

THE UNFINISHED REVOLUTION FOR IMMIGRANT CIVIL RIGHTS

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ABSTRACT

*The Supreme Court's landmark 1971 decision in *Graham v. Richardson*, which declared 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. Noncitizens 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 after just a few years, the inclusion of noncitizens in equal protection doctrine took a surprising turn, as the Court backtracked from expansive protections and created an exceptional "dual standard" for alienage discrimination. As a result, noncitizens were pushed outside the fold of robust Fourteenth Amendment protection. Today, states continue to bar immigrants – both documented and undocumented – from a wide range of professions, economic activities, and forms of political engagement, based on their lack of citizenship. This article is the first legal history to examine equal protection doctrine as it relates to noncitizens during this pivotal era. Drawing on extensive primary source material from the archives of advocacy organizations, the papers of Supreme Court Justices, and more, the article looks at the development of doctrine from the standpoint of the litigants and lawyers who made the movement. In so doing, it provides crucial context for understanding the history of the Equal Protection Clause and the continued struggles for immigrant rights today.*

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.¹

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¹ *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *New Scholarship Celebrates Anthony ('65) and Nancy Ching*, LETTER OF THE LAW (Univ. Ariz. James E. Rogers Coll. L.), Nov. 28, 2018, <https://lotl.arizona.edu/NOV282018.htm> [<https://perma.cc/QTR7-GXTU>].

Although the Court famously held in the 1886 case of *Yick Wo v. Hopkins* that noncitizens were “persons” and thus entitled to the protections of the Fourteenth Amendment, this decision did little to restrain states from passing discriminatory legislation.² Up until the 1970s, 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.³ 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.⁴ 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 state barred noncitizens from practice.⁵ The Court’s ruling 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.⁶

Ching’s success in *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

² *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886); Allison Brownell Tirres, *Exclusion from Within: Noncitizens and the Rise of Discriminatory Licensing Laws*, 49 LAW & SOC. INQUIRY (forthcoming 2024); PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 36 (2015) (noting that “equivocation from the Court’s decision in *Yick Wo* began soon after that case was decided”).

³ See Michael Cornelius Kelly, *A Wavering Course: United States Supreme Court Treatment of State Laws Regarding Aliens in the Twentieth Century*, 25 GEO. IMMIGR. LAW J. 701,740 (2017); Allison Brownell Tirres, *Exclusion from Within: Noncitizens and the Rise of Discriminatory Licensing Laws*, 49 LAW & SOC. INQUIRY (forthcoming 2024); Note, *1947-48 Term of the Supreme Court: The Alien’s Right to Work*, 49 COLUM. L. REV. 257 (1949).

⁴ *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 422 (1948).

⁵ *Centennial Snapshot -- An Alum Recalls Dean Lyons*, LETTER OF THE LAW (Univ. Ariz. James E. Rogers Coll. L.), Aug. 12, 2015, <https://otl.arizona.edu/aug122015.htm> [<https://perma.cc/J4Z4-KC29>].

⁶ *Graham*, 403 U.S. at 372 (“Aliens as a class are a prime example of a ‘discrete and insular minority.’”).

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.⁷

Yet almost as soon as these victories were celebrated, litigants and attorneys found themselves on the defensive again. 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.⁸ Litigants suffered a series of setbacks. The doctrine that resulted is a strange outlier in equal protection today, a “dual standard” that treats noncitizens as a “discrete and insular minority” deserving of strict scrutiny only in certain instances and allowing rational basis review in others.⁹

The shift in the doctrine—from the sweeping strict scrutiny analysis in *Graham* to the return to rational basis review 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.¹⁰ Political scientists and constitutional law scholars typically point to the conservative shift on the Court over the course of the 1970s and 1980s—towards an ideology of federalism and away from equality—as the primary reason for this

7 Luis Plascencia, Gary P. Freeman & Mark Setzler, *The Decline of Barriers to Immigrant Economic and Political Rights in the American States: 1977-2001*, 37 INT'L MIGRATION REV. 5, 6 (2003); DAVID CARLINER, THE RIGHTS OF ALIENS: THE BASIC ACLU GUIDE TO AN ALIEN'S RIGHTS 126 (Norman Dorsen & Aryeh Neier eds., 1977) (noting that some state discriminatory laws persisted despite being unconstitutional).

8 PRATHEEPAN GULASEKARAM & S. KARTHICK RAMAKRISHNAN, THE NEW IMMIGRATION FEDERALISM 47 (2015) (“These cases created exceptions to *Graham*'s equal protection guarantee for noncitizens, providing a safe harbor for state and local laws that discriminated against noncitizens . . .”).

9 See *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1518 (1979); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 707 (1996) (“The Court's review [of alienage classifications] ranges from the strict scrutiny normally associated with suspect classifications to a near abdication of any judicial review responsibilities”); Jenny Broke Condon, *Equal Protection Exceptionalism*, RUTGERS U.L. REV. 563, 563 (2017) (“Equal protection doctrine addressed to immigrants' rights is thoroughly exceptional”). But see Gerald Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1431 (1995) (noting that there are other areas, besides alienage, where the Court has applied a non-uniform standard of review).

10 *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *Ambach v. Norwick*, 441 U.S. 1589, 1593 (1979); Allison Brownell Tirres, *The Immigrant Rights Revolution that Wasn't: Alienage, the Supreme Court, and the 1970s* (unpublished manuscript) (on file with the author).

retrenchment in rights.¹¹ But this Court-centric explanation is too simplistic. It fails to take seriously the ways that the shape, structure and timing of the litigation contributed to the outcome. Greater attention to what was happening both inside and outside the Court's chambers provides a more comprehensive story of legal change. This article is the first to provide that perspective, drawing on extensive primary source research into the organizations and actors fighting for noncitizen civil rights as well as the court filings, oral argument transcripts, and papers of the Justices who heard these cases.¹² It highlights the magnitude of the shift in thinking about noncitizens that this litigation occasioned while also explaining the difficulties that litigants faced in light of an increasingly hostile Court. The advocates' vision of equality, I argue, was stymied by factors both intrinsic and extrinsic to the litigation.

The successes and failures of this effort to bring noncitizens into the constitutional fold are illuminating. Unlike other efforts at legal change in the courts during the civil rights era—like those led by the NAACP or the ACLU Women's Rights Project—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. And unlike the litigation seeking Black freedom or women's liberation, in the

¹¹ See MICHAEL J. GRAETZ AND LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 341 (2016) (arguing that with the Burger Court, unlike the Warren Court, “equality took a backseat to other values: to the prerogatives of states and localities within the federal system, to the preservation of elite institutions, to the efficiency of the criminal justice system, to the interests of business, and, above all, to rolling back the rights revolution the Warren Court had unleashed”).

¹² 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, for example, but little attention has been paid to this parallel, and sometimes intersecting, fight for noncitizen rights against state discrimination. Several legal scholars have examined the Burger Court's alienage rulings in depth, including most notably Elizabeth Hull, Earl M. Maltz, and Michael Scaperlanda. For the most part, their work focuses on developments in, and critiques of, the doctrine rather than on the litigants, lawyers, and litigation strategies in the cases. See generally Elizabeth Hull, *Resident Aliens and the Equal Protection Clause: The Burger Court's Retreat from Graham v. Richardson*, 47 *BROOK. L. REV.* 1,4 (1980); Elizabeth Hull, *Resident Aliens, Public Employment and the Political Community Doctrine*, 36 *W. POL. Q.* 221 (1983); ELIZABETH HULL, *WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS* (1985); Earl M. Maltz, *The Burger Court and Alienage Classifications*, 31 *OKLA. L. REV.* 671, 671 (1978); Earl M. Maltz, *Citizenship and the Constitution: A History and Critique of the Supreme Court's Alienage Jurisprudence*, 28 *ARIZ. STATE L.J.* 1135, 1136 (1996); Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 *IOWA L. REV.* 707, 707 (1996).

case of noncitizens there was no corresponding social movement, at least not on the same scale or with the same focus.¹³

To be sure, there were multiple fronts in the effort to expand rights for immigrants in the 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.¹⁴ 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. The federal immigration enforcement bureaucracy was expanding, with little constraints on the power of the agency to detain and deport migrants.¹⁵ This meant that long-standing organizations like the American Committee for the Protection of the Foreign Born (“ACFPB”) 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.¹⁶

As this article shows, this movement for noncitizen civil rights, outside the immigration law context, was largely uncoordinated and decentralized,

¹³ On the strategies and social movements of these groups, *see generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004) (documenting the role of the Supreme Court in civil rights for African Americans); Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsberg and the ACLU Women’s Rights Project*, 11 TEX. J. WOMEN AND L., 157, 158 (2003) (documenting Justice Ginsberg’s contributions to women’s rights); SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW AND THE CIVIL RIGHTS MOVEMENT 2 (2011) (analyzing the comparisons and contrasts between African American civil rights and LGBTQ civil rights).

¹⁴ On efforts to expand protections for immigrants in the immigration system, *see, e.g.*, RACHEL BUFF, AGAINST THE DEPORTATION TERROR: ORGANIZING FOR IMMIGRANT RIGHTS IN THE TWENTIETH CENTURY (2018).

¹⁵ *See e.g.*, MAE NGAL, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 258–64 (2004) (describing shifts in federal immigration enforcement agencies throughout different decades); ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS 135–46 (2020) (exploring historical movements and responses to federal immigration policies).

¹⁶ *See also* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 42 (1985) (noting that “there had been little organized movement by or on behalf of resident aliens” preceding *Graham*).

without a center of gravity to guide strategy. In this way, it bears some resemblance to the movement to challenge vagrancy laws in the 1960s. As Risa Goluboff shows, that movement was “improvisational, cumulative and only loosely networked”; it was not explicitly planned or organized.¹⁷ But those fighting for noncitizen civil rights faced an additional conceptual hurdle: explaining how expanding rights for noncitizens would not threaten traditional understandings of citizenship. This civil rights struggle triggered profound questions not only about state power vis-à-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.¹⁸ But analogies to race had hidden pitfalls.¹⁹ The noncitizen civil rights litigation presented a potentially much more radical premise than the fights for racial justice or against vagrancy laws, since it stoked fears that expanding rights for noncitizens would diminish the importance of citizenship itself.

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.”)²⁰ The Court was part of what historian Mae Ngai identifies as an overall trend towards the “valorization of citizenship” after World War II.²¹ This emphasis on the importance of citizenship made it more difficult to argue for the rights of aliens. While noncitizens and their attorneys were

¹⁷ RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE AND THE MAKING OF THE 1960s, at 7-8 (2016).

¹⁸ Noncitizens were not the only group in the 1970s looking to the Black civil rights movement as a guide; disability activists took a similar approach. See Christopher D. Schmidt, CIVIL RIGHTS IN AMERICA: A HISTORY 131 (2021).

¹⁹ See SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION (2011) (analyzing the pitfalls of using race analogies in the fight against sex discrimination in the law).

²⁰ *Perez v. Brownell*, 356 U.S. 44, 64 (1958). Although Warren was writing in dissent, his view was later followed by the Court when it overruled *Perez* in *Afroyim v. Rusk*, 387 U.S. 253 (1967). On the growth of protections for citizenship more generally, see PATRICK WEIL, THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC (2013).

²¹ NGAI, *supra* note 15, at 229.

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.

Appreciation for all of these challenges makes the accomplishments of these lawyers and litigants all the more impressive. We should not lose sight of the fact that despite these setbacks and shortcomings—including the odd “dual standard” in alienage and equal protection—immigrants and their advocates were able to make major lasting change in the 1970s, firmly shifting the constitutional relationship between noncitizens and state power. These accomplishments, as well as these enduring struggles, are overdue for attention from legal scholars and historians.

In what follows, I offer an interpretive account of the struggle for noncitizen rights in the civil rights era. One of the key discoveries is the extent to which litigation for the economic rights of aliens was tied to litigation for other rights, including rights to welfare and against age discrimination. Part I begins with the lead up to *Graham v. Richardson*, explaining 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*.²² But, as this section demonstrates, behind the surface of the decisions lingered thorny questions about where to place the constitutional line between citizens and aliens, and whether guaranteeing economic rights necessarily required guaranteeing political

²² *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973).

rights. Despite benefitting from the strong tailwinds of the Warren Court era, those fighting for noncitizen rights faced a difficult challenge in trying to identify the outer limits of rights for noncitizens.

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 of the decade, the Court had adopted the dual standard for alienage review, replacing the prior "state public interest" doctrine with the "political community" and "government function" doctrines. Some advocates lost their faith in equal protection as a claim, turning instead to the Supremacy Clause and arguments about federal preemption to attack discriminatory state legislation.²³

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. Part V describes the persistence of discriminatory legislation in the states despite apparent unconstitutionality. There are still state laws on the books today that discriminate on the basis of citizenship. Those who support a more

²³ Immigration scholars have debated the usefulness of civil rights frameworks for many years. As Hiroshi Motomura writes, "the framing of immigrants' rights in civil rights terms has been halting and very incomplete." Hiroshi Motomura, *The New Migration Law: Migrants, Refugees, and Citizens in an Anxious Age*, 105 CORNELL L. REV. 457, 464 (2020). See also Jenny Broke Condon, *The Preempting of Equal Protection for Immigrants*, WASH. & LEE L. REV. 77-164 (2016) (arguing that it is more important to focus on answering critical civil rights questions than questions of legal theory).

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.²⁴ 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.²⁵

The revolution continues today. There are still opportunities to transform the relationship between immigrants and equal protection by ferreting out instances of baseless, irrational discrimination against noncitizens and developing doctrine that aptly reflects the considerable contributions of these residents to the American economy and polity. Understanding the successes and failures of the 1970s moves us further forward towards that future possibility.

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 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

²⁴ But see the new measure granting legal permanent residents the right to vote in municipal elections in New York City. Grace Ashford, *Noncitizens' Right to Vote Becomes Law in New York City*, N.Y. TIMES (Jan. 9, 2022), <https://www.nytimes.com/2022/01/09/nyregion/noncitizens-nyc-voting-rights.html> [https://perma.cc/94SU-6G8N].

²⁵ *Chamber of Com. v. Whiting*, 53 U.S. 582 (2011); Allison Brownell Tirres, *Property Outliers: Non-Citizens, Property Rights and State Power*, 27 GEO. IMMIGR. L.J. 77 (2012).

and New Deal created an unprecedented social safety net for many Americans. For the most part, those programs were not initially limited by citizenship.²⁶ 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.²⁷ 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.²⁸ 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. 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.²⁹

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 1969.³⁰ In *Shapiro*, the Court struck down durational residency requirements based on a

²⁶ See Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, 102 J. AMER. HIST. 1051, 1053 (2016) (“When the modern welfare state was established in 1935 no federal laws barred non-citizens, even unauthorized immigrants, from social assistance.”). Fox notes that although states were given the option, prior to 1971, to adopt alienage-based restrictions on programs that depended on state and federal aid, few did so. *Id.* For a discussion of alienage and public assistance programs more generally see CYBELLE FOX, *THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE, FROM THE PROGRESSIVE ERA TO THE NEW DEAL* (2012).

²⁷ Oral Argument at 1:10:29, *Graham v. Richardson*, 403 U.S. 465 (1971) (No. 609), <https://www.oyez.org/cases/1970/609> [<https://perma.cc/63AT-8DEC>].

²⁸ The six other states were Colorado, Florida, Indiana, New Hampshire, North Dakota, South Carolina, and Texas. Fred P. Graham, *Welfare Rights of Noncitizens to Be Considered by High Ct.*, N.Y. TIMES, Dec. 15, 1970, at 32.

²⁹ COLO. CONST. art. XXIV, § 3; COLO. REV. STAT. ANN. §§ 101-1-4(1)(a)(f), -5(1)(a)(c) (1963). This provision was ruled unconstitutional in *Gonzales v. Shea*, 403 U.S. 927 (1971).

³⁰ 394 U.S. 618, 636 (1969).

fundamental right to travel, as guaranteed by the Fourteenth Amendment due process clause.³¹

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.³² 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.³³ The same was true for noncitizens seeking aid. Carmen Richardson, an immigrant from Mexico, had lived in Arizona for thirteen years, which was two years shy of the fifteen-year residency requirement for noncitizens to receive benefits for the disabled and elderly under state law.³⁴ Richardson sought out help from the Legal Aid Society of the Pima County Bar Association, where she met Anthony Ching, who had graduated from the University of Arizona Law School and become a legal aid attorney just a few years before.³⁵

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.³⁶ 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.³⁷ Unable to rely on her spouse for support, since he was also disabled, and facing eviction, Leger turned to Jonathan Stein, a lawyer with Community Legal Services, for help.³⁸

³¹ *Id.*

³² See generally MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993) (showcasing the variety of lawyers who devoted their lives to serving low-income clients).

³³ *Id.* at 79.

³⁴ *Graham v. Richardson*, 403 U.S. 365, 367–68 (1971).

³⁵ Alejandra Cardenas Cuestas, *Arizona Law to Honor Six Distinguished Alumni at 2017 Lifetime Achievement Awards*, Aug. 15, 2017, <https://law.arizona.edu/news/2017/08/arizona-law-honor-six-distinguished-alumni-2017-lifetime-achievement-awards> [<https://perma.cc/G9AB-RS7D>]; *New Scholarship Celebrates Anthony ('65) and Nancy Ching*, LETTER OF THE LAW (Univ. Ariz., James E. Rogers Coll. L.), Nov. 28, 2018, <https://lotl.arizona.edu/NOV282018.htm> [<https://perma.cc/U9VX-DDM2>].

³⁶ Brief for Appellees at 3, *Sailer v. Leger*, 403 U.S. 365 (1971) (No. 727), 1971 WL 147104.

³⁷ *Graham v. Richardson*, 403 U.S. 365, 369 (1971).

³⁸ *Graham*, 403 U.S. at 369; *Jonathan Stein*, COMM. LEGAL SERVS., <https://clsphila.org/cls-staff/jonathan-stein/> [<https://perma.cc/S93Z-AVCU>] (last visited Jan. 30, 2023).

Ching and Stein both brought their cases as class actions, and both prevailed in federal district court.³⁹ 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 wound 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 Center was the brainchild of attorney Ed Sparer, who was known as the “guru” of the welfare rights movement.⁴⁰ 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 and also filed amicus briefs on behalf of LSEP.⁴¹

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.⁴² From the very first sentence of the opinion, the influence of *Shapiro* is clear; Justice Blackmun begins, simply, “[t]hese are welfare cases.”⁴³ 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,”⁴⁴ whereas the classifications used in Arizona and Pennsylvania to restrict access to welfare, Blackmun

³⁹ Richardson v. Graham, 313 F. Supp. 34 (D. Ariz. 1970); Leger v. Sailer, 321 F. Supp. 250 (E.D. Pa. 1970).

⁴⁰ See KRIS SHEPARD, POVERTY LAWYERS AND POOR PEOPLE IN THE DEEP SOUTH (2001) (Ph.D. dissertation, Emory University) (ProQuest) (“The Center on Social Welfare Policy and Law was among the earliest legal services grantees and at the center of the ‘welfare rights’ litigation of the late 1960s. Ed Sparer became the Center’s director and, one writer has suggested, the country’s ‘welfare law guru.’”).

⁴¹ Brief for the Legal Servs. For the Elderly Poor as Amicus Curiae Supporting Respondents, Graham v. Richardson, 403 U.S. 365 (1971). Robert Borosody noted in 1969 that LSEP was “cooperating on several suits aimed at residency requirements for aliens in state old age assistance programs.” *Legal Research and Services for the Elderly, A New Program of Legal Services for the Aged: Progress and Prospects*, 3 CLEARINGHOUSE REV. 157, 160 (1969).

⁴² Jon R. Waltz, *The Burger/Blackmun Court*, N.Y. TIMES MAG., Dec. 6, 1970, at 312; *Harry Blackmun*, SUP. CT. HIST. SOC’Y, <https://supremecourthistory.org/associate-justices/harry-a-blackmun-1970-1994/> [<https://perma.cc/6C7U-FD9Z>] (last visited Jan. 30, 2023).

⁴³ *Graham*, 403 U.S. at 366.

⁴⁴ *Id.* at 375.

wrote, “are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired.”⁴⁵ 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.”⁴⁶ 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 *Carolene Products* footnote four, which gave birth to modern equal protection jurisprudence.⁴⁷ 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.”⁴⁸ 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.⁴⁹ 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

⁴⁵ *Id.* at 376.

⁴⁶ *Id.* at 371–72.

⁴⁷ *Id.* at 372; *United States v. Carolene Prods. Co.*, 304 U.S. 152 n.4 (1938). On the impact of footnote four, see, for example, J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

⁴⁸ Waltz, *supra* note 42, at 312. See also LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* (2005).

⁴⁹ See *Truax v. Raich*, 239 U.S. 33, 39–40 (1915) (noting that a state’s “special public interest” could include “the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States”); *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 417 (1948) (“California now urges, and the State Supreme Court held, that the California fishing provision here challenged falls within the rationale of the ‘special public interest’ cases . . .”).

occupation, and participate in various commercial activities.⁵⁰ Until *Graham*, with very few exceptions, courts had upheld these restrictions as valid uses of state power.⁵¹ *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 Nixon appointees under the chief justiceship of Warren Burger.⁵² Not only that, the decision was unanimous, with agreement from conservatives like Chief Justice 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.⁵³ The right to equality for women and racial

⁵⁰ On alienage restrictions in American law, see DAVID CARLINER, *THE RIGHTS OF ALIENS: THE BASIC ACLU GUIDE TO AN ALIEN’S RIGHTS* 126–28 (Norman Dorsen & Aryeh Neier eds., 1977) (detailing the state laws that restrict aliens’ right to work); JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* (Rev. ed. 2002) (recounting how American nativism shaped immigration); MILTON R. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* (1946) (comparing the legal treatment of aliens and American citizens of Asiatic origin); KUNAL PARKER, *MAKING FOREIGNERS: IMMIGRATION AND CITIZENSHIP LAW IN AMERICA, 1600–2000* (2015); Allison Brownell Tirres, *Ownership without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1 (2013) (fleshing out the property rights of noncitizens and the persistence of property right restrictions for noncitizens); Allison Brownell Tirres, *Exclusion from Within: Noncitizens and the Rise of Discriminatory Licensing Laws*, 49 LAW & SOC. INQUIRY (forthcoming 2024) (examining how reformers and government actors restricted noncitizens’ access to the workplace and market through state and local licensing laws).

⁵¹ Michael Cornelius Kelly, *A Wavering Course: United States Supreme Court Treatment of State Laws Regarding Aliens in the Twentieth Century*, 25 GEO. IMM. L.J. 701 (2017); Marian Schibbsby, *Aliens and the Right to Work with Special Reference to the Professions and Licensed Occupations*, 17 INTERPRETER RELEASES 359 (1940).

⁵² See, e.g., Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 SUP. CT. REV. 275, 298 (1977). This phenomenon extended to other groups as well, as legal scholars have noted. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 253–254 (1991) (“By the 1970s . . . a markedly more conservative set of Justices scarcely batted a collective eyelash at extending meaningful equal protection review to groups — women, aliens, and non marital children — plainly not among the contemplated beneficiaries of the Fourteenth Amendment.”).

⁵³ See *Afroyim v. Rusk*, 387 U.S. 253, 257 (1967) (“[W]e reject the idea . . . that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen’s citizenship without his assent.”).

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 valorize citizenship itself, or was it, instead, a zero-sum game, where expanding the rights of one group necessarily contracted the importance of the other?⁵⁴

Both of these facets—the Justices’ 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: “[d]oes that mean that the aliens vote in the United States?,” he asked.⁵⁵ 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.⁵⁶

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 discriminatory welfare law in 1939. Chief Justice Burger interjected to ask whether preventing noncitizens from voting or holding office was also “rooted in some form of the same kind of hostility” toward foreigners.⁵⁷ 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.⁵⁸ But Justice White brought Stein back to the

⁵⁴ See, e.g., Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?* 75 MICH. L. REV. 1092, 1133 (1977) (“Every time one of those rights or obligations is passed on to aliens the gap between citizens and aliens narrows.”).

⁵⁵ Oral Argument at 24:42, *Graham v. Richardson*, 403 U.S. 465 (1971) (No. 609), <https://www.oyez.org/cases/1970/609> [<https://perma.cc/VTL3-VH5B>].

⁵⁶ *Id.* at 37:09.

⁵⁷ *Id.* at 1:11:11.

⁵⁸ *Id.* at 1:11:34.

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?

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.⁵⁹

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?"⁶⁰

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."⁶¹

Despite this cautionary warning, these issues of voting and public office-holding only obliquely made their way into the *Graham* opinion itself. Blackmun's notes during oral argument record his summary of Stein's argument ("voting area is somewhat different"), but in drafting the final decision he did not linger on this issue.⁶² But the questions the Justices asked during oral argument reveal what was on their minds as they considered the rights of noncitizens, as well as their apparent dissatisfaction with the answers they were given. Neither Ching nor Stein provided a clear answer for where

⁵⁹ *Id.* at 1:18:11.

⁶⁰ *Id.* at 39:31.

⁶¹ *Id.* at 1:05:40.

⁶² *Blackmun Oral Argument Notes 1970*, UNIV. MINN., 70-609 <http://users.polisci.umn.edu/~trj/OAnotesbyterm75/HAB75/1970%20term/70-609.jpg> [<https://perma.cc/D4Q3-4XFT>].

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 *amici* who had more extensive experience with immigrant advocacy. The Association of Immigration and Nationality Lawyers, the American Civil Liberties Union (“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.⁶³ 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 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 equal protection 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.⁶⁴ A week after the announcement, the Court vacated

⁶³ See Brief of Ass’n of Immigr. and Nat’y Lawyers as Amicus Curiae Supporting Respondents, *Sailer v. Leger*, 403 U.S. 365 (1971) (No. 727), 1971 WL 147103; Brief for Migration and Refugee Servs. & U.S. Catholic Conference, Inc. et al. as Amicus Curiae Supporting Respondents, *Sailer v. Leger*, 403 U.S. 365 (1971) (No. 727), 1971 WL 133396.

⁶⁴ That is, until the federal government authorized them to do so in 1996, with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act. See Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493, 494-95 (2001) (“The 1996 Welfare Act facially authorizes, but does not require, states to deny a range of public benefits to permanent resident aliens, an invitation that some states have already accepted and that others surely will.”).

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.⁶⁵ Numerous state attorneys general issued opinions noting that their welfare statutes were in conflict with the new ruling, and state lawmakers and regulators worked to amend the laws accordingly.⁶⁶ 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.⁶⁷ As one commentator noted in 1975, states apparently “do not trust aliens with animals, a corpse, or even a person’s hair or beard.”⁶⁸

These laws persisted despite the fact that in 1948 the Supreme Court had struck down a California law that barred aliens ineligible for citizenship from obtaining commercial fishing licenses.⁶⁹ Since essentially only Asian

⁶⁵ *Gonzales v. Shea*, 403 U.S. 927 (1971); see also *Machado v. Dep’t of Health & Rehab. Servs.*, 357 F. Supp. 890, 891, 894 (S.D. Fla. 1973) (striking down Florida Medicaid statute that limited benefits to citizens or those resident in the state for at least 20 years).

⁶⁶ See, e.g., Op. No. CM-1035, 1971 Tex. Att’y Gen. Reps. and Ops. 5047 (1971). As Cybelle Fox discusses, state welfare administrators in Texas and Arizona amended their regulations after the *Graham* ruling by removing exclusions based on citizenship and replacing these with exclusions based on legal status. Cybelle Fox, “The Line Must Be Drawn Somewhere”: *The Rise of Legal Status Restrictions in State Welfare Policy in the 1970s*, 33 STUDS. AM. POL. DEV. 275, 278 (2019).

⁶⁷ DAVID CARLINER, THE RIGHTS OF ALIENS: THE BASIC ACLU GUIDE TO AN ALIEN’S RIGHTS 126 (Norman Dorsen & Aryeh Neier eds., 1977); Herman I. Branse, *State Laws Barring Aliens from Professions and Occupations*, 3 I.N.S. MONTHLY REV. 281 (1946); Grover H. Sanders, *Aliens in Professions and Occupations—State Laws Restricting Participation*, 16 I & N REP. 37, 37 (1968).

⁶⁸ Simona F. Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Prot.*, 2 HASTINGS CONST. L. Q. 1029, 1037 (1975).

⁶⁹ *Takahashi v. Fish & Game Comm’n*, 334 U.S. 410, 420-21 (1948).

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).⁷⁰ In *Takahashi v. Fish and Game Commission*, the Court invalidated California's licensing restriction, casting some doubt on the special public interest doctrine itself.⁷¹ On its face *Takahashi* was a major victory for noncitizen rights, since the Court acknowledged that the Fourteenth Amendment protected noncitizens against state-sponsored discrimination based on "alienage or color."⁷² But the case had limited precedential effect, since the Court did not explicitly overrule its prior decisions in other cases regarding noncitizen private and public employment or property ownership. The holding did not make much of a dent in licensing and employment restrictions in other states in the subsequent years. To the contrary, these restrictions only proliferated. As a study by the Department of Labor concluded in 1968, twenty-seven more professions and occupations had been added to the list since 1953, for a total of eighty-one different occupations that were limited in at least one or more states by the late 1960s.⁷³ These DOL statistics are most certainly an undercount, as later studies and a closer reading of state statutes demonstrate.⁷⁴ For example, California added citizenship restrictions on more than seventy-five different

⁷⁰ *Terrace v. Thompson*, 263 U.S. 197 (1923).

⁷¹ 334 U.S. at 420-21 ("We are unable to find that the 'special public interest' on which California relies provides support for this state ban on Takahashi's commercial fishing To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.").

⁷² *Id.* at 420.

⁷³ Grover H. Sanders, *Aliens in Professions and Occupations— State Laws Restricting Participation*, 16 I & N REPORTER 37, 37 (1968); see also Plascencia, *supra* note 7, at 10 (noting the increase in restricted professions in four states between 1946 and 1977).

⁷⁴ See, e.g., Michael A. Olivas, *Within You Without You: Undocumented Lawyers, DACA, and Occupational Licensing*, 52 VALPARAISO U. L. REV. 65 app. 1, app. 2 (2017) (setting out national data on admissions standards and citizenship or immigration status required for entry into various professions); Janet M. Calvo, *Professional Licensing and Teacher Certification for Non-Citizens: Federalism, Equal Protection and a State's Socio-Economic Interests*, 8 COLUM. J. RACE & L. 33, 40, 43-44, 50-52 (2017) (listing the numerous professions previously requiring citizenship in discussion of New York and California's recent expansion of professional licensing eligibility to non-citizens); Jenessa Calvo-Friedman, Note, *The Uncertain Terrain of State Occupational Licensing Laws for Noncitizens: A Preemption Analysis*, 102 GEO. L.J. 1597 app. 2 (2014) (listing examples of state occupational licensing laws with citizenship or alienage requirements).

public occupations in one year alone, and these are not reflected in the DOL report.⁷⁵

Graham, which was the first alienage discrimination case the Court had heard since *Takahashi*, forced a reckoning that was long overdue. As political scientist Elizabeth Hull observed a decade after the decision, “on the basis of [Graham] thousands of state statutes that discriminate against aliens became constitutionally infirm.”⁷⁶ 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 licensing statutes, ranging from veterinarians to real estate brokers, noting that these citizenship restrictions were unconstitutional. He also included a directive to the state civil service board to end their exclusion of aliens.⁷⁷ In California, the attorney general concluded that citizenship could no longer be required in state law for a range of jobs, including pharmacist, private investigator, psychologist, clinical social worker and insurance broker.⁷⁸

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.⁷⁹ 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.”⁸⁰ The case had 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.⁸¹ Lawyers in Puerto Rico used

⁷⁵ *Chavez-Salido v. Cabell*, 490 F. Supp. 984, 986 (C.D. Cal. 1980) (adopting this definition); *see also* *Chavez-Salido v. Cabell*, 427 F. Supp. 158, 169 n.22 (C.D. Cal. 1977); *Cabell v. Chavez-Salido* 454 U.S. 432, 453 (1982) (Blackmun, J., dissenting) (“[T]he peace officer category encompassed more than 70 public occupations. . .”).

⁷⁶ ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 45 (1985).

⁷⁷ *See* 1971 Penn. Att’y. Gen. Ops. 177 (1971); *see also* Brief of the Commonwealth of Pennsylvania as Amicus Curiae, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222).

⁷⁸ 55 Cal. Att’y. Gen. Ops. 80 (1972).

⁷⁹ *See, e.g.*, *Faruki v. Rogers*, 349 F. Supp. 723 (D.D.C. 1972); *Machado v. Dep’t of Health & Rehab. Serv. of Fla.*, 357 F. Supp. 890 (S.D. Fla. 1973); *Mohamed v. Parks*, 352 F. Supp. 518 (D. Mass., 1973); *Sundram v. City of Niagara Falls*, 357 N.Y.S.2d 943 (Sup. Ct. 1973).

⁸⁰ Oral Argument at 6:15, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222), <https://www.oyez.org/cases/1972/71-1222> [<https://perma.cc/2DQ8-VKL8>].

⁸¹ In some states, immigrants were successful in challenging discriminatory laws before the *Graham* decision was handed down. *See, e.g., In re Park*, 484 P.2d 690, 694-95 (Alaska 1971) (striking down

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.⁸² Rolando Santín 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 Hiram Rafael Cancio of the federal district court could barely disguise his disbelief, noting that the “defendants have lamely tried to justify the discrimination.”⁸³ As he stated, “[w]e 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.”⁸⁴ The court noted that the *Graham* decision mandated “a strict standard of review to guard the interests of the aliens” and that the statute at issue here clearly failed that test.⁸⁵

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 1939.⁸⁶ Of even longer duration was its bar on noncitizen workers on public works projects, which dated from 1894.⁸⁷ 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.⁸⁸ Judge (and later Supreme Court Justice) Benjamin Cardozo, writing for the Court of Appeals in *Crane*, stood by the state’s power to restrict such jobs: “[t]o disqualify aliens is discrimination indeed, but not

a statute preventing aliens from obtaining a license to practice law in Alaska); *Purdy v. State*, 456 P.2d 645, 658-59 (Cal. 1969) (holding unconstitutional a statute that prohibited noncitizens from employment on public works projects).

⁸² *Arias v. Examining Bd. of Refrigeration & Air Conditioning Technicians*, 353 F. Supp. 857, 862 (D.P.R. 1972) (internal quotation marks omitted).

⁸³ *Id.* at 862.

⁸⁴ *Id.*

⁸⁵ *Id.* at 861.

⁸⁶ 1939 N.Y. Laws 1814.

⁸⁷ 1894 N.Y. Laws 1569.

⁸⁸ *People v. Crane*, 108 N.E. 427, 428, 433 (N.Y. 1915), *aff’d* 239 U.S. 175 (1915); *Heim v. McCall*, 108 N.E. 1095 (N.Y. 1915), *aff’d* 239 U.S. 175 (1915).

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.⁸⁹ Furthermore, he argued, “[w]hatever is a privilege, rather than a right, may be made dependent upon citizenship.”⁹⁰ *Graham* did not directly overturn *Crane* or *Heim*, but it opened the doors to doing so by firmly repudiating both the special public interest doctrine and the right/privilege distinction.

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*).⁹¹ 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 access 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 1967.⁹² Fré Le Poole Griffiths was a Dutch lawyer who came to the United States from the Netherlands in the 1960s to work in Washington, D.C. She had an impressive background; her father was a member of the Dutch parliament and both of her parents had been active in the resistance in World War II. (She herself would go on to become

⁸⁹ *Crane*, 108 N.E. at 429.

⁹⁰ *Id.* at 430.

⁹¹ *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973).

⁹² See Sanders, *supra* note 67, at 37; see also Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 SETON HALL CONST. L.J. 103 (1996). New York had a bar on alien attorneys as well. The state filed an amicus brief supporting the state of Connecticut in the case of *In re Griffiths*. Brief of New York Attorney General as Amicus Curiae Supporting Appellee, *In re Griffiths*, 413 U.S. 717 (1973) (No. 71-1336).

a judge and a member of the senate in the Netherlands.)⁹³ 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.⁹⁴ 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.⁹⁵

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 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.⁹⁶

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.⁹⁷ He was still very early in his career when he agreed to help the John and Fré Griffiths. The high court in Connecticut ruled against Griffiths, holding that the citizenship restriction was “not simply reasonable

⁹³ *Fré le Poole*, WIKIPEDIA, https://nl.wikipedia.org/wiki/Fré_le_Poole [https://perma.cc/WS5E-AMZB] (last visited Jan. 11, 2023); *Mr. F. (Fré) le Poole*, PARLEMENT, https://www.parlement.com/id/vg09llpzuazi/f_fre_le_poole [https://perma.cc/VC6S-ATT4] (last visited Jan. 28, 2023).

⁹⁴ Brief of Appellant at 3, *In re Griffiths*, 413 U.S. 717 (1973) (No. 71-1336).

⁹⁵ Dwight Cumming, *Prof's Law Case Aids Aliens*, DAILY SKIFF, Nov. 13, 1973, at 5.

⁹⁶ David Casstevens, *ACLU Lawyer Finds Success, Respect – in Texas*, ALUMNI IN THE NEWS (R.L. Paschal High Sch., Fort Worth, Tex.), July 5, 2006, <https://phs56.com/aclu-lawyer-finds-success-respect-in-texas/> [https://perma.cc/VC6S-ATT4].

⁹⁷ *Id.*

but is basic to the maintenance of a viable system of dispensing justice under our form of government.”⁹⁸

Broiles, who had been a member of the ACLU since 1960, wrote to the organization to ask for their help in appealing the decision to the Supreme Court.⁹⁹ 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 Japanese internment. The ACLU also filed an amicus brief in the *Takahashi* case.¹⁰⁰ 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 almost every state, and a role in most major civil rights and civil liberties issues of the day.¹⁰¹ 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.¹⁰² Nevertheless, ACLU attorneys Joel Gora and Melvin Wulf agreed to help Broiles with the *Griffiths* case.¹⁰³

As Broiles was preparing Griffith’s case for appeal, another case challenging citizenship discrimination was making its way towards the Court. Lester Evens and Jeffrey Stark, staff attorneys for the New York nonprofit Mobilization for Youth Legal Services, 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.¹⁰⁴ The lead plaintiff, Patrick Dougall, was a citizen of what was then called British

⁹⁸ *In re Griffiths*, 294 A.2d. 281, 287 (Conn. 1972).

⁹⁹ Letter from R. David Broiles to Aryeh Neier (Feb. 24, 1972) (on file with the Princeton University Library).

¹⁰⁰ Brief of American Civil Liberties Union as Amicus Curiae supporting petitioner, *Takahashi v. Fish & Game Com’n*, 1948 WL 47437 (U.S.).

¹⁰¹ SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 316 (2d ed. 1999).

¹⁰² See ACLU ANNUAL REPORT 1972–1973, at 21–22 (discussing migrant farm worker rights). The current ACLU Immigrant Rights Project was not established until the 1980s.

¹⁰³ Letter from Joel M. Gora to R. David Broiles (Feb. 25, 1972) (on file with the Princeton University Library).

¹⁰⁴ *Dougall v. Sugarman*, 339 F. Supp. 906, 907 (S.D.N.Y. 1971).

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 and had children who were U.S. citizens.¹⁰⁵

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.¹⁰⁶ 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.¹⁰⁷

The U.S. District Court for the Southern District of New York ruled in favor of Dougall and his coworkers, finding that the *Graham* decision had implicitly overruled the Court's prior decisions in *Heim* and *Crane*.¹⁰⁸ The New York Attorney General, Louis Lefkowitz, decided to appeal the decision to the Supreme Court, and it was heard in the same term as *Griffiths*. 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 Hugo Black and John Marshall Harlan with Justices Lewis Powell and William Rehnquist.¹⁰⁹ As the *New York Times* observed, the addition of these “judicial conservatives,” as Nixon called them, “gave the tribunal a strongly conservative flavor.”¹¹⁰ The fate of this dramatic shift in equal protection doctrine was now in the hands of a distinctly different Court.

¹⁰⁵ *Sugarman v. Dougall*, Appendix 1; see Oral Argument at 44:10, *Sugarman v. Dougall*, 4413 U.S. 634 (1973) (No. 71-1222), <https://www.oyez.org/cases/1972/71-1222> [<https://perma.cc/5VW6-M9WT>].

¹⁰⁶ DAVIS, *supra* note 32, at 26–30.

¹⁰⁷ Robert Sauté, *For the Poor and Disenfranchised: An Institutional and Historical Analysis of American Public Interest Law, 1876 to 1990*, 67 (2008) (Ph.D. Dissertation, City University of New York) (Proquest); DAVIS, *supra* note 32, at 30 (“The aggressive, affirmative use of ‘laws as an instrument of social change,’ patterned after the methods of the NAACP and the American Civil Liberties Union, became the MFY Legal Unit’s credo.”).

¹⁰⁸ *Dougall*, 339 F. Supp. at 909.

¹⁰⁹ MICHAEL J. GRAETZ AND LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* 4–5 (2016).

¹¹⁰ Fred P. Graham, *Powell and Rehnquist Take Seats on the Supreme Court*, N.Y. TIMES, January 8, 1972, at 15; Fred P. Graham, *Profile of the ‘Nixon Court’ Now Discernible*, N.Y. TIMES, May 24, 1972, at 28.

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, as one commentator noted, “dealt a death blow” to 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.¹¹¹ In practice, this meant that a garbage collector had to be a citizen but an aide to the governor did not.¹¹² 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.¹¹³

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).¹¹⁴ State courts were striking down discriminatory state licensing laws, and some state legislatures were moving to remove the restrictions from their statutes.¹¹⁵ 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.

¹¹¹ Rosales, *supra* note 68, at 1044; *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973).

¹¹² Oral Argument at 28:37 and 38:31, *Sugarman v. Dougall*, 413 U.S. 632 (1973) (No. 71-1222), <https://www.oyez.org/cases/1972/71-1222> [<https://perma.cc/5VW6-M9WT>].

¹¹³ Brief for Attorney General of the State of New York at 11, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222), 1972 WL 135787 at *11.

¹¹⁴ *Sanders*, *supra* note 67, at 38–40; *Raffaelli v. Comm. of Bar Exam’rs*, 496 P. 2d 1264 (Cal. 1972); *In re Park*, 484 P.2d 690, 696 (Alaska 1971).

¹¹⁵ *See, e.g.*, *Teitscheid v. Leopold*, 342 F. Supp. 299 (D. Vt. 1971) (striking down a Vermont state law); *Younus v. Shabat*, 336 F. Supp. 1137 (N.D. Ill. 1971) (striking down a college policy denying tenure to non-citizens).

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."¹¹⁶ 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.¹¹⁷ Apparently the strategy was to interpret *Graham* very narrowly despite its broad wording. Attorneys for the state may have anticipated that the new appointees, Justices 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. 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 told a reporter, "[i]n 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.'"¹¹⁸ Broiles took his inspiration from the NAACP. As he later recalled, "[w]e saw the situation of the resident aliens as that of the 20 million blacks in this country, and we based our case on that."¹¹⁹

¹¹⁶ Gerald M. Rosberg, *The Protection of Aliens from Discriminatory Treatment by the National Government*, 1977 S. CT. REV. 275, 298 (1977).

¹¹⁷ Brief for Attorney General of the State of New York at 13, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222); Oral Argument at 14:28, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222), <https://www.oyez.org/cases/1972/71-1222> [<https://perma.cc/5VW6-M9WT>] (contending that "the Equal Protection Clause does not apply because of the Tenth Amendment of the Constitution").

¹¹⁸ Cumming, *supra* note 95, at 5.

¹¹⁹ *Id.*

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, “[t]he 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.”¹²⁰ The Supreme Court of California made the connection directly when overturning a state law that barred noncitizens from licensure as attorneys: “[i]t 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.’”¹²¹ Some characterized the extension of rights to noncitizens as inevitable; *Harvard Law Review* opined that, “[i]n 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.”¹²²

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.”¹²³ 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.”¹²⁴ 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 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

¹²⁰ *Id.*

¹²¹ *Raffaelli v. Comm. of Bar Exam’rs*, 496 P.2d 1264, 1266 (Cal. 1972).

¹²² Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516, 1517 (1979).

¹²³ Memorandum from Justice Douglas to Justice Brennan (March 3, 1973) (on file with author) (quoted in MAYERI, *supra* note 12, at 72).

¹²⁴ Memorandum from Justice Powell to Justice Brennan (March 2, 1973) (on file with author) (quoted in MAYERI, *supra* note 13, at 74).

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 Attorney General, Samuel A. Hirshowitz, who preceded him, quipping, “I really frankly don’t know where to begin . . .”¹²⁵ 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.¹²⁶ 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.”)¹²⁷

They had some good reason to be confident, given the weaknesses in their opponents’ cases. Hirshowitz’s performance as a whole during oral argument was halting and awkward. Justice Marshall made quick work of the state’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.¹²⁸

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

¹²⁵ Oral Argument at 31:35, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222), <https://www.oyez.org/cases/1972/71-1222> [<https://perma.cc/5VW6-M9WT>].

¹²⁶ See Oral Argument at 5:58, *In re Griffiths*, 413 U.S. 717 (1973) (No. 71-1336), <https://www.oyez.org/cases/1972/71-1336> [<https://perma.cc/6P2X-6HSU>] (“We have not found any disabling provisions for an alien to be a United States District Court Judge or to be on the Supreme Court of the United States of America.”).

¹²⁷ David Casstevens, *ACLU Lawyer Finds Success, Respect – in Texas*, ALUMNI IN THE NEWS (R.L. Paschal High Sch., Fort Worth, Tex.), July 5, 2006, <https://phs56.com/aclu-lawyer-finds-success-respect-in-texas/> [<https://perma.cc/2V8K-LTXV>].

¹²⁸ Oral Argument at 14:04, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222), <https://www.oyez.org/cases/1972/71-1222> [<https://perma.cc/5VW6-M9WT>] (“Do you mean that Equal Protection Clause did not apply to state employees?”).

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.¹²⁹ Instead of providing a theory to help the justices differentiate, both Evens and Broiles hedged, ultimately opting for the argument that 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 anything 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, “[p]ray tell what is the benefit of American citizenship?”¹³⁰

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 aliens and of a citizen.”¹³¹

Despite these difficult conversations during oral argument, and the surprise expressed by Marshall and others, the Court struck down both Connecticut’s bar on noncitizen attorneys and New York’s bar on noncitizen civil servants as violations of the Equal Protection Clause. Justice Blackmun, who wrote the majority opinion in *Sugarman*, made sure that the opinions

¹²⁹ *Id.* at 47:27.

¹³⁰ *Id.* at 48:02.

¹³¹ Notes on Oral Argument in *Sugarman v. Dougall*, Jan. 8, 1973 (on file with the Washington & Lee University School of Law), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1022&context=casefiles> [<https://perma.cc/52VW-8G5J>].

were issued at the same time.¹³² 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.”¹³³ 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 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 categorizing laws that discriminated against noncitizens as requiring the highest level of judicial scrutiny under the Equal Protection Clause. How could states be prevented from invidious discrimination based on alienage and, at the same time, continue to be allowed to limit voter rolls and particular public offices to citizens only? To answer this, Blackmun turned to a novel concept from a recent voting rights case, *Dunn v. Blumstein*. In that 1972 decision, written by Justice Marshall, the Court struck down Tennessee's durational residency requirement for voters. Marshall noted, however, that some state limitations on voter rolls, including “bona fide residenc[y] requirements,” might “be necessary to preserve the basic conception of a political community.”¹³⁴ Blackmun borrowed this language in *Sugarman* to indicate when a state might be able to exclude noncitizens. He extended the idea of the “political community” in *Dunn* 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

¹³² As Blackmun asked Powell, “I am inclined to think that the two cases should come down together and, if you would, I hope you do not mind waiting until *Sugarman* is finished.” See Letter from Justice Blackmun to Justice Powell (Mar. 7, 1973) (on file with The Burger Court Opinion-Writing Database), <http://supremecourttopinions.wustl.edu> [<https://perma.cc/2BD8-LNEY>].

¹³³ *Sugarman v. Dougall*, 413 U.S. 634, 643 (1973).

¹³⁴ *Dunn v. Blumstein*, 405 U.S. 330, 343–44 (1972).

representative government.”¹³⁵ But he then noted that even in this political realm, the restriction must be narrowly tailored: “[I]n 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.”¹³⁶

Of course, states were not free under the Equal Protection Clause 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 “ha[d] never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause.”¹³⁷

David Broiles and his client, Fré Le Poole Griffiths, 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 “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.”¹³⁸ 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 Justice Powell noted in a written draft of an oral announcement of the decision from the bench,

¹³⁵ *Sugarman*, 413 U.S. at 647. This carve out was, in its way, a victory for the state of New York. The phrase that Blackmun used—“formulation and execution of government policy”—came directly from the brief for New York. Brief for Attorney General of the State of New York at 23, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222), 1972 WL 135787 at *23. 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 limit this work to citizens only. The Court rejected this blanket assertion, but it adopted the appellant’s phrase as a description of where a line might be drawn.

¹³⁶ *Sugarman*, 413 U.S. at 643.

¹³⁷ *Id.* at 648–49.

¹³⁸ *In re Griffiths*, 413 U.S. 717, 724 (1973).

“[t]here 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.”¹³⁹

Broiles and Evens failed, however, to convince Justice William Rehnquist, who was the only one to dissent in both cases. Justice 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 used to protect against anything other than race discrimination. Rehnquist characterized the majorities in *Sugarman* and *Griffiths* as eliminating the line between citizen and alien and therefore, in his estimation, threatening American political institutions. Furthermore, the decisions, he wrote with apparent disdain, “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.’”¹⁴⁰

Unbeknownst to attorneys, behind the scenes Powell expressed admiration of his colleague’s lengthy and forceful dissent. Powell hand-wrote on a copy of a draft of the dissent, “[a] well written opinion which, if [Rehnquist] wrote on a clean slate, might have considerable appeal.”¹⁴¹ This statement is hard to square with Powell’s majority opinion in *Griffiths*, in which he made a forceful claim for the application of the Fourteenth Amendment to alienage discrimination. His admiration of Rehnquist’s dissent was a first sign of the shift that Powell would make in a few years.

The decisions in *Sugarman* and *Griffiths* were, on their face, ringing victories 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.¹⁴² As one

¹³⁹ Memorandum from *In re Griffiths* Case File, June 22, 1973, at 60 (on file with Washington & Lee University School of Law), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1033&context=casefiles> [<https://perma.cc/3AKJ-FS9U>].

¹⁴⁰ *Sugarman*, 413 U.S. at 657 (Rehnquist, J., dissenting).

¹⁴¹ Memorandum of *Sugarman v. Dougall* Case File, May 9, 1973, at 35 (on file with Washington & Lee University School of Law), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1022&context=casefiles> [<https://perma.cc/2HB4-Q3J5>].

¹⁴² As one legal commentator summarized in 1976, “[t]he cumulative impact of *Graham*, *Sugarman* and *Griffiths* is clear: the states will not be permitted to restrict alien employment unless such employment

newspaper summarized, the two decisions “sharply reduced the power of the states to ban resident aliens from employment.”¹⁴³ Many states attorneys general interpreted these cases as announcing a forceful refutation of alienage-based discrimination of all kinds.¹⁴⁴ In some jurisdictions, legal change came about voluntarily through the revision of laws and regulations in accord with the Supreme Court rulings. Licensing boards took note, as more letters arrived in state attorneys general 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.”¹⁴⁵ The attorney general said no, on the basis of “recent United States Supreme Court decisions” that indicated that such a bar would be unenforceable.¹⁴⁶ The medical board, he concluded, “should not treat an alien applicant, otherwise qualified, differently than a citizen of the United States.”¹⁴⁷

Advocates also succeeded in other cases reviewed by 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.¹⁴⁸ Less than a year later,

constitutes participation in the ‘basic conception of the political community.’ . . . Whenever alienage is singled out for discriminatory classification by a state, it is ‘suspect’ and will be subjected to strict scrutiny.” Daniel J. Hoffheimer, Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 VA. J. INT’L L. 355, 365–66 (1976).

¹⁴³ Associated Press, *Restrictions on Aliens Overruled*, OAKLAND TRIB., June 25, 1973, at 5.

¹⁴⁴ See, e.g., Haw. Att’y Gen. Rep. and Op. No. 74-18 to Dir. of Regul. Agencies, Op. 1 (1974) (“It is our opinion that any state statute which requires United States citizenship or a declaration of intention to become a citizen as a condition of licensure by a board, commission or department is unconstitutional as violative of the Equal Protection Clause of the 14th Amendment...”); see also Ga. Att’y Gen. Rep. and Op. No. 74-4 to Joint Sec’y, State Examining Bds., Op. 4 (1974) (“Citizenship requirements for licensure by state examining boards for certain professions and trades are unenforceable under the Equal Protection Clause. . . .”); see also Fla. Att’y Gen. Rep. and Op. No. 076-238 to City Att’y, Clearwater, Op. 468 (1976) (“[A] municipality may not exclude lawfully admitted resident aliens from all public employment opportunities Municipalities may not exclude aliens from city’s civil service system.”).

¹⁴⁵ Ariz. Att’y Gen. Rep. and Op. 74-7-L to Bd. Of Med. Exam’rs, Op. 87 (1974).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See *Miranda v. Nelson*, 351 F. Supp. 735, 740 (D. Ariz. 1972) (“[A]ny state legislative attempt to exclude that state’s permanent resident aliens from any lawful pursuit of employment or state entitlements and benefits flowing therefore solely because of alienage, runs afoul of the Supremacy Clause of the Constitution.”), *aff’d*, 413 U.S. 902 (1973).

the Court similarly affirmed a district court decision striking down restrictions on real estate licenses in Indiana (against a dissent by Justice Rehnquist).¹⁴⁹ 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.¹⁵⁰ Defenders of Puerto Rico's restriction had said the law was justified in order to prevent an influx of Spanish-speaking professionals. The Court ruled in the noncitizen's favor, with Justice Rehnquist as the lone dissenter.¹⁵¹

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. 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 dicta in *Sugarman*, with the appropriation of the idea of the "political community" from *Dunn*. Justice Powell suggested in *Griffiths* that a state might have a stronger interest in preserving roles that were "close to the core of the political process" for citizens only.¹⁵² But neither opinion explained what characteristics of alienage made noncitizens less trustworthy or worthy of constitutional protection.¹⁵³ (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, without attempting to reconcile the conflict.) In the absence of a theory of the difference, the Justices engaged in a sort of conclusory reasoning: states could potentially exclude noncitizens as voters and office holders because they were not citizens. As one legal commentator noted at the time, "[t]he Court's 'political community' limitation on the alien's right to work under the equal protection clause is remarkably amorphous The result is bound to be confusion."¹⁵⁴

¹⁴⁹ *Ind. Real Est. Comm'n v. Satoskar*, 417 U.S. 938 (1974).

¹⁵⁰ *Examining Bd. of Eng'rs v. Flores de Otero*, 426 U.S. 572, 599–606 (1976).

¹⁵¹ *Id.*

¹⁵² *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

¹⁵³ *In re Griffiths*, 413 U.S. 717, 729 (1973).

¹⁵⁴ Hoffheimer, *supra* note 142, at 366.

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*, *Griffiths* and *Sugarman*. 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 “quartet of harmonious decisions,” as an attorney called them at the time, 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.¹⁵⁵ Attorney Lester Evens, in challenging New York’s civil service law in *Sugarman*, sounded this theme in oral argument, when he argued, in response to questioning by the Justices, that resident aliens should have the right to vote and to hold public office. 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.¹⁵⁶ A different vision of what it

¹⁵⁵ Brief for Mexican American Legal Defense Fund et al. as Amicus Curiae Supporting Appellant at 16, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 76-839).

¹⁵⁶ On the history of noncitizen voting, see generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000) (discussing the history of voting in United States history); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1406–09 (1993) (discussing the practice of alien suffrage in Wisconsin). On noncitizens as jurors, see Lewis H. LaRue, *A Jury of One’s Peers*, 33 WASH. & LEE L. REV. 841, 848–66 (1976); see generally Mary Lombardi, Note, *Reassessing Jury Service Citizenship Requirements*, 59 CASE W. RES. L. REV. 725 (2009); Allison Brownell

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. As Evens explained in a colloquy during oral argument with Justice Blackmun, “the traditional classical roles of citizenship seem to be changing and perhaps changing for the better.”¹⁵⁷ This line of advocacy was aptly summed up in the title of a law review article published by law professor Gerald Rosberg in 1977: *Aliens and Equal Protection: Why Not the Right to Vote?*¹⁵⁸

Justice White, in this sense, was right in his aside during oral argument in *Graham*: once the equal protection door was opened, so to speak, for economic rights, then other kinds of rights claims followed.¹⁵⁹ 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 new 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. Daail Park was a political refugee from North Korea; he escaped that regime as a young man and arrived in Alaska in the 1960s.¹⁶⁰ He left to attend law school at Willamette University in Oregon and then returned to practice law in Alaska. Although he passed the Alaska bar exam in 1970 (and may have been the first Korean immigrant to do so), he was not granted his law license because he was not a citizen.¹⁶¹ In 1971, he represented himself in a lawsuit

Tirres, *American Law Comes to the Border: Law and Colonization on the U.S./Mexico Divide, 1848–1890*, 1–3 (March 2008) (Ph.D. Dissertation, Harvard University) (ProQuest) (discussing participation by individuals of Mexican descent on the frontier).

¹⁵⁷ Oral Argument at 26, *Sugarman v. Dougall*, 413 U.S. 634 (1973) (No. 71-1222) https://www.supremecourt.gov/pdfs/transcripts/1972/71-1222_01-08-1973.pdf [<https://perma.cc/UP33-J5GR>].

¹⁵⁸ 75 MICH. L. REV. 1092 (1977).

¹⁵⁹ See Oral Argument at 1:18:10, *Graham v. Richardson*, 403 U.S. 465 (1971) (No. 609), <https://www.oyez.org/cases/1970/609> [<https://perma.cc/SXA9-H3BE>] (“Can’t you make exactly the same argument with respect to voting, exactly the same argument?”).

¹⁶⁰ Minutes, House State Affairs Standing Committee, Alaska State Legislature, at 11 (January 13, 2004), <https://www.akleg.gov/pdf/23/m/hsta2004-01-130800.pdf> [<https://perma.cc/F583-2RAG>] (“Daail Park[] found his way over the border into South Korea, went to Alaska, attended law school, and passed the bar.”).

¹⁶¹ Daail Park Obituary, ANCHORAGE DAILY NEWS (Jan. 11, 1995), <https://advance-lexis-com.ezproxy.depaul.edu/api/document?collection=news&id=urn:contentItem:3S94-JMN0-000J-84H9-00000-00&context=1516831> [<https://perma.cc/FY2V-3B46>].

challenging Alaska's citizenship restriction on the legal profession, and he won.¹⁶² Three years later, and after the Supreme Court's decisions in *Graham*, *Sugarman* and *Griffiths*, he returned to court as a newly-minted attorney, once again representing himself, to challenge his exclusion from the voter rolls 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 Clauses of both the state and federal constitutions.¹⁶³

On the other side of the country, another noncitizen, Lester Perkins, sued to challenge the exclusion of aliens from grand and petit jury service in Maryland, citing *Graham*, *Sugarman* and *Griffiths*. Just a year before, Perkins had successfully challenged his exclusion from the field of veterinary medicine in Maryland.¹⁶⁴ 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.¹⁶⁵

In Colorado, Peter Skafté, 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. Skafté 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 involved in his child's education.¹⁶⁶ (Noncitizen voting in local elections was not so far-fetched an idea. In 1968,

¹⁶² See *In re Park*, 484 P.2d 690, 695 (Alaska 1971) (“[T]he statutory requirement of citizenship . . . is an encroachment upon prerogatives of Supreme Court in establishing regulations for the practice of law in Alaska.”).

¹⁶³ See *Park v. State*, 528 P.2d 785, 786 (Alaska 1974) (“On appeal it is asserted that the state's requirement of citizenship as a voter qualification denies to appellant the equal protection of the laws . . .”). *Park* filed for naturalization in 1974; the naturalization certificate was issued in 1978. *Park, Daiil*, Naturalization Certificate, Washington, D.C., *Indexes to Naturalization Records of the U.S. District Court for the District Territory, and State of Alaska (Third Division), 1903–1991 (M1788)* (on file with author).

¹⁶⁴ See *Perkins v. Smith*, 370 F. Supp. 134, 134 n.1 (D. Md. 1974).

¹⁶⁵ *Id.* at 135 (D. Md. 1974) (“[I]t cannot be disputed that aliens are ‘persons’ within the protection of the equal protection clause. . . . [N]o compelling state or federal interest justifies the disqualification of aliens as a class from jury service.”), *aff'd*, 426 U.S. 913 (1976).

¹⁶⁶ *Skafté v. Rorex*, 553 P.2d 830, 831, 833 (Colo. 1976).

New York City had begun allowing noncitizens to vote in school board elections. This right was also adopted in the 1970s in Chicago.)¹⁶⁷

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 by many 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 (including Dalil Park, who was *pro se*), 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 district 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 each 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.¹⁶⁸ In Maryland, the court argued that the state had a compelling interest in limiting jury service to citizens-only.¹⁶⁹ 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 Colorado court argued, in conclusory fashion, “[t]he 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.”¹⁷⁰

¹⁶⁷ KEYSSAR, *supra* note 156, at 310; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV., 1391, 1461-1462 (1993).

¹⁶⁸ *Park v. State*, 528 P.2d 785, 787 (Alaska 1974) (“In our opinion, the equal protection clause of the Fourteenth Amendment to the United States Constitution does not guarantee state voting rights for aliens.”).

¹⁶⁹ *Perkins*, 370 F. Supp. at 136 (“Do the State of Maryland and the United States have a compelling interest in confining service on grand and petit juries to citizens? In the view of this Court, both governments have such an interest.”).

¹⁷⁰ *Skafte*, 553 P.2d at 832.

This categorical 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.¹⁷¹

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 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.¹⁷² In 1976, the Court affirmed the Maryland court's ruling in *Perkins* without opinion, upholding the restriction on jury service. (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.¹⁷³) 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.¹⁷⁴

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

¹⁷¹ Skafte's lawyer, Jonathan Chase of the Colorado ACLU, also argued that Skafte was entitled to vote in school board elections as a parent, who had a right to be involved in his child's education. Yet, as Chase noted on appeal, “[w]hat the decision of the Colorado Supreme Court entirely ignores, however—and what makes the question posed herein of great importance—is that appellant is not suing as a member of the general body politic seeking access to the franchise, but as a parent asserting his fundamental right to participate meaningfully in the decision making process affecting his child's education.” Jurisdictional Statement for Appellant at 8, *Skafte v. Rorex*, 430 U.S. 961, (1977) (No. 76-951), 1977 WL 205119.

¹⁷² Perkins was assisted by the Joel Gora and Melvin Wolf of the ACLU Foundation (both of whom had also assisted David Broiles in appealing *In re Griffiths*). Appellant's Brief in Opposition to Motions to Affirm, *Perkins v. Smith*, 1974 WL 186062; Appellant's Brief, *In re Griffiths*, 413 U.S. 717 (1973) (No. 71-1336). Skafte was represented by Jonathan Chase of the ACLU of Colorado. Jurisdictional Statement for Appellant, *Skafte v. Rorex*, 1977 WL 205119 (1977).

¹⁷³ *Perkins v. Smith*, 426 U.S. 913 (1976).

¹⁷⁴ *Skafte v. Rorex*, 430 U.S. 961 (1977).

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 affect 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 *federal 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 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.¹⁷⁵ As a federal district court striking down a law that discriminated in the hiring of “peace officers” in California wrote in 1977, “[o]ur decision herein should come as no shock or surprise either to the defendants in the instant case or to other California officials. . . . [T]he direction of the tide has been clear.”¹⁷⁶

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 David Carliner noted in *The Rights of Aliens*, one of a series of ACLU handbooks that was published in 1977, “[d]espite 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.”¹⁷⁷ 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 twenty-five cases of public sector employment alienage discrimination, even though the Court had struck down New York’s limitations on civil service in *Sugarman* three years earlier.¹⁷⁸

This distinction between economic and political rights, such as it was, might have remained stable if not for a round of highly consequential litigation emerging in 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

¹⁷⁵ Cf. Hoffheimer, *supra* note 142, at 365–66.

¹⁷⁶ Chavez-Salido v. Cabell, 427 F. Supp. 158, 172 (C.D. Cal. 1977).

¹⁷⁷ DAVID CARLINER, *THE RIGHTS OF ALIENS: THE BASIC ACLU GUIDE TO AN ALIEN’S RIGHTS* 128 (Norman Dorsen & Aryeh Neier eds., 1977).

¹⁷⁸ Brief for Washington Lawyers’ Committee for Civil Rights Under Law et al. as Amicus Curiae Supporting Respondent at 3, *Ambach v. Norwick*, 441 U.S. 68 (1979) (No. 76-808), 1976 WL 181231.

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 rights, undermining the rights of noncitizens and giving rise to the awkward and singular dual standard in equal protection doctrine.

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.¹⁷⁹ This represented 11% of the overall population of the state, which was more than double the national value of 4%.¹⁸⁰ 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.”¹⁸¹

By 1975, the state still had many such laws on the books, including restrictions of at least thirty-eight different trades or professions and limitations on state financial aid for higher education.¹⁸² 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.¹⁸³ After *Graham*, *Sugarman*, and *Griffiths*, these provisions were ripe for challenge. In one year alone, federal district courts in New York heard separate

¹⁷⁹ JEFFREY S. PASSEL & REBECCA L. CLARK, URB. INST., IMMIGRANTS IN NEW YORK: THEIR LEGAL STATUS, INCOMES, AND TAXES 5, 8 (1998), <https://www.urban.org/sites/default/files/publication/70756/407432-Immigrants-in-New-York.pdf> [<https://perma.cc/7QV3-F725>].

¹⁸⁰ *Id.*

¹⁸¹ *Ambach v. Norwick*, 441 U.S. 68, 82 (1979) (Blackmun, J., dissenting).

¹⁸² Brief for Appellee Mauclet at 19–22, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (No. 76-208), 1977 WL 189099.

¹⁸³ By 1977, the state had revised some of its laws, but many remained on the books, including those governing professions ranging from funeral director to animal health technician. *Foley v. Connelie*, 435 U.S. 291, 301 n.* (Blackmun, J., concurring). The state legislature did remove the restriction pertaining to the practice of law after the Court issued *In re Griffiths*. See Joy B. Peltz, *State Prohibitions on Employment Opportunities for Resident Aliens: Legislative Recommendations*, 10 FORDHAM URB. L.J. 699, 718 (1981).

challenges from noncitizens who wanted to be physicians, teachers, police officers, civil engineers, and physical therapists.¹⁸⁴

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. New York's long-serving Attorney General, Louis Lefkowitz, did not issue opinions advising licensing boards to remove their citizenship restrictions.¹⁸⁵ 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 trend setter" in the nation.¹⁸⁶

Litigation challenging citizenship restrictions in mid-1970s New York involved a range of legal advocacy groups, most notably the New York Civil Liberties Union ("NYCLU"), which entered the fray of noncitizen civil rights with vigor.¹⁸⁷ The NYCLU was fighting on multiple fronts in the 1970s, winning major victories in school speech and the protection of the rights of the disabled.¹⁸⁸ The New York chapter helped to broaden the mission of the national ACLU to include a wide range of "victim groups" and a focus on various "enclaves," like public schools, where civil liberties were rarely protected.¹⁸⁹ Among those "victim groups" identified as needing assistance were noncitizens. The NYCLU was lead counsel in two significant noncitizen civil rights cases: one challenging restrictions on public school teachers and another challenging restrictions on licenses for physical therapists and civil engineers. Once again, civil rights activists placed issues

¹⁸⁴ *Surmeli v. New York*, 412 F. Supp. 394 (N.D.N.Y. 1976); *Kulkarni v. Nyquist*, 446 F. Supp. 1269 (N.D.N.Y. 1977); *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D.N.Y. 1976); *Foley v. Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976).

¹⁸⁵ Lefkowitz served as the state's attorney general for 22 years. He retired from the role in 1979. Nick Ravo, *Louis J. Lefkowitz, 22-Year Attorney General, Dies at 91*, N.Y. TIMES, June 21, 1996, at A24.

¹⁸⁶ Maria L. Marcus, *Lawyer for the People*, N.Y. ATT'Y GEN. REP. & OP. 79, 80 (1977).

¹⁸⁷ The New York Civil Liberties Union was founded in 1951 and gradually became a strong influence on the direction of the national organization. *About the NYCLU*, NYCLU, <https://www.nyclu.org/en/about-nyclu> [<https://perma.cc/334S-RXYE>] (last visited Jan. 29, 2023). 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. WALKER, *supra* note 101, at 299–300.

¹⁸⁸ NYCLU, *New York Civil Liberties Union: Championing Civil Rights and Civil Liberties for 50 Years*, 18–20 (September 2003); Donald N. Bersoff, *Bruce J. Ennis: A Remembrance*, 25 L. & HUM. BEHAV. 663, 663–64 (2001).

¹⁸⁹ WALKER, *supra* note 101, at 299.

of citizenship restriction squarely in the mix with efforts to expand rights in other arenas.¹⁹⁰

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. The regional office in Colorado represented Peter Skafte, and the ACLU Foundation assisted with the Perkins case. Now the New York office took a lead role in defending the rights of noncitizens to work in both the public and private sectors in the state, with a hope to seal the promises of the *Graham* decision.¹⁹¹

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 1974.¹⁹² Norwick was highly qualified to be a public school teacher. She had prior teaching experience in her native country of Scotland, had received her B.A. degree *summa cum laude* from North Adams State College in Massachusetts and completed a master's degree in developmental reading at the State University of New York at Albany.¹⁹³ Before graduate school, she worked as a teacher at Riverside Elementary, a private school in New York City.¹⁹⁴ 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.¹⁹⁵ A representative of the New York 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

¹⁹⁰ See Peter Kihss, *ACLU Would Allow Licensing for Aliens*, N.Y. TIMES, Jan. 16, 1977, at 35. 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." *Id.* at 300.

¹⁹¹ See *supra* pp. 22-25 (discussing the *Griffiths* case); *supra* pp. 39-42 (discussing the *Skafte* and *Perkins* cases).

¹⁹² Brief for Appellees, *Norwick v. Nyquist*, 417 F. Supp. 913 (No. 76-808); District Court Proceedings, *Norwick v. Nyquist* (on file with the Princeton University Mudd Library).

¹⁹³ Brief for Appellees at 4, *Ambach v. Norwick*, 441 U.S. 68 (1979).

¹⁹⁴ District Court Proceedings, *Norwick v. Nyquist* at 5 (on file with the Princeton University Mudd Library).

¹⁹⁵ Brief for Appellees at 7, *Ambach v. Norwick*, 441 U.S. 68 (1979).

of intent to become one.¹⁹⁶ A similar fate befell Tarja Dachinger, a native of Finland who received both her undergraduate and graduate degrees with distinction in the United States, taught in a private school, and then applied for state certification.¹⁹⁷

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.¹⁹⁸

The NYCLU was not the only organization seeking to defend noncitizen rights in the state at this time. In 1976, lawyers representing eight Turkish physicians challenged a provision in the Education Law pertaining to medical licenses.¹⁹⁹ The law allowed only citizens or declarant aliens to be licensed to practice medicine.²⁰⁰ In addition, it required declarant aliens to become citizens within ten years or lose their licenses.²⁰¹ Suphi Surmeli and seven other physicians sued, claiming that the threatened revocation of their licenses was a violation of equal protection and due process.²⁰² The state argued that such discrimination was rational since the state had an interest in encouraging doctors to demonstrate their political involvement and participate 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 state.²⁰³ 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

¹⁹⁶ *Id.* Citizenship requirements for teachers were part of the broader effort in many states in the late nineteenth and early twentieth centuries to restrict civil service jobs to citizens only. For an account of efforts in California and their challenge by noncitizen teachers and their supporters, see Brendan Shanahan, *A “Practically American” Canadian Woman Confronts a United-States Citizen-Only Hiring Law: Katherine Short and California Alien Teachers Controversy of 1915*, 39 L. & HIST. REV. 621 (2021).

¹⁹⁷ *Norwick v. Nyquist*, 417 F. Supp. 913, 914 n.2 (S.D.N.Y. 1976). Both Norwick and Dachinger were married to U.S. citizens.

¹⁹⁸ *Kulkarni v. Nyquist*, 446 F. Supp. 1269 (N.D.N.Y. 1977); Peter Kihss, *ACLU Would Allow Licensing for Aliens*, N.Y. TIMES, Jan. 16, 1977, at 35.

¹⁹⁹ *Surmeli v. New York*, 412 F. Supp. 394 (S.D.N.Y. 1976); Kihss, *supra* note 198, at 35.

²⁰⁰ *Surmeli*, 412 F. Supp. 394, 395 (S.D.N.Y. 1976).

²⁰¹ *Id.* at 395 n.1.

²⁰² *Id.* at 395.

²⁰³ *Surmeli*, 412 F. Supp. at 397.

the judge held, “there is not the slightest link between a physician’s citizenship and his competency as a physician or surgeon.”²⁰⁴

Nonprofit legal advocacy organizations and private attorneys were not the only ones to get involved. Also litigating were attorneys affiliated with law school legal clinics. Michael Davidson was a clinical instructor at the State University of New York at Buffalo when he agreed to represent Jean-Marie Mauclet in his challenge to New York’s restriction on tuition assistance awards for noncitizens.²⁰⁵ Mauclet, a permanent resident from France, was married to a U.S. citizen and had a U.S. citizen child.²⁰⁶ He attended graduate school at SUNY Buffalo but was denied financial assistance since he had not pursued naturalization.²⁰⁷ Prior to his clinical teaching stint, Davidson had been active in civil rights litigation of a different sort while working for the NAACP Legal Defense Fund.²⁰⁸ (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.)²⁰⁹

Mauclet’s case was eventually consolidated with that of another plaintiff, Alan Rabinovitch. Rabinovitch was a permanent resident from Canada who qualified for an undergraduate scholarship to attend Brooklyn College, but the scholarship was withdrawn when he was identified as a noncitizen.²¹⁰ 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 failure to adequately support school desegregation.²¹¹

Both Davidson and Greenberg succeeded in their challenges before the Western District Court of New York in the winter of 1976.²¹² 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,

²⁰⁴ *Id.*

²⁰⁵ Brief for Appellee Mauclet at 2, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (No. 76-208); 112 CONG. REC. H6347, H5895-96 (Tribute to Michael Davidson by Diane Feinstein).

²⁰⁶ Brief for Appellee Mauclet at 1, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (No. 76-208).

²⁰⁷ *Id.* at 2.

²⁰⁸ 112 CONG. REC. H6347, H5895-96 (Tribute to Michael Davidson by Dianne Feinstein).

²⁰⁹ *Id.*

²¹⁰ Brief for Appellee Rabinovitch at 4, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (No. 76-208).

²¹¹ *Obituary: Gary J. Greenberg*, N.Y. L.J., Jan. 3, 2008.

²¹² *Mauclet v. Nyquist*, 406 F. Supp. 1233 (W.D.N.Y. 1976).

by the fall of 1977, federal 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* 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 United States Supreme Court.”²¹³

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.²¹⁴ 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 state as well. As Glasser commented, “[a]ll this seems to be a colossal waste of time, energy and money at a time when the state can ill afford any extra expenditures.”²¹⁵

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 summer of 1976, a different three-judge panel ruled in favor of the state in the case of *Foley v. Connelie* (with a passionate dissent by Judge Mansfield).²¹⁶ 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.²¹⁷ (Another noncitizen sued the city of New York, which had a similar bar on noncitizens serving as metropolitan police officers.)²¹⁸ Unlike some other areas of employment, the position of state trooper had an age requirement: only applicants between the ages of twenty-one and twenty-nine were eligible to apply and take the examination to become an officer.²¹⁹

²¹³ Kihss, *supra* note 198, at 35.

²¹⁴ *Kulkarni*, 446 F. Supp. at 1271.

²¹⁵ Kihss, *supra* note 198, at 35.

²¹⁶ *Foley v. Connelie*, 419 F. Supp. 889 (S.D.N.Y. 1976).

²¹⁷ *Id.*

²¹⁸ Oral argument at 34:36, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 78-839), <https://www.oyez.org/cases/1977/76-839> [<https://perma.cc/S4L8-BGLU>].

²¹⁹ Reply Brief for Appellants at 2, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 78-839).

This age limitation meant that an immigrant might never be able to become a state trooper if they could not meet the five-year residency requirement for naturalization before they turned thirty.²²⁰ Foley was in precisely this situation; he entered the country in 1973 but did not become a permanent legal resident until 1974.²²¹ At that point, he began to accrue the necessary five years of residence for naturalization.²²² Unfortunately for his job prospects, he would already be over the age of twenty-nine once this five-year period elapsed and thus barred from eligibility to become a state trooper.²²³

It is likely the age requirement provision of the law that led Jonathan Weiss, an attorney with the New York nonprofit Legal Services for the Elderly Poor (“LSEP”), to take Edmund Foley’s case. 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.²²⁴ Weiss himself clearly saw the mission of LSEP as providing direct services for those who were themselves elderly as well as challenging the irrationality of age restrictions present in a wide range of areas of American society; as he noted in testimony before the Senate Committee on Labor and Human Resources in 1983, “age discrimination . . . takes many forms,” noting that “[t]he most obvious is generally that of employment.”²²⁵

The *Foley* case was not the first time LSEP had advocated for immigrant rights. LSEP played an important role assisting attorneys representing the plaintiffs in *Graham* and *Leger* and also filed an *amicus* brief in a case pertaining to federal welfare benefits for aliens.²²⁶ But the *Foley* case was the first time that attorneys from LSEP—including both Weiss and David Preminger—directly represented the plaintiff.²²⁷ Once again, an immigrant plaintiff was

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ Reply Brief for Appellants at *2, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 76-839), 1977 WL 189368.

²²⁴ See Lesley Oelsner, *Elderly Grope with Legal Knots*, N.Y. TIMES, March 21, 1972, at 43 (noting age discrimination claims pursued by LSEP in addition to other services to the elderly poor).

²²⁵ *Judicial Access and the Elderly: Hearing before the Comm. on Labor and Human Resources*, 98th CONG. 49 (July 12, 1983) (statement of Jonathan Weiss, Legal Services for the Elderly of New York City).

²²⁶ Brief for Legal Servs. for the Elderly Poor as Amicus Curiae, *Mathews v. Diaz*, 426 U.S. 67 (1974) (No. 73-1046), 1974 WL 185973.

²²⁷ See Reply Brief for Appellants, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 76-839), 1977 WL 189368 (noting both Weiss and Preminger as both representing Foley on the brief’s cover page).

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.²²⁸ 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.²²⁹ 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.²³⁰ It was this series of cases that led to a splintering of the tentative coalition on the Court and a reassertion of states’ rights 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.²³¹ 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.²³² Because the

²²⁸ Kihss, *supra* note 198, at 35; MARIA L. MARCUS, *Lawyer for the People*, N.Y. ATT’Y GEN. REP. & OP. 79, 82 (1977).

²²⁹ 436 U.S. 901 (1978).

²³⁰ This time, New York was not represented before the Court by Samuel Hirshowitz, whose performance in *Sugarman* was subpar, but instead by Judith Areinstein Gordon, an assistant attorney general who had graduated from NYU Law School in 1968. *Paid Notice: Death, Gordon, Judith Areinstein*, N.Y. TIMES (May 1, 2011), <https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9401E4D9173AF932A35756C0A9679D8B63.html> [<https://perma.cc/QMN2-VRUJ>]. 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. See *Judith A. Gordon*, OYEZ, https://www.oyez.org/advocates/judith_a_gordon [<https://perma.cc/N67L-E4Y7>] (last visited Jan. 9, 2023).

²³¹ *Nyquist v. Mauclet*, 432 U.S. 1, 8–10 (1977).

²³² *Id.* at 8.

law allowed aliens who had declared their intention to become citizens—so called “declarant aliens”²³³—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.²³⁴ The statute discriminated, attorneys for the state 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.²³⁵

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.²³⁶ 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.”²³⁷ 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

²³³ Up until 1952, immigrants were required to file a declaration of intent in advance of their application for naturalization. This declaration of intent could open up additional opportunities prior to naturalization, including voting and property ownership. See HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 116–19 (2006) (“When a declaration of intent was a prerequisite for naturalization, it was clear that intending citizens were not actually citizens, but they were treated like citizens for many purposes.”); Allison Brownell Tirres, *Ownership Without Citizenship: The Creation of Noncitizen Property Rights*, 19 MICH. J. RACE & L. 1 (2013) (exploring declarant benefits in land ownership in the nineteenth century); see also Gabriel Chin, *A Nation of White Immigrants: State and Federal Racial Preferences for White Noncitizens*, 100 B.U. L. REV. 1271 (2020) (tracing the relationship between white supremacy and declarant benefits).

²³⁴ Brief for Appellants at 18, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (No. 76-208) (“Aliens willing to apply for citizenship, either at the time they seek financial assistance [§ 661(3)(b)] or when relieved of a disability that precludes naturalization [§661(3)(c)], and paroled refugees [§ 661(3)(d)] are eligible. Only permanent resident aliens who refuse naturalization are ineligible. The resulting classification for purposes of equal protection analysis is one based on degree of national affinity, not one ‘based on alienage.’”).

²³⁵ *Id.*

²³⁶ *Nyquist v. Mauclet*, 406 F. Supp. 1233, 1235–36 (W.D.N.Y. 1976).

²³⁷ Brief for Appellants in *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (No. 76-208), WL 189098 (“New York has a vital interest in the definition and preservation of its political community.”).

could be limited because such a limitation promotes the political community.²³⁸

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.²³⁹ Each presented a different rationale. Burger argued that financial aid was akin to government "largesse" that a state could divvy up however it pleased.²⁴⁰ Rehnquist and Powell both bought into the state's argument that this was not discrimination "based on alienage" because declarant aliens could receive financial aid, with Powell writing separately to emphasize the state's legitimate interest in "encouraging allegiance" through education policy.²⁴¹ 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*.

Edmund Foley and his attorney, Jonathan Weiss, had a difficult path to victory, given the Court's apparent increasing discomfort with limitations on state power as well as the ubiquity of restrictions on police officers around the country. Unlike in earlier cases, this specific type of employment discrimination was widespread: a survey by the International Chiefs of Police in 1973 found that 94% of state and local police departments responding to the survey restricted male sworn officers to citizens only,²⁴² whereas only a handful of states discriminated against noncitizens in public welfare benefits prior to *Graham*, and fewer than half of the states barred noncitizens from law licenses prior to *Griffiths*.²⁴³ A more targeted state study conducted as part of the litigation found that twenty-four states restricted the state police force to citizens only.²⁴⁴ All nine of the states with a population of more than 100,000 permanent resident aliens—including California, Texas, New Jersey, and

²³⁸ Oral Argument at 39–40, *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (No. 76-208), <https://www.oyez.org/cases/1976/76-208> [<https://perma.cc/B5EZ-8VRS>].

²³⁹ *Nyquist v. Mauclet*, 432 U.S. 1, 2 (1977).

²⁴⁰ *Id.* at 12–15.

²⁴¹ *Id.* at 15–22.

²⁴² TERRY EISENBERG, DEBORAH ANN KENT & CHARLES R. WALL, POLICE PERSONNEL PRACTICES IN STATE AND LOCAL GOVERNMENTS 22 (Int'l Ass'n. of Chiefs of Police and Police Found. ed. 1973).

²⁴³ Sanders, *supra* note 67, at 38–39 (listing states with restrictions on attorney licensure as of 1968).

²⁴⁴ Brief for the Mexican American Legal Defense Foundation et al. as Amici Curiae Supporting the Appellant at 7, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 76-839), 1977 WL 189369.

Illinois, among others—had such restrictions in place.²⁴⁵ Furthermore, the district 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*.²⁴⁶

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, “[i]f you exclude . . . from the pool a large population which speaks Spanish as well as English you may in fact illumining [sic] your ability to recruit able police officers”²⁴⁷ 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.²⁴⁸ 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

²⁴⁵ *Id.*

²⁴⁶ *Foley v. Connelie*, 419 F. Supp. 889, 895 (S.D.N.Y. 1976).

²⁴⁷ Oral Argument at 6:34, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 78-839), <https://www.oyez.org/cases/1977/76-839> [<https://perma.cc/4BKQ-TX4Z>]. The speaker most likely meant “eliminating” rather than illumining.

²⁴⁸ Brief for the Mexican American Legal Defense and Educ. Fund, Inc. et al. as Amici Curiae Supporting the Appellant at *11-12, *Foley v. Connelie*, 435 U.S. 291 (1977), No. 76-839, 1977 WL 189369.

41,894 sworn personnel in 42 states were Hispanic.²⁴⁹ Representation of those of Asian descent was even smaller: only 7 officers out of that 41,894 officers were Asian or Asian-American.²⁵⁰ 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.²⁵¹

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 not voted with the Court in *Graham* and *Sugarman*. He put the issue of difference between alienage and race front and center, asking, just a few minutes into Weiss's argument, "[d]o you think there is a difference between a discrete insular group whether minority or otherwise, when they are—let us say American-Indians or Negroes or women or men who cannot change their condition, that is one kind of a discrete insular group."²⁵² Burger lobbed questions at Weiss related to which groups could be protected classes. The questions all seemed intended to undermine 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 "[a]liens who can become citizens are different from blacks."²⁵³

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.²⁵⁴ 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, "[i]f your friend prevails and we reverse [the lower court], do you think New York can keep these aliens off of

²⁴⁹ See *id.* at *10-11 (citing John Egerton, *A National Survey: Minority Policemen: How Many Are There?*, 5 RACE REL. REP., Nov. 1974, at 19).

²⁵⁰ *Id.* at *11.

²⁵¹ *Id.* at *5-15.

²⁵² Oral Argument at 2:31, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 78-839), <https://www.oyez.org/cases/1977/76-839> [<https://perma.cc/4BKQ-TX4Z>].

²⁵³ Conference Notes at 18, *Foley v. Connelie*, 435 U.S. 291 (1978) (on file Washington & Lee University School of Law), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1816&context=casefiles> [<https://perma.cc/CH9V-WS2K>].

²⁵⁴ See MAYERI, *supra* note 13.

juries How about voting?”²⁵⁵ 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 noncitizen employment rights as a threat to the core distinction between citizenship and alienage.

Unsurprisingly, given this set of circumstances, 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 Foley could never become a state police officer even if naturalized).²⁵⁶ In the majority opinion, Burger left *Graham* standing but created a novel carve out for state power, citing his own dissent in *Maucler* 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.”²⁵⁷ Instead, in cases related to the political community, “[t]he state need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification.”²⁵⁸ 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.”²⁵⁹ 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.²⁶⁰

The Court handed down the *Foley* decision in March of 1978; the ACLU’s case in support of noncitizen schoolteachers Norwick and Dachinger 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

²⁵⁵ Oral Argument at 40:12, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 78-839), <https://www.oyez.org/cases/1977/76-839> [<https://perma.cc/X5AS-V7WU>].

²⁵⁶ *Foley v. Connelie*, 435 U.S. 291 (1978).

²⁵⁷ *Id.* at 295.

²⁵⁸ *Id.* at 296.

²⁵⁹ *Id.*

²⁶⁰ Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516 (1979). The change to the standard of review announced in *Foley* and subsequent cases is also sometimes referred to as an exception to the rule of strict scrutiny, rather than as a dual standard. See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 835–38 (6th ed. 2019).

thousands of others in the ACLU's various regional offices.²⁶¹ 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.²⁶² 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."²⁶³ This meant, as the paper reported, that the regulation had "little practical force as it is now being administered."²⁶⁴ Virginia was not alone; documents in the case indicate that at least ten states had withdrawn their restrictive laws in recent years.²⁶⁵

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."²⁶⁶ The statute was under inclusive, he argued, because the citizenship

²⁶¹ Peter Kihss, *ACLU Names a Staff Attorney as New National Legal Director*, N.Y. TIMES, May 1, 1977, at 64. For Ennis's contributions more broadly, see generally Donald M. Bersoff, *Bruce J. Ennis: A Remembrance*, 25 LAW AND HUMAN BEHAVIOR 663 (2001).

²⁶² *High Court Upholds Denial of Teaching Posts to Aliens*, N.Y. TIMES, Apr. 18, 1979, at 27 (listing the following states as having alienage restrictions on the teaching profession at the time of the *Ambach* decision: Tennessee, Idaho, Montana, North Dakota, Washington, West Virginia, Texas, Mississippi, Oklahoma, and Wyoming).

²⁶³ *Aliens as Teachers*, RICHMOND TIMES DISPATCH, May 3, 1979, in Papers of Justice Lewis A. Powell, Washington and Lee University School of Law, Lewis F. Powell, Jr. Archives, Supreme Court Case Files Collection, Case File 593, <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1643&context=casefiles> [<https://perma.cc/KEX7-24ZF>].

²⁶⁴ *Id.*

²⁶⁵ Oral Argument at 38:18, *Ambach v. Norwick*, 441 U.S. 68 (1979) (No. 76-808), <https://www.oyez.org/cases/1978/76-808> [<https://perma.cc/R86E-UQQ7>].

²⁶⁶ *Id.* at 20:12.

restriction did not apply to private school teachers in the state, who educated 18% of the school-age population.²⁶⁷ 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.²⁶⁸

Assistant Attorney General Judith Gordon, in her remarks for the New York Commissioner of Education, insisted that the case of public school teachers fell under the so-called "*Sugarman* exception," which would require the Court to apply only rational basis review.²⁶⁹ 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.²⁷⁰ 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.²⁷¹ "The principal purpose, if not the overriding purpose of public education is in fact training for citizenship."²⁷² 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."²⁷³ 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: "[t]he citizen has the capacity to participate in democratic decision making. That is the attitude and value that is sought to be transmitted."²⁷⁴

²⁶⁷ Oral Argument at 20:14, *Ambach v. Norwick*, 441 U.S. 68 (1979) (No. 76-808), <https://www.oyez.org/cases/1978/76-808> [<https://perma.cc/R86E-UQQ7>].

²⁶⁸ Brief for Appellees at 9–10, *Ambach v. Norwick*, 441 U.S. 68 (1979) (No. 76-808), 1978 WL 206626.

²⁶⁹ Oral Argument at 14:12, *Ambach v. Norwick*, 441 U.S. 68 (1979) (No. 76-808), <https://www.oyez.org/cases/1978/76-808> [<https://perma.cc/R86E-UQQ7>].

²⁷⁰ *Id.* at 14:37.

²⁷¹ *Id.* at 18:23.

²⁷² *Id.* at 6:10.

²⁷³ *Id.* at 15:47.

²⁷⁴ *Id.* at 16:29. 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 "[e]ducation—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." Notes from Oral Argument in *Ambach v. Norwick*, Justice Lewis A. Powell

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."²⁷⁵ 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."²⁷⁶ 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.

It was a demoralizing loss for Norwick, Dachniger, and thousands of other resident alien 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!*²⁷⁷ 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, "[e]ducation 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*."²⁷⁸ 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 . .

(on file with Washington and Lee University School of Law), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1643&context=casefiles> [<https://perma.cc/KEX7-24ZF>].

²⁷⁵ *Ambach*, 441 U.S. at 76.

²⁷⁶ *Id.* at 78.

²⁷⁷ Ruth Brufsky, *Resident Alien Teachers Not Wanted in the Public Schools! - Ambach v. Norwick*, 1 U. BRIDGEPORT L. REV. 99 (1980).

²⁷⁸ Earl M. Maltz, *Portrait of a Man in the Middle: Mr. Justice Powell, Equal Protection, and the Pure Classification Problem*, 40 OHIO ST. L.J. 941, 949-50 (1979).

. . . I honestly can't see what difference it should make to my teaching ability."²⁷⁹ 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."²⁸⁰ 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*, for example, 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 postscript 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—he would be eager to put the Protestants in jail. Conversely, if he were a Portestant (sic), the Catholics would have a bad time!"²⁸¹

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*: "[t]his heightened protection of resident aliens' interests reflects the

²⁷⁹ Dena Kleiman, *Plaintiffs in Case Dismayed by Supreme Court Verdict*, N.Y. TIMES, Apr. 18, 1979, at B3.

²⁸⁰ Marilyn R. Walter, *The Alien's Right to Work and the Political Community's Right to Govern*, 25 WAYNE L. REV. 1181, 1185 (1979).

²⁸¹ Notes on *Foley v. Connelie*, Justice Lewis A. Powell (on file with Washington and Lee University School of Law), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1816&context=casefiles> [<https://perma.cc/TH4V-65S4>].

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.”²⁸² 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 during oral argument in *Foley v. Connelie*, after Gordon referred to resident aliens as “strangers to [the] community,” whereupon Marshall queried: “[h]ow were they strangers[?] . . . They pay the same tax you do . . . They live right next to you . . . And they [go] to school with you . . .”²⁸³ 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.”²⁸⁴

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 the Court decided *Ambach*, other cases were pending before lower courts or the Supreme Court, including a case challenging the constitutionality of California’s citizenship restriction on deputy 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. This particular anti-alien provision dated from 1961, when the state legislature designated a citizenship

²⁸² *Foley*, 419 F. Supp. at 900 (Mansfield, J., dissenting).

²⁸³ Oral Argument at 33:18, *Foley v. Connelie*, 435 U.S. 291 (1978) (No. 78-839), <https://www.oyez.org/cases/1977/76-839> [<https://perma.cc/S4L8-BGLU>].

²⁸⁴ Lauri Waldman, *Erosion of the Strict Scrutiny Standard as Applied to Resident Aliens: Foley v. Connelie*, 10 LAWYER OF THE AMERICAS 1049, 1064 (1978).

restriction for more than seventy “peace officer” positions, including that of cemetery sexton, game warden, toll service employee, and furniture and bedding inspector.²⁸⁵

Lawyers for the Western Center on Law and Poverty represented Chavez and two other similarly-situated plaintiffs in their suit against the county.²⁸⁶ The case gave the opportunity to set an outer boundary on the seemingly ever-expanding category of “government function.” In their brief to the Supreme court, lawyers Mary Burdick and Dan Stormer argued that deputy probation officers were unlike teachers and state police officers in that 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.²⁸⁷

In short, “those officers simply do not perform vital functions that go to the heart of a representative government.”²⁸⁸

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.”²⁸⁹ 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.”²⁹⁰ As he wrote, “[s]elf-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.”²⁹¹ This was a far departure from the Court’s recognition in *Graham* of resident aliens’ obligations (including the duty to abide by U.S. laws and pay U.S. taxes) and

²⁸⁵ *Chavez-Salido v. Cabell*, 427 F. Supp. 158, 169 n.22 (C.D. Cal. 1977).

²⁸⁶ *Id.* at 159.

²⁸⁷ Brief for Appellees at 17–18, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (No. 80-990), 1981 WL 390434.

²⁸⁸ *Id.* at 18.

²⁸⁹ *Cabell v. Chavez-Salido*, 454 U.S. 432, 445 (1982).

²⁹⁰ *Id.* at 439.

²⁹¹ *Id.* at 439–40.

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 could exercise "discretion" in their work.²⁹²

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 *Sugarman* rule."²⁹³ 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."²⁹⁴ Justice Stevens, who, along with Marshall and Brennan, signed on to Blackmun's dissent, was in full agreement, writing in a memo to Blackmun: "[a]fter reading your opinion, I am tempted to suggest that your characterization of the Court's analysis as 'constitutionally absurd' is almost an understatement."²⁹⁵

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.²⁹⁶ At least with this

²⁹² *Id.* at 446.

²⁹³ *Id.* at 458 (Blackmun, J., dissenting).

²⁹⁴ *Id.* at 449 (Blackmun, J., dissenting).

²⁹⁵ Letter from Justice Stevens to Justice Blackmun (Dec. 30, 1981) (on file with The Burger Court Opinion-Writing Database), http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1981/80-990.pdf [<https://perma.cc/T6G3-4LA4>].

²⁹⁶ *Bernal v. Fainter*, 467 U.S. 216, 225–27 (1984).

case it was clear that there was some outer bound, however far, to the Court's definition of a political function.

But what of professional licenses, or other forms of state-based discrimination in the private workplace? In theory, the Court is still willing to apply strict scrutiny to any such forms of state-sanctioned employment discrimination or limitation on other economic activities. Given the trends of the 1970s, including the invalidation of the "special public interest" doctrine and the significant wins for litigants in defending their rights to be lawyers, doctors, engineers, physical therapists, and a host of other professions, 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, constitutionally questionable citizenship-based restrictions remain in most states. Many of these pertain to professional licensing; as studies by Janet Calvo, Michael Olivas and others have shown, dozens of states still have occupational restrictions across many fields, despite their apparent unconstitutionality.²⁹⁷ In West Virginia, for example, one must be a citizen to work as an auctioneer; in South Carolina, citizenship is required to obtain a commercial fishing license; in Alabama, Massachusetts, New Jersey, Pennsylvania, and Tennessee, one must be a citizen in order to be a funeral home director; in Indiana, one has to be a citizen in order to be a licensed practical nurse.²⁹⁸

Professional licensing is not the only area of current state restriction. One study published in 2003 found close to 300 statutory restrictions in six states alone, not including professional licensing restrictions, with more than half of these pertaining to economic activities.²⁹⁹ As the authors note, even that is surely an undercount, given the presence of such restrictions outside of statutory law, including in bureaucratic procedures at the state or local level.³⁰⁰

²⁹⁷ See, e.g., Olivas, *supra* note 74, at 66–67 (exploring complex stories of immigration and occupational licensing across state and federal dimensions); Calvo, *supra* note 74, at 38–39 (explaining the effects of licensing requirements in both California and New York); see also Calvo-Friedman, *supra* note 74 (discussing federal preemption and state licensing conflicts).

²⁹⁸ See laws cited in Calvo-Friedman, *supra* note 74, at app. 2.

²⁹⁹ Luis Plascencia, Gary P. Freeman & Mark Setzler, *The Decline of Barriers to Immigrant Economic and Political Rights in the American States: 1977–2001*, 37 INT'L MIGRATION REV. 5, 15 (2003).

³⁰⁰ *Id.* The closest we have to a recent national study of the scope and extent of occupational licensing restrictions as they relate to immigration status comes from Michael Olivas, who has undertaken an exhaustive project to catalog these restrictions. The difficulty and complexity of such a study is due, in part, to the intersection of areas of law that are already themselves highly complex, namely

Even a cursory review of state and local occupational licensing reveals potential legal problems. As Michael Olivas notes, those who examine these restrictions “are left with the clear impression of the need for recodification or restatements, profession by profession”³⁰¹ As Janet Calvo comments, “the developments in this area are complex, confusing, ineffective, and in great need of improvement.”³⁰²

In recent years, several states—including California, Illinois, and New York—have taken up the hard work of trying to eliminate outmoded references to citizenship from their state laws.³⁰³ Efforts in Illinois underscore the difficulty of removing these provisions, given that they are oftentimes embedded in both prominent and obscure sections of state law. Illinois lawmakers, with the help of MALDEF and other organizations, passed a bill in 2018 to update the Civil Administrative Code to eliminate a citizenship requirement from state licensing.³⁰⁴ One year later, lawmakers passed another bill to cover areas not reached with the first bill, including modifications to the Illinois Explosives Act, the Illinois Plumbing License Law, the Water Well and Pump Installation Contractor’s License Act, the Illinois Horse Meat Act, the Liquor Control Act of 1934, the Safety Deposit License Act, and the Coal Mining Act.³⁰⁵ A further complication stems from the fact that licensing can depend on multiple levels of governance and a high level of discretion, which means that legal interventions to remove citizenship

immigration law and licensing law. See Olivas, *supra* note 74, at 67 (“In geology, the earth’s lithosphere—sub-layers of the crust—moves in regular and punctuated fashion, creating continental drift, faults, and trenches across the globe. Its counterpart in immigration and licensing law is the changing and moving universe of immigration law and the growing state regulation of labor and employment, necessitating special tools of legal analysis.”).

³⁰¹ Olivas, *supra* note 74, at 106.

³⁰² Calvo, *supra* note 74, at 37.

³⁰³ *Professional and Occupational Licenses for Immigrants*, NAT’L CONF. STATE LEGISLATURES (Jan. 1, 2017), <https://www.ncsl.org/research/immigration/professional-and-occupational-licenses-for-immigrants.aspx> [https://perma.cc/Y4YU-96DP]. See Calvo, *supra* note 74, at 33 (assessing the licensing changes in California and New York).

³⁰⁴ See IL SB-3109, Sec. 2105-140 (“[N]o person shall be denied a license, certificate, limited permit, or registration issued by the Department [of Professional Regulation Law] solely based on his or her citizenship status or immigration status.”).

³⁰⁵ IL SB-1166. In some states, lawmakers replaced references to citizenship with references to legality or status, in an attempt to limit economic access and rights for undocumented immigrants or temporary migrants. In those states, undocumented immigrants (however inaccurately a state might define them) face the restrictions that all noncitizens did in the past. For example, in Rhode Island, a funeral director has to be either a citizen or “have lawful entry into the country;” in Alabama, an occupational therapist must be a citizen or “a person who is legally present in the United States with appropriate documentation.” Calvo-Friedman, *supra* note 74, at Appendix 2.

requirements must be at multiple levels, not just at the level of state statutes.³⁰⁶

It is hard to come up with another “discrete and insular minority” 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 between 1971 and 1976 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

³⁰⁶ Michael Olivas provides a helpful example from the legal profession; as he writes, lawyer licensing is usually the domain of state statute, but in a number of states, the details are determined by a state bar, a separate licensing authority (such as a state board of law examiners or bar examiners), or the state’s supreme court, or an amalgam of the various decision makers. A longstanding tradition of self-governance within law licensure has given much discretion to the final arbiter in each state to determine who may join the profession and have permission to practice law in that jurisdiction, making it a very complicated pathway and journey

Olivas, *supra* note 74, at 82–83.

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, “[s]tate legislators face mounting pressure to restrict the availability of state licenses and employment opportunities to United States citizens because of recession, inflation, severe unemployment and the influx of refugees.”³⁰⁷

Another factor in the persistence of these restrictions 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 federal preemption arguments in the 1970s, but courts commonly did not reach them, since they ruled instead on the basis of equal protection.³⁰⁸ After the 1970s, more lawyers and immigrant advocates looked to preemption as a way to stop unlawful state action.³⁰⁹ The advantages and disadvantages of this shift are well represented in the literature,³¹⁰ but I would go further to posit that the persistence of discriminatory legislation may be due in some part to this strategic abandonment of equal protection arguments in light of a hostile Supreme Court.

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

³⁰⁷ Joy B. Peltz, *State Prohibitions on Employment Opportunities for Resident Aliens: Legislative Recommendations*, 10 *FORDHAM URB. L.J.* 699, 700 (1981).

³⁰⁸ While the Court in *Graham v. Richardson* considered both equal protection and preemption arguments (and found that the Arizona law was also unconstitutional on that basis), other decisions that followed addressed equal protection only. 403 U.S. 365, 382–83 (1971). *See, e.g.*, *Surmeli v. New York*, 412 F. Supp. 394, 398 (S.D.N.Y. 1976) (noting that the finding that New York’s provision was unconstitutional on the basis of equal protection “makes it unnecessary to consider plaintiff’s further argument that the act is unconstitutional because it interferes with the exclusive federal power over aliens”).

³⁰⁹ *See, e.g.*, Note, *State Burdens on Resident Aliens: A New Preemption Analysis*, 89 *YALE L.J.* 940, 947 (1980) (arguing that “the preferred doctrine to protect the dominant national interest in alienage policy ought to be federal preemption”).

³¹⁰ *See generally* Jenny-Brooke Condon, *The Preempting of Equal Protection for Immigrants*, 73 *WASH. & LEE L. REV.* 77, 81–82 (2016) (exploring equal protection in immigration law); *see also* Jenny Broke Condon, *Equal Protection Exceptionalism*, *RUTGERS U. L. REV.* 563, 563–64 (2017) (advocating for a rethinking of the equal protection doctrine).

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 the Court's decision 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.³¹¹ After the victories 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, which created the dual standard of review. Still to this day there are laws in many states that discriminate based on citizenship. The reasons for this shift away from the broad protection of *Graham* were both intrinsic and extrinsic to the struggle. 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 conservatives on the Court of an over-proliferation of rights more generally.³¹² 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."³¹³ As he quipped, "[w]e have refurbished rights that lay dormant. We have even invented a few new ones."³¹⁴ The Burger Court, as Kenneth Karst observed in 1977, "sought not only to consolidate the recent equal protection doctrine but to limit its growth."³¹⁵ The story of alienage law is part of this broader history of retrenchment in equal protection jurisprudence.

³¹¹ *Yick Wo v. Hopkins*, 118 U.S. 356, 366 (1886).

³¹² See David S. Louk, *Repairing the Irreparable: Revisiting the Federalism Decisions of the Burger Court*, 125 YALE L.J. 682 (2016) (discussing the Burger Court's increasing, if inconsistent, emphasis on federalism).

³¹³ Justice Lewis Powell, Remarks at the University of Virginia Law Review Banquet (Feb. 25, 1978) (transcript on file with the Washington & Lee University School of Law, Virginia), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1078&context=powellspeeches> [<https://perma.cc/R3WJ-PR7N>].

³¹⁴ *Id.*

³¹⁵ Kenneth L. Karst, *Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 2 (1977).

But ideological shifts alone cannot explain the trajectory of the doctrine. Just as salient, this article shows, was the shape, structure and timing of the legal movement itself. 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 challenging citizenship restrictions for state troopers 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. The *Park*, *Skafte*, and *Perkins* cases were brave efforts to expand the political rights of noncitizens, but this litigation appears to have backfired by confirming Justices' fears of exactly this sort of threat to what was perceived of as a core right of citizenship (and it is notable that *Perkins* and *Skafte* are cited in all three of the cases that later hold against the noncitizen plaintiffs). This civil rights story presents a cautionary tale about the difficulties of making major constitutional change without a cohesive litigation strategy.

Even with a more cohesive strategy, however, litigants still would have faced a daunting challenge: devising a “theory of the difference” that could account for the rights of noncitizens in a society that valorized citizenship. From the very start, the 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. They were able to convince the courts to repudiate what were widely seen at the time as outdated vestiges of nativism and xenophobia, but they were not able to translate those gains into a broader vision of immigrant belonging. Such reimagining is especially hard to do when there is no broader social movement to support a durable shift in norms. These two factors – the lack of a broader social movement and the difficulty of drawing that line between citizen and noncitizen – were key contributors to the doctrinal outcome.

Ultimately, it was difficult for advocates to make the case for immigrant inclusion. The hard-fought struggle for civil rights for women and racial minorities in the voting booth and jury box was characterized as a fight for the core rights of citizenship. 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 the

binary categories of citizen and alien. Traditional conceptions of membership in the civil rights era proved to be a liability for furthering the rights of all people in the country.