrine to an extent, they did not succeed in their more radical claims for full inclusion of noncitizens in the political community, nor were they able to keep noncitizens in the same realm of "strict scrutiny" as racial minorities.

The successes and failures of this effort to bring noncitizens into the constitutional fold are illuminating. The fight to obtain the full reach of the equal protection clause in alienage law was left to a fragmented, if enthusiastic and idealistic, set of disparate organizations and individuals. It was an era of remarkable litigation without a coordinated social movement. There was no noncitizen equivalent of the NAACP or the ACLU Women's Rights Project at this time.[5] Unlike the litigation seeking Black freedom or women's liberation, here there was no corresponding social movement, at least not on the same scale or with the same focus.

To be sure, there were multiple fronts in the effort to expand rights for immigrants in the

[2] Tirres, "The Immigrant Rights Revolution that Wasn't: Alienage, the Supreme Court, and the 1970s" (forthcoming draft/work in progress).

[3] See Mayeri, *Reasoning from Race*.

[4] Perez v. Brownell. Although Warren was writing in dissent, his view was later followed by the Court when it overruled Perez in *Afroyim v. Rusk*.

[5] (Buff, *Against the Deportation Terror*. See, e.g., the ACLU's expansion in Farmworker Advocacy projects.)

1960s and early 1970s. But most advocacy and legal organizations that were immigrant-centered were focused on the rights of immigrants *in the immigration system* (for example, fighting for rights in deportation proceedings and against indiscriminate raiding by the INS) or against the mistreatment of migrant laborers in the fields. The federal immigration enforcement bureaucracy was expanding, with little constraints on the power of the agency to detain and deport migrants. The Immigration Act of 1965 overhauled immigrant admissions, finally jettisoning the racially-restrictive quota system created in the 1920s. But the Act also created new problems in unauthorized migration due to its caps on Western Hemisphere admissions. This meant that long-standing organizations like the American Committee for the Protection of the Foreign Born (ACPFB) and newer ones like the Mexican American Legal Defense Fund (MALDEF) had their work cut out for them in defending migrants facing deportation and resisting racial profiling of Mexicans and Mexican Americans. The matter of *state-based discrimination against resident aliens in their civil rights* (what is commonly referred to as "alienage law") did not receive prominent focus among these organizations during the 1960s and 1970s.

This civil rights story presents a cautionary tale about the difficulties of making major constitutional change without a cohesive litigation strategy. Despite these setbacks and shortcomings, however, immigrants and their advocates were able to make major lasting change in the 1970s, firmly shifting the constitutional relationship between noncitizens and state power. This article seeks to give these litigants the attention that their story deserves, and in the process to shed greater light on a pivotal chapter in the history of civil rights in the United States.

Part I demonstrates the importance of the welfare rights movement for creating the opportunity to defend alien rights. The efforts of litigants and lawyers to challenge discriminatory state welfare laws ended up leading to a landmark victory for noncitizens. This section charts the dramatic shift in doctrine occasioned by the *Graham v. Richardson* decision, while also illuminating the difficult tightrope that attorneys had to walk as they made arguments for the inclusion of noncitizens in equal protection.

Part II describes the waves of litigation that followed that landmark case. Although *Graham* was, at heart, a welfare rights case, the broad inclusion of aliens as "discrete and insular minorit[ies]" reverberated in other areas of state law that used alienage to exclude. *Graham* galvanized noncitizens who sought to work in various occupations, including for the state itself, and gave new life to efforts to secure economic rights for resident aliens. These efforts were largely successful in the next cases to come before the Supreme Court — *Sugarman v. Dougall* and *In Re Griffiths*. But, as this section demonstrates, behind the surface of the decisions lingered thorny questions about where to place the constitutional line between between citizens and aliens, and whether guaranteeing economic rights necessarily required guaranteeing political rights.

Part III explains how, following *Graham*, *Sugarman* and *Griffiths*, noncitizens challenged the boundaries of citizenship and alienage in suits seeking the right to vote and serve on juries, and how courts grappled with how best to apply the Supreme Court's newly announced equal protection doctrine to these claims. The radicalism of these legal challenges pointed towards a different future, where resident aliens could be allowed a voice in matters commensurate with their ties and connections to the country. These cases presented a powerful case for inclusion of noncitizens in the polity, but they were ultimately unsuccessful. They may also have backfired, since they gave greater credence to conservatives' claims that treating aliens as a suspect class meant that there would be no division left between citizens and aliens.

Part IV contrasts the optimism of advocacy groups in the mid-1970s with the increasing hostility on the Court towards expansive rights arguments. Towards the end of the decade, litigants continued to experience victories at the state court level, but then lost key fights before the Supreme Court. A key player in this was the state of New York, which persisted in defending its discriminatory legislation long after other states had refused to do so. By the end, the Court had adopted the dual standard for alienage review, and some advocates turned away from equal protection and towards preemption as a result.

Part V describes the persistence of discriminatory legislation in the states despite apparent unconstitutionality. While noncitizens and their attorneys were successful in overturning decades of precedent and invalidating hundreds, if not thousands, of state laws, the revolution was ultimately only a partial one. There are still state laws on the books today that discriminate on the basis of citizenship. Those who support a more expansive vision of the membership of noncitizens have made important inroads in some locations, but notions of noncitizen voting in local elections, for example, have not gained widespread popularity.[6] Other innovations in state discrimination have appeared, like Arizona's withholding of business licenses for employers who they claim have hired undocumented workers, or states' attempts to restrict the rights of undocumented works to lease property.[7] These modern-day successes and failures in expanding rights for immigrants are a continuing reflection of the crucial wins and losses of the 1970s.

## I. FROM WELFARE RIGHTS TO ALIEN RIGHTS

*Graham v. Richardson* is a landmark case for immigrant rights, but it did not have its roots in

[6] But see recent change to allow noncitizens to vote in New York City. See also NY Times editorial 11/7

[7] See Tirres, Property Outliers.

the immigrant rights movement. Instead, the genesis of the case was in the movement for welfare rights. *Graham* was not the result, in other words, of immigrant-centered impact litigation. It took the intersection of alienage with another key civil right for citizens — that of the distribution of welfare — to draw greater attention and build a path to the Supreme Court. As this section describes, the burgeoning welfare rights movement gave the case support and exposure, but the most difficult questions underlying the decision were not about welfare but about alienage. The case raised prickly questions about the constitutional line between citizens and aliens, and advocates were not always prepared to answer them. The unanswered questions and untested assumptions that were part of the litigation would play out in unexpected ways over the next decade.

Restrictions on public benefits were a fairly late addition to the panoply of discriminatory state-based alienage laws in the nineteenth and twentieth centuries. The expansion of the welfare state during the Great Depression and New Deal created an unprecedented social safety net for many Americans. For the most part, those programs were not initially limited by citizenship.[8] There were some exceptions. For example, the anti-immigrant provisions in state welfare laws in Arizona and Pennsylvania both dated from the late 1930s, created by state legislatures during a time of "war hysteria and anti-alien feelings," as a lawyer would later argue. By the late 1960s, when noncitizens in Arizona and Pennsylvania challenged their exclusion from public benefits, these states were in the minority: only six other states had such restrictions. Although they varied in terms of the requirements and exclusions, most laws created either a durational residency requirement — requiring aliens to be resident in the state for a certain number of years before becoming eligible — or barred aliens from certain kinds of state aid altogether.[9] Most were created as a matter of statutory law, but one state, Colorado, included a limitation on noncitizen access to public benefits in its state constitution.

Excluding noncitizens was one method that state legislatures used to limit the welfare rolls and thus the burden on the public fisc. More common was the use of residency requirements that prevented those moving from other states (regardless of citizenship status) from taking advantage of aid until they had lived for a certain number of years in the new state. Welfare rights activists successfully challenged this practice in the landmark case of *Shapiro v. Thompson*, handed down by the Supreme Court in 1969. In *Shapiro* the Court struck down durational residency requirements based on a fundamental right to travel, as guaranteed by the Fourteenth

[8] See, for example, the Social Security Act, which did not exclude aliens. Fox, *Three Worlds of Relief*, p. 256.

[9] The six other states were Colorado, Florida, Indiana, New Hampshire, North Dakota, South Carolina and Texas. Graham, Fred P. "Welfare Rights of Noncitizens to Be Considered by High Court." *The New York Times*, December 15, 1970.

Amendment due process clause.

The *Shapiro* decision further galvanized the work of a cohort of lawyers in the burgeoning welfare rights movement. Central to this movement were the legal aid attorneys who served low-income clients. The plaintiffs in *Shapiro* came to the attention of welfare rights groups through the auspices of legal aid attorneys, whose job it was to help residents apply for the aid they were entitled to under the law. The same was true for noncitizens seeking aid. Carmen Richardson, an immigrant from Mexico, had lived in Arizona for 13 years, which was two years shy of the 15-year residency requirement for noncitizens to receive benefits for the disabled and elderly under state law. Richardson sought out help from the Legal Aid Society of the Pima County Bar Association, where she met a young lawyer, just a few years out of law school, named Anthony B. Ching. Ching was an immigrant himself; he was born in China, educated in France and Germany, and graduated from the University of Arizona Law School in 1965. Ching was no stranger to legal restrictions based on citizenship: Arizona did not permit noncitizens to sit for the bar exam, so Ching had to become a naturalized citizen in order to become an attorney after his graduation from law school.

Noncitizens in Pennsylvania who found themselves barred from benefits similarly turned to a legal aid organization for help. Elsie Leger, a Scottish immigrant, was denied benefits after she became ill and lost her job. Leger fell a few years short of the age requirements for federal old age assistance and did not qualify for state unemployment due to the exclusion of noncitizens. Unable to rely on her spouse for support, since he was also disabled, and facing eviction, Leger turned to Joseph Stein, a lawyer with Community Legal Services, for help.

Ching and Stein both brought their cases as class actions, and both prevailed in federal district court. Arizona and Pennsylvania appealed to the Supreme Court, which consolidated the cases. Attorneys in the welfare rights movement were critical players here. As these cases winded their way through the stages of litigation, Stein and Ching were assisted by attorneys from an organization called the Legal Services for the Elderly Poor (LSEP). This was a project of the Center for Social Welfare Policy and the Law, the brainchild of attorney Ed Sparer, known as the "guru" of the welfare rights movement. It was established specifically with the aim of creating impact litigation, in the tradition of the NAACP and the ACLU, in the area of welfare rights. Two attorneys from LSEP, Robert Borosody and Jonathan Weiss, assisted Ching and Stein in bringing the cases to the Supreme Court.

The Court heard oral argument on March 22, 1971 and handed down a decision three months later. Justice Harry Blackmun, who had joined the Court almost exactly a year before as a Nixon appointee, wrote the opinion. From the very first sentence of the opinion, the influence of *Shapiro* is clear; Justice Blackmun begins, simply, "These are welfare cases." But his opinion departed in significant ways from *Shapiro*, in that he lodged the constitutional claim squarely in the equal

protection clause rather than in the right to travel as guaranteed by the due process clause. The restrictions in *Shapiro* had been declared unconstitutional because they "impinged upon the fundamental right of interstate movement," whereas the classifications used in Arizona and Pennsylvania to restrict access to welfare, Blackmun wrote, "are inherently suspect and therefore subject to strict judicial scrutiny whether other not a fundamental right is impaired." Citing prior cases that struck down state legislation that discriminated against Japanese immigrants, Blackmun asserted that "the Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." Blackmun took the analogy even further, citing aliens as a "prime example" of a "discrete and insular minority," that phrase coined by Justice Stone in the famous Caroline products footnote 4, which gave birth to modern equal protection jurisprudence. In this way Blackmun took the decision beyond the bounds of interstate travel and into the broadest sphere of constitutional protection for those protected on the basis of race and national origin.

Blackmun was not known to be liberal on matters of individual rights. As the New York Times described him, his profile at the time of appointment to the Court was as a "White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the suburbs." Yet the decision he authored was a dramatic refutation of decades of precedent, rejecting both the "special public interest doctrine" and the right/privilege distinction that had shaped alienage law since the early twentieth century. For much of the nineteenth and twentieth centuries, foreigners trying to make a life in the United States faced the constraints of state and local laws that controlled their access to property, the ballot box, public assistance, education and the workplace. These citizenship-based restrictions reached far and wide into immigrant lives, determining whether a foreigner who had not yet naturalized could own and inherit property, vote, receive public welfare, work in their chosen occupation, and participate in various commercial activities. Until *Graham*, with very few exceptions, courts had upheld these restrictions as valid uses of state power. *Graham* definitively announced that that era was over. Commentators noted that the decision spelled a surprising continuation of the spirit of the Warren Court, even with the shift to more conservative appointees. Not only that, the decision was also unanimous, including conservatives like Chief Justice Warren Burger and Justice Byron White as well as liberals like Justice Thurgood Marshall and Justice William Brennan.

The sweeping declaration of the inclusion of noncitizens as a "discrete and insular minority," and the Court's unanimity on this point, belie a deeper conflict on the Court as well as obscure the significance of the challenge facing advocates, who were tasked with crafting a new vision of the expansive membership rights of noncitizens during an era of the glorification of citizenship. Just a few years before, the Court had ruled in *Afroyim v. Rusk* that citizenship was such an important right that it could not be taken away without a person's consent. The right to equality

for women and racial minorities was often posed in the guise of a right to equal citizenship. If citizenship was so important, where did noncitizens — excluded from the category by definition — fit in the civil rights framework? Was it possible to expand rights for noncitizens while also continuing to glorify citizenship itself, or was it, instead, a zero sum game, where expanding the rights of one group necessarily contracted the importance of the other?[10]

Both of these facets — of the justices's own hesitancy in this area and the heavy lift faced by attorneys — were apparent in oral argument and in the briefs, memos and conference notes of *Graham*. It is here, in these other pieces of the historical record, that we see the more pressing questions and concerns behind what seems to be a fairly cut and dry — if revolutionary — opinion.

Omnipresent during oral argument in both *Graham* and its companion case *Leger* was the question of where to draw the line in constitutional protection for noncitizens. The Justices repeatedly asked both attorneys — Ching, for Richardson, and Stein, for Leger — if aliens should have the right to vote or to hold political office. These questions came not just from the conservative wing of the Court but from the liberal wing as well. Ching had not gotten very far into his opening salvo about noncitizen rights and treaty obligations before Justice Marshall interjected with the first question: "Does that mean that the aliens vote in the United States?," he asked. Ching answered that equal protection might leave open this possibility in the case of a strong enough interest for the alien, such as a matter of local taxation.

Stein faced a similar first question after his opening remarks, which focused on the anti-alien wartime hysteria that led to the passage of Pennsylvania's law in 1939. Chief Justice Burger interjected to ask whether preventing noncitizens from voting or holding office was also motivated by the same kind of animus towards foreigners. ("Do you think the limitations which state places on voters and holding public office is rooted in some form of the same kind of hostility?," he asked.) Stein answered initially in a more categorical vein than did Ching, arguing that "the government has much wider latitude in acting to protect its political processes" than it does in economic legislation, before swiftly changing the subject. But Justice White brought Stein back to the issue again, after Stein asserted that noncitizens have rights to equal treatment because of their ties and obligations in this country. White followed up:

> *White*: Can't you make exactly the same argument with respect to voting, exactly the same argument?

[10] See, e.g., Rosberg's comment.

> *Stein*: I think one could and that's why I would only suggest that the two areas are distinguishable but it may well be that for certain voting rights as my colleague from Arizona, Mr. Ching, suggested that voting privileges maybe those privileges which are and should be extended to aliens. I'm not closing my mind to that, you know, to that point.
>
> *White*: Well, that's what I suspect and I assume that if this case is affirmed you'll be back here next year with a voting case.

Voting and political office holding was not directly at issue in the case, and it was nowhere to be found in the briefs, but it was clearly on the Justices' minds. Justices Marshall, Burger and White represented very different ends of the ideological spectrum, but all three raised the question of the political rights of aliens. As Marshall asked of Ching, somewhat rhetorically, "where are you going to stop?"

Counsel for the state of Pennsylvania, Joseph P. Work, was quick to pick up on this theme, cautioning the justices in his oral remarks that if they were to adopt the view that the state welfare restrictions were a violation of the Fourteenth Amendment, "this Court may in the very near future be ready to say that denial for the right to vote and the denial of the right to hold public office are also rights which may not be denied to aliens for the same reasons."

Despite this cautionary warning, these issues only obliquely made their way into the *Graham* opinion itself.[11] But the questions the justices asked during oral argument reveal what was on their minds and also their apparent dissatisfaction with the answers they were given. Neither Ching nor Stein provided a clear answer for where to draw the line between the rights of citizens and the rights of aliens, ultimately signaling that the line was up for grabs.

It is unclear if either attorney expected the questioning in oral argument to go in this direction. In bringing their cases as generalist legal aid attorneys, they expanded out the reach of their arguments with *amicii* who had more extensive experience with immigrant advocacy. The Association of Immigration and Nationality Lawyers, the ACLU, and a collection of various religious and charitable organizations, spearheaded by Migration and Refugee Services of the U.S. Catholic Conference, all drafted amicus briefs. None of these briefs ventured to answer the question of where rights for aliens would end (understandable, given that this was not the task at hand). In the end, it was Ching and Stein who were fielding the questions from the justices on a topic that they had likely not thought would dominate questioning as it did.

*Graham* was a major victory for equal protection of aliens, but it was not the product of a

[11] Unclear from Blackmun's conference notes whether it was discussed. Blackmun's notes on oral argument only mention it briefly ("voting area is somewhat different," he wrote, summarizing Stein's argument).

coordinated legal effort to expand the rights of aliens. It was the product of a coordinated legal effort to expand welfare rights generally, and aliens happened to be the group at issue. This meant that the animating drive of the cases was rooted in conceptions of welfare rights, despite the fact that advocates argued for a new treatment of noncitizens under the equal protection clause. As the decision opened doors for new litigation on behalf of immigrants, the question of how far alien rights extended — and whether the equal protection clause stopped well short of political rights — was not answered by the case. The next stages of litigation would push the Court to address this question, with or without a theory provided by advocates.

## II. A NEW ERA OF ADVOCACY

*Graham* spelled the end of alienage-based welfare restrictions at the hands of state governments.[12] A week after the announcement, the Court vacated and remanded *Gonzales v. Shea*, another case from a district court in Colorado that had upheld the constitutionality of a ban on old age assistance for resident aliens. Numerous state attorneys general issued opinions noting that their welfare statutes were in conflict with the new ruling, and state legislatures worked to amend the laws accordingly.[13] But *Graham* had much greater reach than just welfare rights. Because the language of the case was so broad — and not limited to welfare benefits alone — it forced a reevaluation of states' other discriminatory laws based on alienage, and it fueled an acceleration of those legal claims. The most prevalent form of such discrimination in state law was in the area of the right to work, particularly in positions that required state licensure or were part of state public employment.

### *A. Operationalizing* Graham v. Richardson

Unlike discriminatory welfare laws, these employment restrictions were omnipresent. Every state in the union had some kind of employment-based alienage restriction in the late 1960s, and most had dozens each. Such restrictions were not limited to the "elite" licensed professions, like law and medicine, but also included occupations like liquor dealers, steam boiler inspectors, undertakers, and barbers.[14] As one commentator noted in 1975, states apparently "do not trust

[12] Until the federal government authorized them to do so in the 1990s welfare reform laws.

[13] See, e.g., Opinion No. M-1035, 1971 Texas Attorney General Reports and Opinions 5047 (1971). Nikolas v. Box.

[14] David Carliner, *The Rights of Aliens*, 126; I & N Reporter.

aliens with animals, a corpse, or even a person's hair or beard."[15]

These laws persisted despite the fact that in 1948 the Supreme Court had struck down a California law that barred aliens ineligible to citizenship from obtaining commercial fishing licenses. Since essentially only Asian noncitizens were statutorily ineligible for citizenship, this law targeted that population (as had California's Alien Land Laws, which were upheld by the Court in the 1920s). In *Takahashi v. Fish and Game Commission*, the Court invalidated California's licensing restriction, casting some doubt on the special public interest doctrine. Although the case was strongly worded in support of alien rights, it had limited precedential effect. Later courts interpreted the case as being more about anti-Japanese animus, and hence about racial discrimination, than about citizenship discrimination. The Court also did not explicitly overrule its prior decisions in other cases regarding noncitizen private and public employment.

On its face *Takahashi* was a major victory for noncitizen rights, but it did not make much of a dent in licensing and employment restrictions in other states in the preceding years. To the contrary, these restrictions only proliferated. As the Department of Labor reported in 1967, 27 more professions and occupations had been added to the list since 1953, for a total of 81 different occupations that were limited in at least one or more states by the late 1960s.[16] These DOL statistics are most certainly an undercount, as later studies and a closer reading of state statutes demonstrates. For example, California added citizenship restrictions on more than 75 different public occupations in one year alone, and these are not reflected in the DOL report.[17]

*Graham*, which was the first alienage discrimination case the Court had heard since *Takahashi*, forced a reckoning that was long overdue. As Elizabeth Hull observes, "on the basis of [Graham] thousands of state statutes that discriminate against aliens became constitutionally unfirm." Across the country, state boards that had relied on a citizenship restriction for licensure moved to change their policies after the decision. Pennsylvania's attorney general issued close to a dozen opinions on various statutes, ranging from veteranarians to real estate brokers, and including a directive to the state civil service board to end their exclusion of aliens.

In those states where officials were resistant to change, immigrants found new opportunities to file suit. They drew upon the newly invigorated equal protection doctrine to support their claims. As one government attorney complained at a later proceeding, "The *Graham* case has spawned a flock of litigation in various federal courts throughout the land."[18] The case had

[15] Rosales, Resident Aliens and the Rights to Work, 1037.

[16] Grover H. Sanders, *Aliens in Professions and Occupations - State Laws Restricting Participation*, I & N Reporter, January 1968, p. 37.

[17] See Olivas, etc.

[18] Oral Argument transcript, Sugarman v. Dougall.

opened a new world of opportunity for immigrants, attorneys, advocacy organizations and the legal aid community. They challenged discriminatory laws that were both very old and very recent.[19] Lawyers in Puerto Rico used the case to challenge a statute passed by the legislature in 1970, just a year before *Graham*, that barred noncitizens from working as refrigeration and air-conditioning technicians in the commonwealth. In defending the law, lawyers for the examining board claimed that it was necessary for safety reasons, since technicians need to go into homes where "a wife is generally alone with or without children," and because aliens "have an unknown past history which reduces the possibility of apprehension" in case of criminal activity. Rolando Santin Arias was a Cuban citizen who had worked as a refrigeration and air-conditioning technician in various countries, including in Puerto Rico, until the new law prohibited him from doing so. In the decision, Chief Judge Cancio of the federal district court could barely disguise his disbelief, noting that the "defendants have lamely tried to justify the discrimination," and concluding, "We can perfectly understand defendants' troubles in trying to find a reasonable connection between the fitness to practice this trade and the citizenship requirement of the law. They cannot find it simply because there is none."[20]

Less common than these restrictions on private employment, but still quite prevalent, were restrictions on *public* employment, through public works projects or state civil service. New York's bar on noncitizens in the competitive civil service dated from 1939.[21] Of even longer duration was its bar on noncitizen workers on public works projects, which dated from 1894.[22] That law was upheld by the New York Court of Appeals in 1915 in two cases, *People v. Crane* and *Heim v. McCall*, both of which were affirmed by the Supreme Court. Justice Cardozo, writing for the Court of Appeals in *Crane*, stood by the state's power to restrict such jobs: "To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state," he wrote.[23] Furthermore, he argued, "Whatever is a privilege, rather than a right, may be made dependent upon citizenship." *Graham* did not directly overturn *Crane* or *Heim*, but it opened

[19] In some states, immigrants were successful in challenging discriminatory laws before the Graham decision was handed down. See Application of Park (1971) (license to practice law in Alaska); Purdy & Fitzpatrick v. State (1969)(civil service jobs in California). [not sure whether to include this point in the text, and where]

[20] Arias v. Examining Bd. of Refrigeration & Air Conditioning Technicians, 353 F. Supp. 857, 862 (D.P.R. 1972).

[21] 1939 N.Y. Laws ch. 767.

[22] 1894 N.Y. Laws ch. 622. NY had a bar on alien attorneys as well, and filed an amicus brief in Griffiths. [Papers]

[23] People v. Crane, 108 N.E. 427 (1915).

the doors to doing so by firmly repudiating both the special public interest doctrine and the right/privilege distinction. (One state had done so even before the Supreme Court. In 1969, the California Supreme Court ruled unconstitutional a statute that prohibited noncitizens from employment on public works projects.)[24]

Litigants challenged these two modes of discrimination — in private and public employment — before the Supreme Court just two years after *Graham*, when the Court agreed to hear challenges to Connecticut's exclusion of noncitizen attorneys (*In Re Griffiths*) and to New York's bar on noncitizen civil servants (*Sugarman v. Dougall*). Both cases presented issues that were similar to *Graham* — since they involved discrimination by a state entity based on citizenship — but they also posed the potential to dramatically expand assess to economic rights for noncitizens across the country.

Unlike the welfare litigation that led to *Graham*, in *Griffiths* and *Sugarman* there was no overarching impact litigation infrastructure. Instead, the cases were brought by a motley crew of organizations and individuals who had run into alienage discrimination while focused on other endeavors and who now had the opportunity to test just how far the protection created in *Graham* would extend.

Laws against noncitizen attorneys either sitting for the bar exam or becoming licensed were common by the 1970s. Some of the laws dated from the nineteenth century but others were more recent; five states added such restrictions between 1953 and 1967.[25] Fre Le Poole Griffiths was a Dutch lawyer who came to the United States from the Netherlands in the 1960s to work in D.C. She had an impressive background; her father was a member of the Dutch parliament and both her parents had been active in the resistance in World War II. (She herself would go on to become a judge and a member of the senate in the Netherlands.) In 1967, she enrolled in Yale Law School to pursue an LLB. She worked as an assistant to Yale professor Gerald Mueller. Upon graduation in 1969, she began working at the New Haven Legal Aid Bureau. But when she attempted to sit for the bar exam in Connecticut in 1970, she was denied due to the state's ban on noncitizen licensure, which dated from 1879. She and her husband, John Griffiths, an American attorney and lecturer at Yale, reached out to a fellow former Yale classmate, David Broiles, who agreed to represent Griffiths in a suit against the state licensing board.

Like many a young law graduate in the early 1970s, Broiles was inspired by the work of civil rights attorneys before him. While a law student in Georgia, Broiles witnessed the federal trial of two members of the Ku Klux Klan who were charged with the murder of a Black army reserve

[24] Purdy & Fitzpatrick v. State, 456 P.2d 645 (1969).

[25] But note that five states added citizenship restrictions for attorneys between 1953 and 1967.

officer. Federal prosecutors sued the men in the first such civil case under the Civil Rights Act of 1964, after an all-white jury found them not guilty of criminal charges. Broiles, who was white, was moved by the dramatic, impassioned arguments of the federal prosecutor, Floyd Buford. By this time, Broiles was a member of the ACLU, had a doctorate in philosophy from Ohio State, and was attending law school at the University of Georgia while also teaching philosophy classes there. He was fired, however, after he burned a Confederate flag in a class discussing Confederate Memorial Day. Broiles completed his law studies at Yale.[26]

Broiles represented a certain type of activist attorney of the era, concerned with civil liberties and civil rights in equal measure. His first jury case out of law school was arguing for the First Amendment rights of demonstrators. He was still very early in his career when he agreed to help the John and Fre Griffiths. His effort paid off when the district court ruled in her favor. The state licensing board appealed to the Supreme Court.

Broiles, who had been a member of the American Civil Liberties Union (ACLU) since 1960, wrote to the organization to ask for their help in bringing *In Re Griffiths*.[27] The ACLU had a history of involvement with immigrant rights issues; the organization included a Committee on Alien Civil Rights as early as 1932, and ACLU lawyers brought both the *Hirabayashi* and *Korematsu* cases challenging Japanse internment. The ACLU also filed an amicus brief in the *Takahashi* case. The early 1970s were a time of rapid expansion for the organization. By the 1970s, the ACLU had almost 300,000 members, an affiliate in every state, and a role in most major civil rights and civil liberties issues of the day.[28] Although the organization had written an amicus brief in *Graham*, it was not actively coordinating litigation in the area of noncitizen civil rights. The focus had shifted towards migrant worker rights.[29] Nevertheless, ACLU attorneys Joel Gora and Melvin Wulf agreed to help Broiles with the *Griffiths* case.

Lawyers for Mobilization for Youth Legal Services, a nonprofit in New York City, found an opportunity to challenge New York's public employment exclusion when employees of the city's Manpower Career and Development Agency were fired from their jobs due to their lack of citizenship. Each of the employees had been working for private nonprofit agencies that were merged into the city's Human Resources Administration after federal funding for those nonprofit agencies dried up. Because they now worked for the city, they were subject to the bar on noncitizen civil servants, and they were fired after a month on the job.

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[26] Casstevens, David. "ACLU Lawyer Finds Success, Respect – in Texas." *Fort Worth Star-Telegram*, July 5, 2006.

[27] ACLU archives.

[28] Walker, p. 316.

[29] The ACLU Immigrant Rights Project was not established until the 1980s.

Mobilization for Youth Legal Services was an outgrowth of a social welfare organization, Mobilization for Youth (MFY), that was formed in the 1950s to tackle issues of juvenile delinquency. In 1964, MFY took advantage of funding from the federal Office of Economic Opportunity to form a legal wing. The kind of legal work that the organization took on was broad, ranging from housing law to consumer credit to criminal defense.[30] Two staff attorneys, Lester Evens and Jeffrey Stark, took the case of the four noncitizen employees who had lost their jobs, filing suit against the civil service commission. The lead plaintiff, Patrick Dougall, was a citizen of what was then called British Guiana (now Guyana) and who had fled political unrest in that country around the time of Guyana's independence. By the time of the suit, he had been living in New York for five years, was married to a U.S. citizen, and had children who were U.S. citizens.[31] Like Griffiths, Dougall and his fellow coworkers were successful at the district court level, and found themselves headed to the Supreme Court in the winter of 1973.

This duo of cases — *Sugarman v. Dougall* and *In Re Griffiths* — put the question of the public and private employment rights of aliens squarely before the Court. Both were heard in the 1972-73 term, just one year after *Graham*, but this time the roster of Justices had changed significantly, as President Nixon replaced Justices Black and Harlan with Justices Powell and Rehnquist. As the New York Times observed, the addition of these "judicial conservatives," as Nixon called them, "gave the tribunal a strongly conservative flavor."[32] The fate of this dramatic shift in equal protection doctrine was now in the hands of a distinctly different Court.

### *B. Public Work and Private Practice*

Attorneys representing the New York City Civil Service Commission and the Connecticut State Bar Examining Committee faced uphill battles in defending their exclusionary practices before the Supreme Court in the winter of 1973. On the one hand, New York would seem to be on solid ground given earlier decisions in *Heim* and *Crane* that upheld state practices of discrimination in public employment. But *Graham* had cast aspersions on the special public interest doctrine, other states (including California and Pennsylvania) had jettisoned their restrictions on civil service workers, and the New York statute itself was problematic on its face, setting out four different tiers of competitive civil service, only some of which were subject to the citizenship requirement. In practice, this meant that a garbage collector had to be a citizen but an

[30] Robert Sauce, "For the Poor and Disenfranchised: An Institutional and Historical Analysis of American Public Interest Law, 1876 to 1990," p. 67.

[31] Sugarman appendix 1.

[32] Fred P. Graham, Powell and Rehnquist Take Seats on the Supreme Court, NYT, January 8, 1972, p. 15.

aide to the governor did not. This policy was hard to square with the state's argument that the restriction on public employment related directly to policy-making and the political rights of citizens.

Attorneys for the Bar Examining Committee in Connecticut faced similar headwinds. Although a majority of states restricted the legal profession to citizens only, or to those intending to become citizens, the California Supreme Court had recently declared their state restriction unconstitutional, and the Supreme Court of Alaska followed suit not long after (albeit with a requirement that lawyers be intending, even informally, to become citizens eventually).[33] State courts were striking down discriminatory state licensing laws, and some state legislatures were moving to remove the restrictions from their statutes. The legal profession generally was growing ever more international in scope, and American attorneys did not want to be precluded from practicing abroad, which was a risk if countries relied on reciprocity to determine their licensing requirements.

But in the states' favor was the very newness of the doctrine announced in *Graham*, as well as the evidently growing skepticism on the Court of equal protection jurisprudence as initially developed by the Warren Court. Alienage was not the only area where equal protection jurisprudence was in flux. As one commentator noted at the time, the Court was "showing signs of diminished interest in the marvels of suspect classification analysis…and was already having difficulty fixing on an appropriate standard of review in cases involving discrimination on the basis of gender and legitimacy."[34] Perhaps because of this lack of clarity and seeming ambivalence regarding equal protection doctrine more generally, New York's attorney general in *Sugarman* argued against the grain of the *Graham* decision rather than in line with it, claiming that the equal protection clause did not apply at all, rather than — as he could have — arguing that the state's interest was compelling enough to prevail even under strict judicial review. Apparently the strategy was to interpret *Graham* very narrowly despite its broad wording. States attorneys may have anticipated that the new appointees, Powell and Rehnquist, would happily limit this precedent.

For their part, attorneys for the noncitizen litigants were riding a wave of analogy between aliens and other "discrete and insular minorities," hoping to use the momentum to expand the rights of noncitizens even further.[35] Broiles saw the Connecticut restriction as a clear means to exclude outsiders and directly analogized to civil rights struggles around race and gender. As he

[33] Sanders, I & N Reporter, 38-40. *Rafaelli v. Committee of Bar Examiners; Park.*

[34] Rosberg, Gerald M. "The Protection of Aliens From Discriminatory Treatment by the National Government." *The Supreme Court Review* 1977 (July 17, 2020): 275–339, p. 298.

[35] Cf. Serena Mayeri, *Reasoning from Race*.

told a reporter, "In effect Connecticut has created an absolute presumption that aliens cannot possess the loyalty and allegiance to the United States. This is similar to the laws that required members of the bar to be both 'male,' and 'white.'"[36] Broiles took his inspiration from the NAACP. As he later recalled, "We saw the situation of the resident aliens as that of the 20 million blacks in this country, and we based our case on that."[37]

The comparisons of anti-alien discrimination to that against blacks and/or women was common in the litigation, case law, and the popular press at this time. As a newspaper article asked rhetorically in 1973, "The public has heard about 'black power, gay power' and 'women's lib.' But not much has been said about the four million resident aliens living in America."[38] The Supreme Court of California made the connection directly when overturning a state law that barred noncitizens from licensure as attorneys: "It is the lingering vestige of a xenophobic attitude which, as we shall see, also once restricted membership in our bar to persons who were both 'male' and 'white.'"[39] Some characterized the extension of rights to noncitizens as inevitable; *Harvard Law Review* opined that, "In light of the Court's consistent invalidation of discrimination based on race and national origin, criteria previously established as suspect, it was not surprising that *Graham* and several subsequent decisions struck down discrimination against aliens in a variety of areas."[40]

Tellingly, the equivalence of "blacks and aliens" appears in the statements of some of the Justices during the early 1970s as well, as they discussed whether women belonged in the list of protected categories. Douglas argued that they did, writing in 1973 that the discrimination against women is "as invidious and purposeful as that directed against blacks and aliens."[41] Powell disagreed, writing that same year that the reasons for treating women differently "in no way resembled the purposeful and invidious discrimination directed against blacks and aliens."[42] Statements such as these reveal an accepted, if unexamined, equivalence between race discrimination and alienage discrimination.

This analogy was important as a strategy to bolster the chances of continued protection for noncitizens under the equal protection clause. But within it lay dangers, as the comparison raised

[36] Cumming, Dwight. "Prof's Law Case Aids Aliens." *The Daily Skiff*, November 13, 1973.

[37] Cumming, Dwight. "Prof's Law Case Aids Aliens." *The Daily Skiff*, November 13, 1973, p. 5.

[38] Cumming, Dwight. "Prof's Law Case Aids Aliens." *The Daily Skiff*, November 13, 1973, p. 5.

[39] Raffaeli case.

[40] "Note: a Dual Standard for State Discrimination Against Aliens." *Harvard Law Review* 92 (1979): 1516–37.

[41] Memorandum from Douglas to Brennan, quoted in Mayeri, p. 72.

[42] Memorandum from Powell to Brennan, quoted in Mayeri, p. 74.

questions about the importance of citizenship and the extent of noncitizen membership. The heart of the civil rights movement for Black Americans had been political rights — most notably, the right to vote. What kind of civil rights were appropriate for those who were, *by definition*, excluded from formal citizenship? Where was one to draw the line between these categories, or should there even be a line at all? The facile connection between these groups could, upon second thought, seem to devalue citizenship, which itself had been such a core mission of the Black civil rights struggle that inspired noncitizens and their lawyers.

The Court heard arguments in both *Griffiths* and *Sugarman* in the winter of 1973, each case argued just a day apart, almost a year exactly from the date that Powell and Rehnquist were sworn in. Lester Evens and David Broiles both come across in the audio of oral argument as supremely confident. Evens could barely hide his disapproval of the line of argument presented by the Assistant States' Attorney, Samuel Hirshowitz, who preceded him, quipping, "Frankly, I don't know where to begin…." Broiles, just a few years out of law school, did not shy away from pointing out to Chief Justice Burger that under the law, a noncitizen could legally hold the job of Chief Justice of the Supreme Court. As a reporter later characterized it, "Burger's countenance turned as cold as the winter weather outside." (For his part, reflecting on Burger's eventual dissent in *Griffiths*, Broiles said that he "learned not to anger the Chief Justice if you want his vote.")[43]

They had some good reason to be confident, given the weaknesses in their opponents' cases. Hirshowitz's performance as a whole was halting and awkward. Justice Marshall made quick work of the states's argument that the equal protection clause did not apply, asking with some incredulity whether he meant to say that equal protection does not apply at all to state employees, which itself would have been a major setback for the civil rights not just of noncitizens but of citizens as well.

But oral argument was far from easy for Evens or Broiles. Justices pushed the attorneys on the question of the division between citizens and aliens even more so than they had in oral argument in *Graham*. Does the equal protection clause require states to allow aliens to vote or to hold public office or to serve on juries? Does extending rights to noncitizens invalidate the other provisions in the Constitution that indicate a preference for citizenship? As in *Graham*, justices from different sides of the ideological spectrum pressured the attorneys to provide what Burger called, during oral argument, "a theory of the difference" between citizens and noncitizens when it came to application of the equal protection clause. Instead of providing a theory to help the justices differentiate, both Evens and Broiles hedged, ultimately opting for the argument that

[43] Casstevens, David. "ACLU Lawyer Finds Success, Respect – in Texas." *Fort Worth Star-Telegram*, July 5, 2006.

there essentially was no constitutionally defensible difference, at least not when it came to state law.

Justice Marshall was the most direct in his questioning, asking Evens "[i]s there any thing that you can think of, any right, that a citizen could possibly have that you wouldn't urge that an alien would also have?" When Evens demurred, saying "it would be very difficult for me to answer that question," Marshall followed with a pronounced tone of exasperation in his voice, asking, "Pray tell what is the benefit of American citizenship?"

These discussions clearly made an impression on Justice Powell, whose handwritten notes from oral argument took note of the issue. Of Evens' argument in *Sugarman*, Powell wrote, in part, "Evens thinks aliens should have right to vote. At present they don't. Evens also thinks N.Y. Const. restrictions as to elective offices being confined to citizens may be invalid." And then, next to this, he wrote "[k]ey to Evens thinking." Powell also took specific notes on the colloquy between Evens and Justice Marshall, about the difference between citizens and aliens, writing that "Evens couldn't answer Marshall's quest[ion]. He could think of no benefit of Am[erican] citizenship — as he would draw no distinction between rights of alien and a citizen."[44]

Despite these difficult conversations during oral argument, and the surprise expressed by Marshall and others, the Court struck down both of the laws at issue as violations of the Equal Protection clause.[45] Justice Blackmun, who wrote the majority opinion in *Sugarman*, made sure that the opinions were issued at the same time.[46] Together, they reaffirmed the *Graham* decision. Blackmun's opinion honed in ways that the New York civil service statute was over- and under-inclusive, barring noncitizens from some positions that had nothing to do with government policymaking and not barring them from others that definitely did. Blackmun argued that the law failed the application of heightened scrutiny — the required level of judicial review in this case due to alienage discrimination — because it was "neither narrowly confined nor precise in its application." The reasoning in *Sugarman* deviated little from that in *Graham*, continuing the treatment of noncitizens as a protected class and applying strict scrutiny to strike down a discriminatory state law.

However, in a reflection of the concerns raised during oral argument, Blackmun also included

[44] Powell Archives, W&L.

[45] A slim majority of justices — including Marshall and Powell as well as Douglas, Brennan and Stewart — indicated in conference on *Sugarman* (as noted by Justice Powell) that they would vote to affirm the lower court and strike down the New York statute as unconstitutional. Justices Burger, Blackmun and White were less certain, choosing to pass on stating an opinion. Only Justice Rehnquist said that he would vote to reverse. In Griffiths, Burger and Rehnquist said they would have affirmed the lower court. Interestingly, it was Justice Blackmun who eventually wrote for the Sugarman majority, despite his initial hesitancy to state his position in conference.

[46] Burger Court opinion writing database.

a section of the opinion that suggested when state discrimination on the basis of alienage might be constitutional. This section represented the Court's first attempt to grapple in writing with the conundrum posed by the strict scrutiny guaranteed to state laws that discriminated against noncitizens in *Graham*. How could states be prevented from invidious discrimination based on alienage and, at the same time, be allowed to limit voter roles and particular public offices to citizens only? To answer this, Blackmun turned to a concept from a voting rights case, *Dunn v. Blumstein*, that upheld the idea of a state's interest in preserving "the basic conception of a political community."[47] In this passage in *Sugarman*, he extended the idea of the "political community" beyond simply the qualifications of voters, to potentially include government office holding, both elective and non-elective, as well, since, as the opinion stated, "officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[48] But he then noted that even in this political realm, the restriction must be narrowly tailored: "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."[49]

Of course, states were not free to shape their "political community" in any manner they pleased (for example, by not allowing Blacks to vote, or charging poll taxes to accomplish the same aim); they did not operate free of any constitutional constraint. States could not, for example, discriminate on the basis of race in deciding who could serve as a public officer. Why, then, could they discriminate on the basis of alienage, which had also been declared to be a suspect classification? Blackmun's opinion did not provide an answer, other than pointing to "a State's historical power to exclude aliens from participation in its democratic political institutions" and reasoning in reverse that the Court "had never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause."

Litigants were also successful in convincing Justice Powell, a relative newcomer on the Court, that the state had failed its burden. Powell disputed the state bar examining committee's claim that an across-the-board exclusion of noncitizens was necessary to ensure an informed and ethical state bar, finding unconvincing the state's argument that only citizens, who possessed

[47] NY cited to Dunn v. Blumstein but not for this proposition (of "political community"), rather to support their arguments about the appropriate standard of review that the Court should use. See NY Brief.

[48] Sugarman, 647. This carve out was, in its way, a victory for the state attorney general. The phrase "formulation and execution of government policy" came directly from the brief for New York. While the state had tried to argue, unsuccessfully, that all civil servants in New York were engaged in this type of work and therefore the state had reason to bar this work to citizens only…the Court rejected this blanket assertion, but it adopted this phrase as a description of where a line might actually be drawn constitutionally. This would have ramifications for cases down the line.

[49] Sugarman, 643.

"undivided allegiance" to the country, could demonstrate the character and fitness for the profession. As Powell noted, the lawyer's powers in the state "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." Furthermore, any shortcomings in knowledge of the legal system or potential conflicts of interest could be handled in the normal regulation of the profession without need for a blanket exclusion. As he noted in announcing the decision from the bench, "There is no reason to believe that an alien lawyer validly residing in this country will be less mindful of his professional responsibilities to the courts and clients than other lawyers. All persons licensed to practice law in a state are subject to the same regulations and the same Standards of Professional Conduct."[50]

Stein and Ching failed, however, to convince Justice Rehnquist, who was the only one to dissent in both cases. Rehnquist's dissent not only attacked the treatment of aliens as a suspect class but also the very premise that the equal protection clause could be use to protect against anything other than race discrimination. Rehnquist characterized the majorities in *Sugarman* and *Griffith*s as eliminating the line between citizen and alien and therefore, in his estimation, threatening American political institutions. Furthermore, the decisions, he wrote, "stand for the proposition that the court can choose a 'minority' it 'feels' deserves 'solicitude' and thereafter prohibit the States from classifying that 'minority' differently from the 'majority.'"

Unbeknownst to attorneys, behind the scenes Powell expressed admiration of Rehnquist's lengthy and forceful dissent. Powell hand-wrote on his copy of the draft of the dissent, "A well written opinion which, if [Rehnquist] wrote on a clean slate, might have considerable appeal."[51] This statement is hard to square with Powell's majority opinion, given that Rehnquist's disdain for the Court's extant equal protection jurisprudence was clear, so it is that much more surprising that Powell would admire it, after himself make a forceful claim in support of the Court's equal protection jurisprudence.

The decisions in *Sugarman* and *Griffiths* were, on their face, a ringing victory for noncitizen rights. Both opinions made clear that the equal protection clause would protect against state discrimination on the basis of alienage not just when it was a question of access to welfare but also in the context of the workplace, in both the private and public sectors. As one newspaper summarized, the two decisions "sharply reduced the power of the states to ban resident aliens from employment."[52] Many states attorneys general interpreted these cases as announcing a forceful refutation of alienage-based discrimination of all kinds. [Will discuss these changes here,

[50] Oral Announcement, In Re Griffiths (also see Powell archive).

[51] Powell archive, May 9, 1973.

[52] Associated Press, "Restrictions on Aliens Overruled," Oakland Tribune, June 25, 1973, p. 5.

noting new locales that dropped their citizenship requirements, like Wyoming and Hawaii]. In some jurisdictions, legal change came about voluntarily through the revision of laws in accord with the Supreme Court rulings. Licensing boards took note, as more letters arrived in state attorney generals offices querying the constitutionality of various exclusionary provisions. In Arizona, for example, the Board of Medical Examiners sought an opinion from the state attorney general in 1974 as to whether they may "deny licensure for the practice of medicine in the State of Arizona to an alien solely on the basis of his noncitizenship." The attorney general said no, on the basis of "recent United States Supreme Court decisions" that indicated that such a bar would be unenforceable. The medical board, he concluded, "should not treat an alien applicant, otherwise qualified, differently than a citizen of the United States."[53]

Advocates also succeeded in additional cases before the Court. On the same day that *Sugarman* and *Griffiths* were handed down, the Court issued a decision declaring unconstitutional an Arizona state constitutional provision barring noncitizens from holding positions in state and local public employment, including as public school teachers.[54] Less than a year later, the Court similarly affirmed a district court decision striking down restrictions on real estate licenses in Indiana (against a dissent by Rehnquist).[55] And in 1976, Justice Blackmun penned the opinion in *Examining Board of Engineers v. Flores de Otero*, which struck down a law in Puerto Rico that mandated citizenship for engineers.[56] Defenders of Puerto Rico's restriction had said the law was justified in order to prevent an influx of Spanish-speaking professionals. It was an 8 to 1 decision, with Justice Rehnquist as the loan dissenter.

These cases in the middle of the decade seemed finally to put to rest the old doctrines that protected a state's right to discriminate against noncitizens in their midst. This trend appeared to be a logical extension of the equal protection clause as applied in cases of racial discrimination.[57] But embedded within this litigation were unanswered questions, most notably the question of where constitutional protection for noncitizens ended and state prerogatives took precedence. Noncitizens and their attorneys had not provided a clear answer. Blackmun had ventured a suggestion in *Sugarman*, with the appropriation of the idea of the "political community" from

[53] 1974 Arizona Attorney General Reports and Opinions 87 (Opinion No. 74-7-L (R 13), February 27, 1974. Check ARS sections 32-1423 through 32-1425.01

[54] Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), aff'd, 413 U.S. 902, 93 S. Ct. 3065, 37 L. Ed. 2d 1021 (1973).

[55] Indiana Real Estate Comm. v. Satoskar, 417 U.S. 938 (1974).

[56] 426 U.S. 572 (1976).

[57] As a note in the *Harvard Law Review* opined, the results in these cases were "not surprising" given the Court's "consistent invalidation of discrimination based on race and national origin." Note: a Dual Standard for State Discrimination Against Aliens." *Harvard Law Review* 92 (1979): 1516–37.

*Dunn*. Justice Powell suggested in *Griffiths* that a state might have a stronger interest in preserving roles that were involved in "formulating policy" for citizens only. But neither opinion explained what characteristics of alienage made noncitizens less trustworthy or worthy of constitutional protection. (After all, a lack of access to the political realm was precisely what made a group a "discrete and insular minority," so it seemed odd to indicate that this realm itself was precisely off-limits.) In the absence of a theory of the difference, Justices engaged in a sort of conclusory reasoning: states could potentially exclude noncitizens as voters and office holders because they were not citizens.

The successes in the early 1970s spurred further challenges to alienage restrictions, not just in the realm of economic opportunity but also in the area of political rights. Underappreciated in the scholarship to date is the extent to which noncitizens and their advocates attempted to expand the zone of rights in the political realm -- not just in the economic realm — after *Graham*. As the next section elucidates, these challenges demonstrated the radicalism of the moment but also may have served to further stoke anxieties among the more conservative members of the Court about the extension of the equal protection clause to alienage.

## III. EXPANDING THE BOUNDARIES OF THE "POLITICAL COMMUNITY"

In just five years, from 1971 to 1976, and four cases (*Graham*, *Sugarman*, *Griffiths* and *Flores de Otero)* litigants had succeeded in convincing the Court to overturn decades of precedent, a dramatic course correction from the "special public interest doctrine" and the "rights vs. privilege" distinction that had governed alienage law for decades. The decisions gave lawyers an avenue to challenge the thousands of citizens-only economic restrictions that were still on the books. But the "harmonious quartet" of cases, as one attorney called them, also opened a door to an even more revolutionary quest for inclusion of noncitizens in areas that were squarely within the realm of political rights, particularly the right to vote and the right to serve on juries. This litigation pushed back at conclusory assumptions that such distinctions were either constitutionally-required or necessary in a democracy. After all, noncitizens had, at various points in American history, had the right to vote, and noncitizens had also served on juries in certain times and places. A different vision of what it meant to be a resident alien was possible: someone who is embedded in their local community and just as effected by the policies of lawmakers as their neighbors, and therefore equally entitled to a voice in matters of governance. This line of advocacy was aptly summed up in the title of a law review article published in 1977: "Aliens and Equal Protection: Why Not the Right to Vote?"

Justice White, in this sense, was right in his aside during oral argument in *Leger*: once the

equal protection door was opened, so to speak, for economic rights, then other kinds of rights claims followed. The cases that resulted from these efforts, coming on the heels of *Griffiths* and *Sugarman*, gave noncitizens an opportunity to test the range and extent of the Supreme Court's alienage jurisprudence.

The link between economic rights and political rights for noncitizens was conceptual, but it was also literal: in at least two cases, noncitizens who succeeded in their claims of unconstitutional employment discrimination based on alienage returned to court not long after to seek political rights. Daiil Park was a refugee from North Korea who managed to flee to South Korea and then to Alaska.[58] He attended both college and law school at the University of Alaska. Upon graduating from law school in 1971, he represented himself in a lawsuit challenging Alaska's citizenship restriction on the legal profession, and he won. Three years later, and after the Supreme Court's decisions in *Graham*, *Sugarman* and *Griffiths*, he returned to court as a newly-minted attorney, representing himself, to challenge his exclusion from the voter roles in Alaska. His was a straight-forward equal protection argument: he asserted that barring permanent residents from state and local elections violated the equal protection clause of both the state and federal constitutions.[59]

On the other side of the country, another noncitizen, Lester Perkins, brought suit to challenge the exclusion of aliens from grand and petit jury service in the Maryland, citing *Graham*, *Sugarman* and *Griffiths*. Just a year before, Perkins had successfully challenged his exclusion from the field of veterinary medicine in Maryland.[60] In arguing for the right to serve on juries, Perkins noted that aliens were a protected class, that states had to meet a high threshold to justify discriminatory treatment, and that neither the state nor the federal government had a compelling interest in excluding aliens as a class from jury service.[61]

In Colorado, Peter Skafte, a Dutch citizen who had been a permanent resident since 1966, claimed that Colorado statutes that denied resident aliens the right to vote in local school board elections were unconstitutional. Skafte was married to a U.S. citizen and had a child who was a student in public school. He argued that disqualifying him based on his alienage was a violation of the equal protection clause and also was a violation of his fundamental right as a parent to be

[58] Minutes, House State Affairs Standing Committee, Alaska State Legislature, January 13, 2004, p. 11.

[59] Park v. State, 528 P.2d 785 (Alaska 1974).

[60] Perkins v. Board of Veterinary Medical Examiners of Maryland, Civil No. 72-1174-HM. Judgment was entered for the plaintiff on March 16, 1973, following an oral opinion in the matter rendered at a hearing held on March 2, 1973.

[61] Perkins v. Smith, 370 F. Supp. 134, 135 (D. Md. 1974), aff'd, 426 U.S. 913, 96 S. Ct. 2616, 49 L. Ed. 2d 368 (1976)

involved in his child's education. (Noncitizen voting in school elections was not so far-fetched an idea. In 1968, New York City had begun allowing noncitizens to vote in school board elections. This right was also adopted in Chicago and Los Angeles.)

District court judges hearing the constitutional challenges in *Park*, *Perkins* and *Skafte* were confronted with a conundrum. On the one hand, the Supreme Court had issued four recent and highly significant decisions that supported treating noncitizens as a "discrete and insular minority," meaning that discriminatory state laws must be reviewed under the standard of strict scrutiny. But the legal claims that the noncitizens presented — that states could not restrict the ballot box (either statewide or at the school board level) or the jury pool to citizens only — challenged lines that had been squarely drawn, and widely accepted, between citizens and aliens for decades. Even though the Constitution nowhere indicates that voting or jury service must be restricted to citizens-only, this idea was clearly perceived at the time as a truism, a sort of unquestionable assumption of the core differences between citizens and aliens.

In all three cases, attorneys for the noncitizen litigants (or pro se, in the case of Dalil Park), argued against the grain of the widely-accepted notion of exclusion of noncitizens from political life. This proved too much for the lower courts to support. In all three cases, the lower courts resorted to citing the passage regarding "political community" in *Sugarman* — despite the fact that it was dicta — to support states' rights to discriminate, but they went about it in different ways. In Alaska, the court argued that states were not compelled, under the equal protection clause, to guarantee the voting rights of noncitizens. In Maryland, the court argued that the state had a compelling interest in limiting jury service to citizens-only. In Colorado, the court argued that the state only had to demonstrate a rational basis for its restriction, and that limiting voting to citizens was clearly rational. As the court argued, in a conclusory fashion, "The state has a rational interest in limiting participation in government to those persons within the political community. Aliens are not a part of the political community."[62] This categorial statement of exclusion from political life completely failed to consider Skafte's more nuanced claim for inclusion in matters that related to his children and his local community.

By bringing these voting and jury service cases, litigants gave the courts their first opportunity to interpret the language in *Graham* regarding "discrete and insular minorities" paired with the language in *Sugarman* pertaining to the "political community." The interpretation and level of scrutiny applied were not uniform, but in all three cases judges used that language to defend a zone of state power, with little analysis of the more nuanced claims made by the plaintiffs here. It was a "know it when you see it" type of analysis, which relied largely on status quo and

[62] Skafte v. Rorex, 191 Colo. 399, 402, 553 P.2d 830, 832 (1976)

stereotypes rather than reasoned opinion.

As Justice White had predicted in his colloquy with attorney Joseph Stein, cases pertaining to political rights ended up on the Supreme Court's doorstep. Perkins and Skafte both appealed their cases to the Court, with the assistance of different offices of the ACLU.[63] The Court affirmed the Maryland court's ruling in *Perkins* without opinion, upholding the restriction on jury service, in 1976. (In an enticing indicator of what might have been, both Justice Marshall and Justice Brennan voted instead to note jurisdiction and schedule the case for oral argument, but they were outvoted by others on the Court.[64]) And a year later, in 1977, the Court dismissed Skafte's appeal for want of a substantial federal question, leaving the Colorado court's decision as the final one.

By ruling on these cases without opinion, the Supreme Court gave no reasoning or rationale for why it decided each case the way that it did. It was a missed opportunity to elaborate on precisely that point that Justice Blackmun had shared in dicta in *Sugarman*, about the extent of state power to discriminate within the bounds of the Equal Protection clause, but the Court refused to do so.

Despite the negative outcomes, the challenges brought by Park, Perkins and Skafte reveal the profound sense of possibility afoot mid-decade, as old doctrines were abandoned and new approaches adopted in courts across the country, not just pertaining to the rights of noncitizens but also for other historically marginalized groups as well. In pushing for more thoroughgoing inclusion of noncitizens in American economic and political life, litigants imagined a constitutional framework that would recognize the ties and connections that resident aliens had to American society, even if not naturalized. This vision focused on the real, functional ways that noncitizens were involved and invested in American society, through work, school, taxes, family relationships, and other important connections. These were precisely the kinds of connections that Blackmun and Powell had highlighted in their opinions extending the equal protection clause to alienage. It was not outside the realm of possibility for noncitizens to have a voice in important decisions that would effect their day-to-day lives. Advocates and noncitizens would continue to push for rights to vote in local school board elections, and in municipal elections as well, but their efforts at extending constitutional protections for these rights had led nowhere.

These state cases pertaining to political rights are rarely, if ever, discussed in constitutional law circles, but they had an important role to play in the development of equal protection doctrine and alienage law. The cases, as I discuss below, had a sort of rebound effect on economic rights for noncitizens. The very fact that noncitizens were seeking the right to vote in state, local, or

[63] Perkins was assisted by the ACLU Foundation and Skafte by the ACLU of Colorado.

[64] *Perkins v. Smith*, 96 S. Ct. 2616 (1976).

school board elections seemed to fulfill the prophecy, as expounded by Justice Rehnquist, that treating aliens as a suspect class under equal protection would jettison any difference between citizens and aliens. For those, like Rehnquist, who did not approve of the holding in *Graham*, the "*Sugarman* exception" provided a possible opening not only to strike down noncitizen claims for political rights but also to further erode their economic rights. The next cases to come before the Supreme Court provided an opportunity to do just that.

## IV. THE REEMERGENCE OF RATIONAL BASIS

By 1977, advocacy on behalf of noncitizen civil rights had resulted in a fairly bright line in the courts between two categories of rights: economic and political. It appeared that economic rights were strongly protected — and therefore states could not use citizenship to limit access to public or private occupations or to public benefits — but that political rights like voting were subject to greater state control.

That is not to say that economic rights — like the right to work in one's chosen profession — were automatically guaranteed; to the contrary, in many jurisdictions those restrictions remained in place until they were challenged in court. This was an increasing source of frustration to advocates. As the ACLU handbook on *The Rights of Aliens* noted in 1977, "Despite the clear trend of the Supreme Court's rulings, state laws barring aliens from certain kinds of employment are still on the books and continue to be enforced until individually challenged in the courts."[65] This included state laws barring aliens from working for the government. One advocacy organization, the Washington Lawyers' Committee for Civil Rights Under Law, reported in 1976 that pro bono attorneys for the organization were working on 25 cases of public sector employment discrimination, even though the Court had struck down New York's limitations on civil service in *Sugarman* three years earlier.[66]

This distinction between economic and political rights, such as it was, might have remained fairly stable if not for a round of highly consequential litigation from the state of New York in the mid- to late-1970s. Although advocates were attempting to follow through on the logic of *Graham*, the cases that made their way to an increasingly hostile Supreme Court gave the Justices an opportunity to reconsider their equal protection jurisprudence in the area of noncitizen economic rights. The decisions in those cases ultimately blurred the lines between economic and political

[65] See Miranda v. Nelson, Arizona, etc.

[66] "Motion and Brief on Behalf of Amici in Ambach v. Norwick," October 1976, 3.

rights, undermining the rights of noncitizens and creating the awkward alienage dual standard in equal protection law.

*A. New York and "the expanding volume of cases"*

For much of the nineteenth and twentieth centuries, New York was a primary gateway for immigration and a prime destination for millions of new residents. By 1970, New York's number of foreign-born residents was one of the largest in the country, at 2.1 million. This represented 11% of of the overall population of the state, which was more than double the national value of 4%.[67] Despite (or because of) the vital importance of immigration for the state's overall economic growth, over the course of the twentieth century the state legislature and state licensing boards had adopted dozens of citizens-only laws. As Justice Blackmun described them, the laws "ha[d] 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."[68]

By 1975, the state still had many such laws on the books, including restrictions of at least 38 different trades or professions and limitations on state financial aid for higher education. Unlike some other jurisdictions in the mid-1970s, the New York state legislature rarely proactively revised laws in light of the recent Supreme Court decisions.[69] After *Graham, Sugarman,* and *Griffiths*, these provisions were ripe for challenge. In one year alone, federal district courts in New York heard separate challenges from noncitizens who wanted to be physicians, teachers, police officers, civil engineers and physical therapists.

Unlike other large immigrant-receiving states like Pennsylvania and California, and even after the state's defeat in *Sugarman*, the state of New York attempted to defend these remaining exclusionary laws. The New York Attorney General, Louis Lefkowitz, did not issue opinions advising licensing boards to remove their citizenship restrictions. Instead, the Attorney General's office took pride in the flurry of defensive litigation, as noted in an annual report proclaiming the state's role as a "legal trendsetter" in the nation.[70]

Litigation challenging citizenship restrictions in mid-1970s New York involved a range of

[67] Passel and Clark, Immigrants in New York (The Urban Institute, 1996), p. 5-6.

[68] Dissent in Ambach.

[69] By 1977, the state had revised some of its dozens of restrictive laws but many remained on the books, including those governing professions ranging from funeral director to animal health technician. Foley v. Connelie, 98 S. Ct. at 1073 (Blackmun, J., concurring). The Legislature did remove the restriction pertaining to the practice of law after the Court issued In Re Griffiths. See Peltz, 718.

[70] See report.

legal advocacy groups, most notably the New York Civil Liberties Union (NYCLU), which entered the fray of noncitizen civil rights with vigor in the mid-1970s.[71] NYCLU had multiple fights going simultaneously in the 1970s, winning major victories in school speech and the protection of the rights of the disabled. The New York chapter helped to broaden the mission of the national ACLU to include a wide range of "victims groups" and a focus on various "enclaves," like public schools, where civil liberties were rarely protected. Among those "victims groups" identified as needing assistance were noncitizens. The NYCLU was lead counsel in two significant cases: that of public school teachers and a consolidated case challenging restrictions on licenses for physical therapists and civil engineers. Once again, civil rights activists placed issues of citizenship restriction squarely in the mix with efforts to expand rights in other arenas.[72]

Of course, this was not the first time that an arm of the ACLU was engaged in defending noncitizen rights. The national ACLU had been an important partner in helping David Broiles bring *In Re Griffiths* to the Supreme Court in 1973. Regional offices in Colorado and Maryland assisted with the appeals of the *Skafte* and *Perkins* cases. Now the regional New York office took on a lead role in defending the rights of noncitizens to work in both public and private employment in the state, with a hope to seal the promises of the *Graham* decision.

Bruce Ennis, NYCLU attorney, represented Susan Norwick and Tarja Dachinger in their lawsuit against the New York Education Department, filing a complaint and a temporary restraining order on their behalf in the summer of 1974.[73] Norwick was highly qualified to be a public school teacher. She had prior teaching experience in her home country of Scotland, had received her B.A. degree *summa cum laude* from North Adams State College in Massachusetts and completed a masters degree in developmental reading at the State University of New York at Albany. Before graduate school, she worked as a teacher at Riverside Elementary, a private school in New York City. Despite these qualifications, she was summarily refused when she applied for provisional certification from the state so that she could teach in New York public schools. A representative of the state department of education admitted that she met the academic qualifications for certification, but stated that she did not meet the additional requirement of either being a citizen or having filed a declaration of intent to become one. A similar fate befell Dachinger, a teacher from Finland who received both her undergraduate and graduate degrees

[71] The New York Civil Liberties Union was founded in 1951 and gradually became a strong influence on the direction of the national organization. Two of the ACLU's executive directors in the 1970s, Aryeh Neier and Ira Glasser, had their start with NYCLU, as did national legal directors Bruce Ennis and Burt Neuborne.

[72] As Samuel Walker notes, "NYCLU activists developed perhaps the most comprehensive vision of civil liberties as a force for transforming American institutions; they represented the future of the ACLU."

[73] Representing noncitizen teachers and challenging the Education Law was an extension of the NYCLU's emphasis on civil liberties issues in schools. (Glasser himself had been fired from a teaching position for refusing to say teh oath.)

with distinction in the U.S., taught in a private school, and then applied for state certification.[74]

That same year, another NYCLU attorney, Thomas Litwack, filed complaints for two other plaintiffs, Dilip Kulkarni and Aase Jackson, who were barred from employment under different provisions of the Education Law, those pertaining to civil engineers and physical therapists. As with public school teachers, the law barred noncitizens in those professions from practicing in the state.

The NYCLU was not the only organization seeking to defend noncitizen rights. In 1976, lawyers representing eight Turkish physicians challenged a provision in the Education Law pertaining to medical licenses. The law allowed only citizens or declarant aliens to be licensed to practice medicine. In addition, it required declarant aliens to become citizens within ten years or lose their licenses. Suphi Surmeli and seven other physicians sued, claiming that the threatened revocation of their licenses was a violation of equal protection and due process. The state argued that such discrimination was rational since the state had an interest in encouraging doctors to demonstrate their political involvement and be involved in public affairs, and because such provision would guarantee stability in the medical field, arguing that foreign doctors were more likely to be "sojourners" and to leave. The district court pushed back forcefully against this line of argument, holding that the law was unconstitutional under either a rational basis or strict scrutiny standard. As the judge held, "there is not the slightest link between a physician's citizenship and his competency as a physician or surgeon."

Nonprofit legal advocacy organizations and private attorneys were not the only ones to get involved. Also bringing litigation were attorneys affiliated with law school legal clinics. Michael Davidson was a clinical instructor at SUNY Buffalo when he agreed to represent Jean-Marie Mauclet in his challenge to New York's restriction on tuition assistance awards for noncitizens. Mauclet, a permanent resident, was married to a U.S. citizen and had a U.S. citizen child. He attended graduate school at SUNY Buffalo but was denied financial assistance since he had not pursued naturalization. Prior to his teaching stint, Davidson had been active in civil rights litigation of a different sort while working for the NAACP Legal Defense Fund. (He would go on to serve as the first legal counsel for the U.S. Senate and to argue the case of *INS v. Chadha*. He later served as the General Counsel of the Select Committee on Intelligence.)[75]

Mauclet's case was eventually consolidated with that of another plaintiff, Alan Rabinovitch. Rabinovitch was a permanent resident from Canada who qualified for a undergraduate scholarship to attend Brooklyn College but the scholarship was withdrawn when he was

[74] Both Norwick and Dachinger were married to U.S. citizens, which meant that they did not need to obtain separate labor certification in order to maintain lawful immigrant status. Ambach Appendix, Part I.

[75] Tribute to Michael Davidson (Diane Feinstein), Congressional Record, Sept. 22, 2011 (p. S5896)

identified as a permanent resident. His attorney, Gary J. Greenberg, also had prior experience in the field of civil rights, having served in the civil rights division of the Department of Justice in the late 1960s. Greenberg resigned from government service in 1969 after openly protesting President Nixon's school integration policy.

Both Davidson and Greenberg succeeded in their challenges before the Western District court of New York in the winter of 1976. That summer, the Southern District ruled in favor of Norwick and Dachinger. In January of 1977, the Northern District ruled in favor of Kulkarni and Jackson. Thus, by the fall of 1977, district courts in New York had ruled in favor of noncitizen teachers, doctors, physical therapists and engineers. The executive director of the NYCLU, Ira Glasser, was clearly thrilled with the progress, telling the New York Times in that Attorney General Lefkowitz "can stop going through the futile formalities of defending what is essentially the same statute over and over again from the District Court to the Supreme Court."

Although these were clear successes, there were still dozens of citizens-only licensing laws on the books, which attorneys would have to challenge one-by-one, unless and until the state legislature revised the laws. Litwack tried to get class action status in *Kulkarni*, allowing the court to consider removing references to citizenship from all the professions listed in the Education Law, but his attempt was denied due to lack of standing. Not being able to overturn them with a blanket order meant that the litigation would be that much more costly and prolonged. This fact helps to explain why the NYCLU began to pressure the state legislature to overturn the remaining laws, highlighting the costliness of this litigation to the as well. As Glasser commented, "All this seems to be a colossal waste of time, energy, and money at a time when the state can ill afford any extra expenditures."

It looked like the tide was clearly turning in favor of those noncitizens who had challenged New York laws in the 1970s, but one case went in a different direction in the district court. In the summer of 1976, a different three-judge panel of the Southern District of New York ruled in favor of the state in the case of *Foley v. Connelie* (with a dissent by Judge Mansfield). Edmund Foley was an immigrant from Ireland who applied to take the examination to become a New York State trooper but was denied under the state law that limited the state police force to citizens only. (Another noncitizen brought suit against New York City, which had a similar bar on noncitizens serving as metropolitan police.) Unlike some other areas of employment, the position of state trooper had an age requirement: only applicants between the ages of 21 and 29 were eligible to apply and take the examination to become an officer. This age limitation meant that an immigrant might never be able to become a state trooper, even if naturalized, if he or she could not meet the five-year residency requirement and pass the naturalization test before she turned 30. Foley was in precisely this situation; he entered the country in 1973 but did not become a permanent resident until 1974. At that point, he began to accrue the necessary five years of residence for

naturalization. Unfortunately for his job prospects, he would already be over the age of 29 in 1979 and thus barred from eligibility to become a state trooper.[76]

It is likely the age requirement provision that led Jonathan Weiss, an attorney with the New York nonprofit Legal Services for the Elderly Poor (LSEP), to take the case. Edmund Foley was not a member of the elderly poor (being in his late 20s at the time of the suit), but his case likely appealed to LSEP because of the nexus with age discrimination. Weiss himself clearly saw the mission of LSEP to extend not only to direct services to those who were themselves elderly but also to challenging the irrationality of age restrictions across a wide range of areas of American society. As he noted in his testimony before the Senate Committee on Labor and Human Resources, "age discrimination….takes many forms," noting that the "most obvious is generally that of employment."[77]

The *Foley* case was not the first time LSEP had advocated for immigrant rights. LSEP had played an important role assisting attorneys representing the plaintiffs in *Graham* and *Leger*, and had also filed an amicus brief in a case pertaining to federal welfare benefits for aliens, *Mathews v. Diaz*. But the *Foley* case was the first time that attorneys from LSEP — including both Weiss and David Preminger — directly represented the plaintiff. Once again, an immigrant plaintiff was represented not by an immigrant rights organization but instead by a group dedicated to a parallel fight, that of fighting age discrimination.

Attorney General Lefkowitz apparently did not see defending these laws as a "futile formality," as Glasser had called it, since his office appealed all the district court cases won by noncitizens. The Supreme Court denied cert in *Surmeli*, the case of the Turkish physicians, essentially affirming the lower court decision, but it agreed to hear the remaining three cases, pertaining to financial aid, state troopers, and public school teachers.[78] In quick succession, one year after the next (1977, 1978 and 1979), these three cases out of New York — *Nyquist v. Mauclet*, *Foley v. Connelie*, and *Ambach v. Norwick* — came before the Court, and with each the Court contracted what were perceived as expansive rights for noncitizens.[79] It was this series of cases that led to a splintering of the tentative coalition on the Court and a reassertion of states' rights

[76] Reply Brief for Appellants, Foley v. Connelie, p. 2.

[77] Weiss, "Judicial Access and the Elderly," Hearing before the Senate Committee on Labor and Human Resources, July 12, 1983, p. 49.

[78] Nyquist v. Surmeli., 436 U.S. 903, 98 S. Ct. 2230, 56 L. Ed. 2d 400 (1978)

[79] This time, New York was not represented before the Court by Samuel Hirshowitz, whose performance in *Sugarman* was subpar, but instead by Judith Arenstein Gordon, an assistant attorney general who had graduated from NYU Law School in 1968. Gordon argued all three of the next cases before the Supreme Court. She lost *Mauclet*, but by only one vote (the most divided court yet on these issues), and she won in the next two. For Bruce Ennis, her opposing ACLU counsel on *Ambach*, one of his very few S. Ct. loses.

to discriminate.

*B. "Distasteful intruders" or "welcome participants"?*

The trio of cases from New York heard by the Supreme Court in the late 1970s gave both sides opportunities to rehash old arguments as well as introduce new ones about the relationship between noncitizens and the Constitution. In *Mauclet*, which challenged the constitutionality of citizenship-based restrictions on state financial aid for higher education, the state tried a new defense. Once again, New York argued that the Equal Protection clause did not apply to the law at issue, but this time it was not because of the particular benefit at hand (as the state had argued in *Sugarman*) but instead because of the nature of the classification itself. Because the law allowed aliens who had declared their intention to become citizens — so called "declarant aliens" — to be eligible for financial aid, the state reasoned, this was not discrimination "based on alienage" but instead discrimination against those who were aliens but refused to pursue citizenship. The statute discriminated, state attorneys argued, only between *types of categories of aliens* — those who intend to become citizens and those who do not — and not between aliens and citizens. According to this argument, since it was not discrimination "based on alienage," strict scrutiny need not apply.

Davidson and Greenberg, the attorneys for Mauclet and Rabinovitch, made quick work of this nonsensical argument, noting that such reasoning "defies logic," and the district court agreed with them wholeheartedly. New York also argued that the state had a substantial interest in limiting financial aid to citizens in order to encourage voting and office-holding, and that this interest was justified under Sugarman's rationale regarding the "political community." This, too, Greenberg criticized with gusto during oral argument, calling such "post-hoc rationalization[s]" the state's "habitual reflexive discriminations against the aliens" that are "trotted out on every occasion," including when they argued that licenses for physical therapists could be limited because such a limition promotes the political community.

Davidson and Greenberg were able to convince a majority of justices that New York did not have a legitimate interest in such limitations, but they won by only one vote. *Mauclet* was the most divided alienage case yet, with three separate dissents by Rehnquist, Burger and Powell, with Stewart joining Powell's dissent. Each presented a different rationale. Rehnquist questioned the applicability of the equal protection clause to alienage entirely (and would have overruled Graham); Burger argued that financial aid was akin to government "largesse" that a state could divvy up however it pleased; and Powell bought into the state's argument that this was not discrimination "based on alienage" because declarant aliens could receive financial aid. Although the dissenters failed to win a majority, their arguments were a foreshadowing of what was to

come in the next two cases, *Foley* and *Ambach*.

Foley's attorney, Jonathan Weiss, had a difficult path to victory, given the Court's increasing discomfort with limitations on state power as well as the ubiquity of restrictions on police officers around the country. Unlike earlier cases, this specific type of employment discrimination was widespread: a survey by the International Chiefs of Police in 1974 found that 94% of state and local police departments responding to the survey restricted male sworn officers to citizens only. A more targeted state study conducted as part of the litigation found that 24 states restricted the state police force to citizens only. All nine of the states with a population of more than 100,000 permanent resident aliens — including California, Texas, New Jersey, and Illinois, among others — had such restrictions in place. Furthermore, the lower court had ruled in favor of the Superintendent of the New York State Police, declaring that the regulation was constitutional because the job of a state trooper was an "important nonelective executive position" as described in *Sugarman.*

Whereas in the earlier litigation, the focus was on the harm caused by exclusion — including the stigma as well as the irrationality — in the *Foley* litigation we see advocates presenting an argument based on the advantages of inclusion, particularly in a country that had a growing percentage of noncitizen residents. Weiss highlighted this theme in oral argument, noting that it makes no sense for the state to exclude, through a flat ban, a whole class of persons who might have skills of value, such as the ability to speak Spanish, and who could be an asset to the police force. As Weiss noted, "if you exclude…from the pool a large population which speaks Spanish as well as English you may in fact eliminate your ability to recruit able police officers…." In this line of argument, alienage restrictions were irrational because they made it harder, rather than easier, for police departments to fulfill their duties.

Weiss, aided by an amicus brief from the Mexican American Legal Defense Fund and the Asian Law Caucus, also tried to make the connection between alienage discrimination and race discrimination clearer. In their amicus brief, MALDEF and the Asian Law Caucus identified Mexican-American and Asian-American interests in the result of the case, drawing attention to the connections between citizenship restrictions and the treatment of racially and ethnically marginalized populations. Given that Mexican Americans made up the largest single group of permanent resident aliens in the country at the time (20% of over four million in 1975), such restrictions were bound to have a particular impact on that group, which was already woefully underrepresented on police forces nationwide. In a study conducted by the Race Relations Information Center in 1974, just 1.2% of 41,894 sworn personnel in 42 states were Hispanic. Representation of those of Asian descent was even smaller: only 7 officers out of that 41,894 officers were Asian or Asian American. The brief noted the dire problems stemming from lack of representation of language-minorities on police forces, and they questioned the rationality of

excluding completely a major source of such national origin minorities from consideration.

It is in oral argument for *Foley* that we first see an all-out assault on strict scrutiny for noncitizens coming, for the first time, from a justice other than Justice Rehnquist. Justice Burger openly criticized the treatment of noncitizens as a protected class, even though he himself had ruled in favor of *Graham*. He put the issue of difference with alienage and race front and center, asking, just a few minutes into Weiss's argument, "Do you think there is a difference between a discrete insular group whether minority or otherwise, when they are -- let us say American-Indians or Negros or women or men who cannot change their condition, that is one kind of a discrete insular group?" Burger lobbed questions at Weiss related to which groups could be protected classes. The questions all seemed intended to criticize the prior treatment of aliens as a discrete and insular minority, which would erode the power of the *Graham* decision. Justice Powell's notes of the Court's conference after oral argument reflected this tone; Powell wrote that Burger, after defending the state's discretionary power to select police, stated that "Aliens who can become citizens are different from blacks."

Reasoning from race, as attorneys had done in earlier cases, was losing its persuasiveness as Burger, Rehnquist and others argued, despite the holding in *Graham*, that noncitizens were not the appropriate subject of strict scrutiny. They also returned to the specter of alien voting as a sort of warning. Burger referenced the *Skafte* and *Perkins* cases directly, asking the state's attorney during oral argument, "If your friend prevails and we reverse [the lower court], do you think New York can keep these aliens off of juries?...How about voting?" The implication was clear: if we limit the state's right to exclude noncitizens from the police force, then voting and jury service are next. This was a characterization of citizenship and alienage as a zero sum game, which meant that any expansion in alien rights meant a contraction in citizenship.

Unsurprisingly, given the apparent shifting attitudes of the justices, the Court held for the state in *Foley*, upholding a citizenship restriction on the state police force (as well as the age restriction, meaning that some noncitizens, like Foley, could never become a state police officer even if naturalized). In the majority opinion, Burger left *Graham* standing but created a novel carve out for state power, citing his own dissent in *Mauclet* for the proposition that requiring strict scrutiny in all cases of state-based alienage discriminate would "obliterate all the distinctions between citizens and aliens, and thus deprecate the historical values of citizenship." Instead, in cases related to the political community, "the state need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification." For public employment, then, the Court "must necessarily examine each position in question to determine whether it involves discretionary decision making or execution of policy, which substantially effects members of the political community." From now on, cases of alienage discrimination would be examined under this dual standard: rational basis for some types of

discrimination, and strict scrutiny for others.

The Court handed down the *Foley* decision in March of 1978; the ACLU's case in support of noncitizen school teachers, Norwick and Dachnigner, was set to be argued the following year. The path became considerably more fraught after *Foley*. By the time the *Ambach* case was heard for oral argument, Bruce Ennis had been promoted to national legal director for the ACLU, supervising a staff of 26 other attorneys and consulting with thousands of others in the ACLU's various regional offices.[80] There were still many elements of the case that pointed in favor of an outcome for the teachers. Public school teachers clearly did not make, interpret or enforce the laws, so it was difficult to imagine how restricting those positions to citizens only was in furtherance of the "political community." And, unlike regulations of state police, citizenship restrictions on public school teachers were far less prevalent by this time than those for police officers; only ten states still had such restrictions on the books by the 1970s. Some of those state restrictions, including those in New York, allowed for the granting of a provisional certificate to noncitizens, at the request of the superintendent and under the discretion of the education agency head. In Virginia, one newspaper reported that officials had been granting these certificates "almost automatically," since they were "under the impression that the requirement might not withstand a court test." This meant, as the paper reported, that the regulation had "little practical force as it is now being administered."[81] Virginia was not alone; briefs in the case indicate that at least ten states had withdrawn their restrictive laws in recent years.

In briefs and oral argument, Ennis argued that the statute should be held unconstitutional under equal protection because it was both under- and over-inclusive. The statute swept broadly, barring all noncitizen teachers whether they were unqualified recent arrivals with little connection to the country or highly-qualified long-term residents with strong connections to the country. As Ennis stated in oral argument, the exclusion "applies to any alien from any country and prevents that alien from teaching any subject at any grade level." The statute was under inclusive, he argued, because the citizenship restriction did not apply to private school teachers in the state, who educated 18% of the school-age population. Both points went to the irrationality of the law, undermining the state's claim that this exclusion helped the state ensure a qualified teaching staff and inculcate all children with the principles of good citizenship. Of further salience to this analysis was the fact that school boards in New York City allowed noncitizen parents to vote and to serve on the school boards themselves.

States attorney Judith Gordon, in her remarks for the New York Commissioner of Education,

[80] NY Times Obituary.

[81] Aliens as Teachers, Richmond Times Dispatch, May 3, 1979.

insisted that the case of public school teachers fell under the *Sugarman* exception, which would require the Court to apply only rational basis review. Teachers were performing a "governmental purpose," she argued, and therefore all the state had to show was a rational basis to exclude aliens as public school teachers. Gordon argued that the state had good reason to exclude noncitizens as public teachers because noncitizens, by definition, could not instill the principles of good citizenship in their pupils. "The principle purpose, if not the overriding purpose of public education is in fact training for citizenship." She stressed a vision of the teacher as a role model in instilling the values of civic education, no matter what subject taught or in what grade. Teachers, she argued, "transmit attitudes and values as well as information by their example." When Justice Stevens pushed Gordon to articulate what exactly these "attitudes and values" are that a citizen has and a noncitizen does not, Gordon honed in on the right to vote: "The citizen has the capacity to participate in democratic decision making. That is the attitude and value that is sought to be transmitted."[82]

Ennis was aware that Justice Powell had been the head of the Virginia School Board prior to becoming a Supreme Court justice, but he likely could not have known just how strongly Powell felt about the role of teachers in civic education. Powell directly cited this argument as the reason for upholding New York's restriction, despite the poor fit between the teaching profession and sovereign political functions. Powell's majority opinion reversing the lower court in *Ambach v. Norwick* highlighted the role of the teacher as civic educator and the place of public school in socializing young people. "Public education," he wrote, "like the police function, fulfills a most fundamental obligation of government to its constituencies."[83] Teachers, in Powell's estimation, were the primary conduit for "developing students' attitude toward government and understanding of the role of citizens in our society."[84] Because they were performing this "governmental function," a state merely had to demonstrate that there was a rational basis for excluding noncitizens from the teaching profession, which, according to Powell, New York had demonstrated here.[85]

It was a demoralizing loss for Norwick, Dachniger, and the thousands of other resident alien

[82] Gordon's argument about the role of teachers as civic educators clearly resonated with Justice Powell. In his notes on oral argument, he wrote "public school teachers serve in a 'governance' related position," and "Education - next to public safety is principal function of state gov't." He then added in parentheses, "I think N.Y. statute is silly but I'm by no means sure it is beyond power of state."

[83] 441 U.S. at 76.

[84] 441 U.S. at 78.

[85] Commentators were understandably frustrated that Powell doubled-down on the importance of public schooling in this decision, which excluded noncitizens, but refused to declare education a fundamental right in *San Antonio ISD*.

teachers across the country, who now were at risk of their state legislatures passing similar laws, if they had not done so already. A law review comment accented the point with an exclamation mark: "Resident Alien Teachers Not Wanted in the Public Schools!"[86] Scholars were particularly critical of the inclusion of the teaching profession in the category of "political community." As law professor Earl Maltz wrote in 1979, "Education is no doubt one of the most important functions of the state, but teachers are in no sense policymakers….To define the teaching function as being at the core of the sovereign prerogative of the state would be to extend that concept far beyond the bounds envisioned in *Sugarman*."[87] Powell's opinion did nothing to explain why else such teachers were unqualified, other than their failure to become citizens. As Susan Norwick told a reporter after the verdict was announced, "I maintained British citizenship because it's important to me. I honestly can't see what difference it should make to my teaching ability."[88] It was difficult to escape the conclusion that the same nativist impulses of an earlier era were at play here.

The decisions in *Foley* and *Ambach* were a grave disappointment to litigants and their advocates, not only because it made it easier for a state to discriminate but also because it reverted to tired tropes of the 'bad immigrant' who had questionable allegiance due to a failure to naturalize. The litigation did little to explain why resident aliens as a class were not, by definition, trustworthy or qualified. Instead, it caught them in a kind of Catch-22: under *Graham*, they were a protected class in part because of their political powerlessness, but it was this same political powerlessness (i.e., the inability to vote) that made it acceptable for a state to exclude them from particular occupations. As one commentator argued, "the Court's abandonment of strict scrutiny for classifications based on alienage is supported neither by precedent nor logic, and ignores fundamental reasons why the Court had initially considered alienage suspect."[89] The cases reintroduced notions of alien disloyalty and lack of allegiance, which *Graham* and its immediate progeny had pushed against. The lower court decision in *Foley* characterized resident aliens as a potential threat to the state due to their divided loyalties and risk of enforcing the law in a way that would help their own countrymen. Justice Powell engaged in a sort of joke at the plaintiff's expense that summarizes this attitude, adding as a sort of post-script in a memo in his files: "The plaintiff in this suit is a citizen of Ireland. If he were a Catholic — judging by what one reads —

[86] Brufsky, Ruth. "Resident Alien Teachers Not Wanted in the Public Schools! - Ambach v. Norwick." University of Bridgeport Law Review 1 (1980): 99–114.

[87] Maltz, E. M. Portrait of a Man in the Middle: Mr. Justice Powell, Equal Protection, and the Pure Classification Problem. *Ohio State Law Journal* **40**, 941–966 (1979).

[88] Kleiman, D. Plaintiffs in Case Dismayed By Supreme Court Verdict. *New York Times* B3 (1979)

[89] Walter, M. R. The Alien's Right to Work and the Political Community's Right to Govern. *Wayne L. Rev.* **25**, 1181–1216 (1979).

he would be eager to put the Protestants in jail. Conversely, if he were a Portestant (sic), the Catholics would have a bad time!"

Both sides painted very different visions of what a noncitizen could be: for the attorneys for the noncitizens, immigrants were welcome members of an ever more diverse America; for the state, they were a potential threat. This difference was aptly summarized by district court judge Mansfield in his dissent, in which he summarized the powerful message sent by the Court in *Graham*: "This heightened protection of resident aliens' interests reflects the realization that they should not be treated as distasteful intruders upon our society but rather as welcome participants in it, even though they lack the full political rights reserved for citizens."[90] This contrast between a vision of noncitizens as "distasteful intruders" versus "welcome participants" was drawn clearly in a colloquy between Judith Gordon and Justice Marshall, after Gordon referred to resident aliens as "strangers to [the] community," whereupon Marshall queried: "How are they strangers?…They pay the same taxes you do….they live right next to you….and they go to school with you…" This was precisely the tone struck in the earlier cases, which highlighted the contributions of noncitizens and the fallacy and irrationality of the allegiance/loyalty bar. With *Foley* and *Ambach*, however, that characterization was back. As one commentator noted, the trend "marks a return to the incompetency-criminality decisions of fifty years ago which created an almost irrebuttable presumption of ineptitude and untrustworthiness on the part of the alien."[91]

Although *Foley* and *Ambach* had expanded the dicta in *Sugarman* regarding "political community" to include not only voting and office holding but also other positions pertaining to "government functions," they had not overruled *Graham*, *Griffiths* or *Sugarman*. This meant that strict scrutiny would be required in some instances and rational basis scrutiny in others, and the decision as to which would apply would depend on the particularities of the position in controversy. Unsurprisingly, many unanswered questions remained, especially given that the public employment sector covered many hundreds of distinct positions in different states. At the time that *Ambach* was decided, other cases were pending before lower courts or the Supreme Court, including a case challenging the constitutionality of California's restriction on probation officers. In 1975, Jose Chavez-Salido, a permanent resident from Mexico, applied for a job as a deputy probation officer in Los Angeles County — with the specific job requirement of fluency in Spanish — but was denied due to his lack of citizenship. The anti-alien provision dated from 1961, when the state legislature had designated a citizenship restriction for more than 70 "peace officer" positions, including that of cemetery sexton, game warden, toll service employee, and

[90] *Foley v. Connelie*, 419 F. Supp. 889, 900 (Mansfield, J., dissenting).

[91] Lawyer for the Americas article, p. 83. Waldman, Lauri. "Erosion of the Strict Scrutiny Standard as Applied to Resident Aliens: Foley v. Connelie." *Lawyer of the Americas* 10 (1978): 1049–65.

furniture and bedding inspector.[92]

Mary Burdick and Dan Stormer of the Western Center on Law and Poverty represented Chavez and two other similarly-situated plaintiffs in their suit against the county. The case gave the opportunity to set an outer boundary on the seemingly ever-expanding category of "government function." Burdick and Stormer argued that deputy probation officers were unlike teachers and state police officers in they did not exercise unsupervised discretion in their jobs. Trying to stay within the bounds of the extant doctrine, they argued that "[d]eputy probation officers, unlike teachers and state troopers, are authorized to perform only limited, basically ministerial duties. The population they serve is small, and comes under their control only after the police, judges, and juries have first determined that they are in need of supervision. Further, probation officers are not important symbolic figures." In short, "those officers simply do not perform vital functions that go to the heart of a representative government."[93]

The Supreme Court disagreed in its decision on *Cabell v. Chavez-Salido* in 1982, deciding that deputy probation officers "sufficiently partake of the sovereign's power to exercise coercive force over the individual that they may be limited to citizens."[94] The majority's reasoning was the most categorical yet regarding the divisions between citizens and aliens: Justice White, writing for the majority, defended a state's powers to discriminate based on an erroneous assumption that the lack of voting rights meant categorical exclusion from the "community of the governed." As he wrote, "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." This was a far departure from the Court's recognition in *Graham* of resident aliens' obligations (including the duty to abide by US laws and pay US taxes) and their contributions to American economy and society. Once again, the Court defined the *Sugarman* language in a remarkably expansive way, to include within minimum scrutiny a state's choice to limit low-level government employee positions to citizens only, even though such employees had nothing to do with making law, but merely because such employees exercise "discretion" in their work.

Perhaps no justice was more dismayed at this turn of events than Justice Blackmun, who had penned the *Sugarman* decision and then had to watch as a conservative majority, as he stated in dissent, twisted its meaning to allow the so-called "*Sugarman* exception" to "swallow the

[92] 490 F.Supp. 984, June 4, 1980.

[93] Clarence E. CABELL, v. Jose CHAVEZ-SALIDO, Ricardo Bohorquez and Pedro Luis Ybarra, Appellees., 1981 WL 390434 (U.S.), 17-18.

[94] Cabell v. Chavez-Salido, 454 U.S. 432, 445, 102 S. Ct. 735, 743, 70 L. Ed. 2d 677 (1982)

*Sugarman* rule."[95] As he wrote in no uncertain terms, "In my view, today's decision rewrites the Court's precedents, ignores history, defies common sense, and reinstates the deadening mantle of state parochialism in public employment." Justice Stevens, who, along with Marshall and Brennan, signed on to Blackmun's dissent, was in full agreement, writing in a memo to Blackmun: "After reading your opinion, I am tempted to suggest that your characterization of the Court's analysis as 'constitutionally absurd' is almost an understatement."[96]

## V. AN UNFINISHED REVOLUTION

By the early 1980s, the equal protection consensus on the Court had crumbled. The dual standard proclaimed by *Foley* and expanded by *Ambach* and *Chavez-Salido* became the new norm in alienage law. States appeared to be able to restrict almost any public job to citizens only if they could merely meet rational basis review. The last major case that the Court would hear on this issue — *Bernal v. Fainter* (1984) — came out in favor of the noncitizen, holding that "clerical or ministerial" positions, including that of notary public, did not fall within the "political community" or "government function" exception and so could not be restricted to citizens-only, unless the state could demonstrate a compelling reason to do so. At least with this case it was clear that there was some outer bound, however far, to the Court's definition of a political function.

But what of private employment, or other forms of state-based discrimination? In theory, the Court was still willing to apply strict scrutiny to any such forms of private employment discrimination. Given the trends of the 1970s, including the significant wins for litigants in defending their rights to be lawyers, doctors, engineers, physical therapists, and a host of other positions, one might expect that the state provisions barring nonresidents from such positions would be definitively phased out of state law. This did not happen. In fact, citizenship-based restrictions remain in many states. While some of these provisions are apparently artifacts that are not routinely enforced (see, for example, the state of Illinois, which still had a citizenship restriction for bar eligibility until 2017, which was apparently not enforced[97]), others are not a dead letter. [I will elaborate here on the various laws that still remain, despite the high likelihood that they are unconstitutional.]

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[95] 454 U.S. 458 (Blackmun, J., dissenting).

[96] Letter from Justice Stevens to Justice Blackmun, December 31, 1981, in the Burger Court Opinion Writing Database.

[97] But see Illinois law, which up until 2018 still had a citizenship restriction in bar eligibility, which was apparently not enforced. See Plasencia, 17.

In some states, legislatures removed references to citizenship and replaced them with references to legality, so that now only undocumented immigrants face the restrictions that all noncitizens did in the past. [Will describe these laws here, as well as the difficulties in defining who is "legal."][98]

It is hard to come up with another "suspect class" under the Fourteenth Amendment that is still subject to *de jure* discrimination based on that identity in state law. Why did advocates not make more progress on eradicating all of these references to citizenship in areas of private employment? A complete answer to that question is outside the scope of this article, but I can gesture to several factors that likely played a major role in the persistence of these restrictions in state law. First of all, the quartet of Supreme Court cases that struck down restrictions were not self-executing. Lasting legal change required either a willing state legislature — to do the hard work of revising laws to remove those restrictions — or a willing litigant, with necessary financial support, to be able to sue to force the state law into conformity. As the NYCLU found out in the *Kulkarni* litigation, courts were not necessarily willing to certify a class of noncitizens in different areas of employment. This meant that advocates had to challenge each restricted profession with someone in that profession, despite the fact that the discrimination was often part of a broader legislative scheme (like New York's Education Law, which included restrictions on dozens of professions and occupations). By the 1980s, groups like the NYCLU and MALDEF, among many others, found themselves with multiple fights on their hands in the area of immigrant rights. It is not surprising that these contests against alienage discrimination took a back burner, especially when the Court's attitude towards immigrants had changed so dramatically by the end of the decade.

The fight for legislative change was likely even more difficult than mounting a legal challenge in the courts. Why would a state legislature prioritize the revision of these laws when the people who most stood to benefit did not themselves vote? Legislative efforts on this front were increasingly unpopular during a time of increasing hostility to immigrants. In the 1980s, a potent mix of issues pointed towards restriction rather than expansion of rights. As one scholar noted in 1982, "State legislators face mounting pressure to restrict the availability of state licenses and employment opportunities to United States citizens because of recession, inflation, severe

[98] The inclusion of this term reflected the growing awareness and preoccupation with "illegal immigration" in the 1970s and 1980s. It was something that was clearly on the minds of Supreme Court justices when they heard *Chavez-Salido*, since in the same term they also heard *Plyler v. Doe*, the first case to squarely address the civil rights of those in the country without authorization. Justice Sandra Day O'Connor made a point of making sure that whatever ruling they issued in *Chavez-Salido* did not imply any rights for the undocumented; she sent multiple edits and corrections to Justice White to make sure the ruling characterized past cases as upholding rights only for legal resident aliens. These characterizations were anachronistic and incorrect — *Takahashi*, for example, said nothing about legality — and yet O'Connor encouraged White to characterize them as such.

unemployment and the influx of refugees."[99]

Another factor in this persistence bears mention. The losses in *Foley*, *Ambach* and *Chavez-Salido* led some advocates and scholars to abandon the Fourteenth Amendment as a source of limitation on alienage discrimination and to turn instead to the Supremacy Clause. Advocates had made preemption arguments in the 1970s, but courts commonly did not reach them since they ruled instead on the basis of equal protection. After the 1970s, more immigrant advocates looked to preemption as a way to stop unlawful state action. The pros and cons of this shift are well represented in the literature, but I would go further to posit that the persistence of discriminatory legislation is due in part to a premature, but strategic, abandonment of equal protection arguments in light of a hostile Supreme Court.[100]

## CONCLUSION

The 1970s represented a watershed moment in noncitizen rights, when immigrants and their attorneys convinced courts to overturn decades of constitutional law precedent, and judicial opinions openly criticized the nativist stereotypes of foreigners that had given rise to discriminatory laws in the first place. Scholars and legal commentators have not appreciated the breadth and depth of this litigation, brought by a range of individuals and groups, from intrepid individuals like refugee Dalil Park in Alaska, to national organizations like the ACLU, to a variety of regional legal aid groups. These lawyers and litigants were able to seize a moment of constitutional possibility to bring noncitizens into the fold of Fourteenth Amendment protection, a guarantee that had first appeared in *Yick Wo v. Hopkins* in 1886 but had been routinely sidestepped or contradicted in the ensuing decades, as courts upheld states' rights to discriminate. After the victory in *Graham v. Richardson* and the cases that immediately followed, it was clear that noncitizens had entered the modern constitutional landscape. They succeeded in creating significant legal victories without a large-scale social movement to back these efforts.

But, as we have seen, this rights revolution was only a partial one. The announcement of suspect classification was eroded by the decisions the Court issued late in the decade, and still to this day there are laws in many states that discriminate based on citizenship. The reasons for this shift from the broad protection of *Graham* were both intrinsic and extrinsic to the struggle.

[99] Joy B. Peltz, State Prohibitions on Employment Opportunities for Resident Aliens: Legislative Recommendations, 10 Fordham Urb. L. J. 699, 700 (1981).

[100] see State Burdens on Resident Aliens: A New Preemption Analysis, 89 Yale L.J. 940 (1980), and references therein

Certainly the jurisprudential shifts in alienage law between *Graham* and *Chavez-Salido* were related to the rise on the Court of federalism as a guiding judicial ideology, as well as the fear of some on the Court of an over-proliferation of rights more generally. Justice Powell noted this concern in a speech at the *Virginia Law Review* banquet in 1978, blaming an overload of cases before the federal courts on the Court's "expansive interpretations." As he quipped, "We have refurbished rights that lay dormant. We have even invented a few new ones."[101] The story of alienage law is part of this broader story of retrenchment in equal protection jurisprudence.

Could the outcome have been different if litigants and their advocates had approached the issue in another way? It is an unfair question to ask, given that they worked within the world of what they knew at the time, but the answers are nevertheless illuminating. From the very start, Justices were thinking about how expanding economic rights under equal protection would impact political rights, particularly the right to vote. Litigants did not seem to have any unified theory to offer on this front. The effort to expand those political rights in *Park*, *Skafte* and *Perkins* were brave efforts to articulate the importance of resident aliens in their communities, but this litigation also likely backfired by confirming fears of exactly this sort of threat (and it is notable that *Perkins* and *Skafte* are cited in all three of the cases that later hold against the noncitizen plaintiffs). The range and variety of groups bringing litigation could be a good thing, since it expanded the number of challenges in the courts across the country, but it also could be a liability, since the lack of coordination among litigation meant that no hand was at the tiller, so to speak, guiding overall strategy in the litigation for alien rights. In retrospect, it is easy to see, for example, that a case involving police officers, which unlike lawyers was a highly common one to be limited to citizenship, might ultimately make bad constitutional law for noncitizens, but there was no overarching group that was attempting to pick and choose the best cases to bring, or control the timing of those cases.

Ultimately, it was difficult for advocates to navigate the rocky shoals of citizenship. The hard-fought struggle for full inclusion for women and racial minorities in the voting booth and jury box was characterized as a fight for the core rights of citizenship. These rights were identified frequently as the pinnacle of what it meant to be a citizen. That association was hard to break for noncitizens, who claimed a right to participate based not on formal citizenship but on a more expansive notion of belonging that transcended those binary categories. In a time of great emphasis on citizenship, citizenship itself proved a liability for furthering the rights of all people in the country.

[101] The Lawyer as a Citizen.