If the Doctrine Loosely Fits, Wear It: Constitutional Adjudication in State Alienage Cases

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The United States Supreme Court has permitted state legislative classifications based on alienage rather freely through the use of the special public interest exception and the public/political function doctrine. This article critically assesses the Court's methods of adjudication and its interpretation of principles, examines the consequences for aliens and our system, and concludes that an appropriate standard of review requires an important governmental objective served by a closely drawn legislative classification.

INTRODUCTION

The integrity of our federal democratic system and all it entails depends, in the last analysis, upon the United States Constitution and its meaning. Judicial review of constitutional cases requires the Supreme Court to function as actor, interpreter of the constitutional script, and director of all constitutionally required roles, including its own. Constitutional, and therefore the system’s, integrity must be measured in large part by assessing how faithfully this ultimate actor/director directs and performs its own role.

This assessment of the Supreme Court's performance is particularly significant where the constitutional provision subject to the Court's review is open-textured, that is, not self-operating, ex-
pressly prohibitive, reasonably clear or clearly bounded. In assessing the Court’s performance in interpreting these open-textured provisions of the Constitution, two general questions should be asked: (1) is the method of adjudication faithful to the Constitution? and (2) does the interpretation placed upon the provision, in the circumstances of the case, comport with stare decisis in a constitutional sense?

The extent to which states can discriminate between classes of persons is the focus of the particularly open-textured equal protection clause of the fourteenth amendment, a provision of pervasive importance to our governmental system and societal structure. Further, one significant area of state discrimination which is cause for considerable concern today is legislative discrimination based upon alienage. Therefore, Supreme Court equal protection analysis in alienage cases is significant both in terms of the consequences to aliens and in terms of the consequences to our federal democratic system.

This discussion will critically assess the Court’s methods of adjudication, its interpretation of principles, and the consequences for aliens and our system as a result of its state alienage discrimination decisions. More particularly, this evaluation leads to recommendations which are directed toward an equal protection clause analysis infused with both vitality and integrity.

**Historical Perspective**

States have often legislatively deprived aliens of the capacity to participate in activities open to citizens.1 Over the years, the

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United States Supreme Court has permitted legislative limitations based upon alienage rather freely, using the special public interest exception until 1971, and the public or political function doctrine since 1978. Between 1971 and 1978, however, the Supreme Court strictly scrutinized such legislation: unless the state statutory classification served a compelling state interest it would be invalidated under the fourteenth amendment's equal protection clause.

2. Special public interests which served as justifications for withholding the application of the equal protection clause on behalf of aliens by the Supreme Court have included public works employment in constructing the New York subways, Heim v. McCall, 239 U.S. 175 (1915); the ownership of pool and billiard rooms, Ohio v. Deckeback, 274 U.S. 392 (1927); and the leasing or ownership of a small family farm, Terrace v. Thompson, 263 U.S. 197 (1923). The "special public interest" doctrine, which pre-dated modern equal protection analysis, was described as an exception to the general rule that resident aliens could not be denied the right to engage in useful occupations, and presumably other activities. However, the exception permitted the states to discriminate against aliens whenever public benefits or public resources were involved. As the public domain expanded the exception became more generally applied than the rule, and the special public interest label as justification for discrimination was rather freely used. The exception afforded states implicit approval for some rather absurd discrimination in the public interest including cosmetologists, hygienists, poultry technicians, opticians, and embalmers. See supra note 1 and statutes cited therein.

Graham v. Richardson, 403 U.S. 365 (1971), significantly eroded the "special public interest" doctrine. See infra notes 14-22 and accompanying text; see also Sugarman v. Dougall, 413 U.S. 634, 644-45 (1973) (the Court confirmed that the Graham case virtually eviscerated the "special public interest" doctrine).

3. Like its historical antecedent (the special public interest doctrine), the public or political function doctrine in alienage cases was formed as an exception to general equal protection principles. See infra notes 35-43 and 61-63 and accompanying text. The general principle that alienage discriminations are suspect and precipitate exacting scrutiny under the equal protection clause can be disregarded whenever the classification is deemed to serve "public or political functions." The phrase is deemed an exception, but as the public/political/governmental domain widens, the generally applied exception risks swallowing the rule. See, e.g., infra notes 44-53 and accompanying text. The Court has not clearly differentiated between public and political functions. It has used both terms, as well as "governmental function," to justify providing considerable discretion to states to discriminate on the basis of alienage. See Foley v. Connellie, 435 U.S. 291 (1978) ("political responsibilities" and "public responsibilities"); Ambach v. Norwick, 441 U.S. 68 (1979) ("governmental" functions); and Cabell v. Chavez-Salido, 102 S. Ct. 735 (1982) (political function).

The doctrinal struggle present in the alienage cases is an unfortunate example of the Court's failure to provide consistently principled bases of constitutional adjudication. In so failing, the Court has seriously eroded the most significant protection available to minorities, the fourteenth amendment's equal protection clause; its meaning, its reliability, and therefore its value is shaken. The Court itself has often noted that these cases "have not formed an unwavering line over the years." That the cases have not formed an unwavering line alone raises no serious problem; little today does not waver. That no appropriate method of adjudication is used to arrive at principles in support of the Court's decisions, that no enduring or evolving principle justifies the wavering, that the wavering is justified by ignoring and rewriting earlier precedential decisions, and that recent decisions which promote the wavering line gracelessly abuse logic are, however, cause for grave concern.

The concern then, is not solely for aliens and other groups who may be vulnerable to majoritarian mistreatment, but also for the integrity of constitutional roles and provisions and for the principled articulation of constitutional values. These constitutional pronouncements furnish no reliable pattern from which consistent and closely connected principles can evolve, and require those seeking answers to elemental questions to hazard a guess based upon the political, social or economic disposition of the Court.

Further, if on the one hand the Court can in the name of sub-

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6. Of course, there must also be concern for the reappearance of obnoxious state parochialism toward aliens and minorities. These decisions may be viewed as supportive of such parochialism, to the extent that it exists. See, e.g., Cabell v. Chavez-Salido, 102 S. Ct. at 744-51 (Blackmun, J., dissenting). Though an important concern, it is secondary to the fundamental constitutional concerns of this discussion.

One excellent example of the general problem can be observed in the right-to-privacy cases culminating in Roe v. Wade, 410 U.S. 113 (1973). The problem there concerns the Court's own imposition of rights not reasonably inferable from the text of the Constitution. Even assuming the propriety of a right to privacy in the abortion context, the Court's capacity for constitutional rights enactment might only be exceeded by its necessarily concomitant capacity to repeal constitutional rights. The alienage cases are indeed an example. The integrity of the Constitution and our structure as a constitutional society is thereby weakened. Individuals cannot rely on fundamental values whose durability wholly depends upon the values of a majority of the Supreme Court. Indeed, values so dependent are not fundamental.
stantive due process weave its own values into constitutional fabric and, on the other hand, shake the integrity and reliability of a representation-reinforcing protection such as the equal protection clause by carving out potentially unlimited exceptions based upon a majority's view of public need, then under what circumstances can the Court not dilute constitutional language and thereby crumble these and other constitutional cornerstones?

The Present Problem and a New Direction

Even if the Court had consistently applied any one of the principles or sets of principles that it has up to now called upon in these cases the constitutional integrity of its decision-making in this area would be flawed. The use of either the special public interest doctrine or the more recent public/political function exception saps the vitality of a main principle for constitutional adjudication. Suspect classes, compelling interests and precise fits mean little next to such expanding exceptions.

8. A much discredited but still chilling example is Lochner v. New York, 198 U.S. 45 (1905). The most recent weaving has taken place in the right to privacy area. See supra note 7.


10. These principles include the special public interest exception utilized prior to Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), the pure suspect class rationale of Graham v. Richardson, 403 U.S. 365 (1971), the political function/suspect class hybrid of the Foley, Ambach, and Cabell cases, see supra note 3; or the traditional rational basis test. Perhaps the substantial goal/rational basis test hybrid of Plyler v. Doe, 102 S. Ct. 2382 (1982), can be added, though that principle arrives as a result of a different set of antecedents. Aliens generally were not the subject of discriminatory state legislation in Plyler. Further, the discriminatory deprivation of an education injured the children of the illegal aliens. The loss of an education, an important if not fundamental interest, and the harm to the children, made Plyler a unique case. The Court stated that more was involved than the question whether the law discriminated against a suspect class, or whether education was a fundamental right. The Court emphasized that the law depriving the children of illegal aliens of an education imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our nation.

Id. at 2398.

Interestingly, the Court in Plyler went on to apply a hybrid rational basis test, which is similar to the important objective balancing test that is advocated in this article. See infra notes 94-95, 111-12, and accompanying text. The test advocated here would yield the same result, however, through reasoning which is consistent with principled constitutional adjudication.
The rational basis test which is used with increasing frequency is generally debilitating in that under it almost any insubstantial justification forecloses protective application of the clause. On the other hand, the enlargement of the “suspect class” status to include aliens, and presumably eventually other like categories, which accounted for the hiatus of virtually absolute protection of lawful resident aliens between 1971 and 1978, is unwarranted. It is unwarranted because the kind of unrestrained elasticity of definition which led to the determination that alienage was a suspect class, as with substantive due process, encourages judges to enshrine their collective or individual value judgments beyond constitutionally connected meaning. Though rational basis and public function exception tests drain the clause of its vitality, infirm definitions of suspect status distend its constitutional function and reduce its reliability and integrity. Definitional firmness connected to the core purpose of the clause, as well as an analysis which imbues the clause with vitality, is needed.

Both stare decisis in a constitutional sense and principles of constitutional adjudication are best served by consistently applying a firm definition, which would not include aliens, to the term “suspect class.” However, by requiring that legislation discriminating against socially and politically isolated groups, such as aliens, be invalidated unless it is closely drawn to serve an important state objective, the general vitality of the clause can at the same time be enhanced, compatible with stare decisis and principled constitutional adjudication.

THE LOOSE AND INCONSISTENT BASES OF THE COURT’S ALIENAGE DECISIONS

Constitutional principles derive their strength and vitality from two primary sources, constitutional language and well-reasoned and judicially articulated connections to constitutional language. The quality of the constitutional “principles” created by the alienage cases must be measured in terms of the second source. The bases for the public/political function doctrine as recently articulated by the Court are—far from well-reasoned connections to constitutional language—loose and inconsistent at best.

The present public/political function doctrine, which results in most state discrimination being tested under the rational basis test, must be viewed in light of the shadows cast by the Court’s opinions adjudicating the rights of aliens challenging state discriminatory legislation over the past dozen years.11

11. Although the Court’s decisions concerning congressional power to discrim-
Prior to 1971, the Court's view was typified in Takahashi v. Fish and Game Commission, where the Court determined that the special public interest doctrine was no bar to an alien earning a living as a commercial fisherman off the coast of California. The Court was "unable to find that the 'special public interest' upon which California relies [ownership of the fish within its territorial waters] . . . provides support for [a] state ban on [alien] fishing." The position taken was doctrinally consistent with earlier decisions. Beginning with Graham v. Richardson in 1971, however, the Court has been doctrinally inconsistent. In Graham, the Court was faced with challenges to Arizona and Pennsylvania laws by alien applicants for public assistance benefits. The alien residents had been denied welfare benefits by their respective states because of a fifteen-year alien residency requirement in Arizona and a citizenship requirement in Pennsylvania. The Court declined to follow the traditional special public interest exception analysis, which had been used whenever state legislation was challenged by aliens on constitutional grounds. Instead, the Court suggested that the earlier case, Takahashi, had "cast doubt on the continuing validity of the special public interest doctrine in all contexts."

In Takahashi, however, Justice Black applied the special public interest doctrine and simply could not find that California had any special public interest in denying commercial fishing rights to aliens. The majority opinion cast no doubt whatsoever on the general validity of the special public interest doctrine; it explicitly considered the doctrine and found it inapplicable to the case at hand. The Graham Court, however, invented a "cast doubt" to justify springing from that doctrine to a modern equal protection

13. Id. at 420.
15. Id. at 367.
16. Id. at 374.
17. Id. The special public interest doctrine, in effect, had permitted state discriminatory legislation if governmental concerns amounted to a "special public interest." See supra note 2.
19. Id. Indeed Justice Rehnquist emphatically recognized this in his dissent in Sugarman. See 413 U.S. at 454-55 (Rehnquist, J., dissenting).
analysis.\textsuperscript{20} And, having wiped the slate clean for present purposes, the Court proceeded to articulate compassionate, fairly logical, but altogether new standards. Stare decisis, even in a flexible constitutional sense, had taken a backseat.\textsuperscript{21} Nonetheless the \textit{Graham} Court did part company with the exception and embarked on a new journey guided by recently evolving equal protection dogma.\textsuperscript{22}

As a result of long accepted and seldom questioned wisdom, our courts generally protect persons from discrimination by state acts under the aegis of the equal protection clause unless the state act is rationally related to some legitimate state objective.\textsuperscript{23} Where, however, the persons affected by the discriminatory state classification are members of a “suspect class” or are losing fundamental constitutional rights, courts as a rule “strictly scrutinize” the state legislation, which will not withstand such scrutiny unless the state can show compelling reasons for the classification.\textsuperscript{24} The use of the rational basis test usually means the courts will uphold the discriminatory legislation;\textsuperscript{25} the application of strict scrutiny usually supports invalidation, though these outcomes need not be as automatic as they generally are. In fact, a conscientious application of either branch of this analysis would result in a more vital principle and more constitutionally appropriate results.\textsuperscript{26}

\textsuperscript{20} See 403 U.S. at 374-76.
\textsuperscript{21} See infra note 96.
\textsuperscript{22} To be fair, the \textit{Graham} Court offered further justification. It stated that the doctrine was grounded upon the notion that whatever is a privilege rather than a right may be made dependent upon citizenship. It distinguished between the privilege of “commercial fishing opportunities” at issue in \textit{Takahashi} and the right to welfare benefits, as if the ability to earn a living and support a family by fishing were any less important than the ability to support a family through public assistance eligibility. 403 U.S. at 374-75.
\textsuperscript{23} Id. at 371; \textit{Dandridge} v. Williams, 397 U.S. 471, 485 (1970); \textit{Lindsley} v. \textit{Natural Carbonic Gas Co.}, 220 U.S. 61, 78 (1911).
\textsuperscript{24} This discussion is not concerned with the “fundamental rights” branch of equal protection analysis, though it too has constitutional and logical deficiencies in an “equal protection” context. See, e.g., \textit{Shapiro} v. \textit{Thompson}, 394 U.S. 618, 660-62 (1968) (Harlan, J., dissenting).
\textsuperscript{25} For example, the Warren Court only invalidated one statute under the rational basis test. See \textit{Morey} v. \textit{Doud}, 354 U.S. 457 (1957). Since 1971, the Burger Court has invalidated more; however, those cases involved wholly unwarranted gender-based discrimination. See, e.g., \textit{Reed} v. \textit{Reed}, 404 U.S. 71 (1971); \textit{Stanley} v. \textit{Illinois}, 405 U.S. 645 (1972); \textit{Weinberger} v. \textit{Weisenfeld}, 420 U.S. 636 (1975).
\textsuperscript{26} A more conscientious application of the rational basis test should seriously review the reasonableness of the legislative choice by assessing the choice’s intended impact in comparison to the significant disadvantages promoted by the choice. The acceptance of any out-of-context rational basis by the Court without serious consideration of the disadvantages accompanying it is virtually a refusal to review. See infra note 50 and accompanying text. Further, if under the strict scrutiny/compelling state interest type of analysis the Court precisely and graphically draws upon factors elucidating the importance of state interests in comparison to
The *Graham* Court did not apply the rational basis test, but found that “[a]liens as a class are a prime example of discrete and insular minority ... for whom, like racial minorities, ... our heightened judicial solicitude is appropriate” and so characterized aliens as a “suspect class” and applied the “strict scrutiny” test. The Court did not reveal precisely why aliens are a prime example of a discrete and insular minority. Indeed, just what is a discrete and insular minority for equal protection analysis purposes constitutes a much more important question than the virtual *ipse dixit* treatment which accompanied this determination in *Graham*. Not only did stare decisis take a backseat but no thoughtfully conceived method of constitutional adjudication was evident at all.

In *Sugarman v. Dougall*, Justice Blackmun, for the majority, again rejected the application of the special public interest doctrine, this time in the context of an equal protection challenge to New York’s exclusion of aliens from competitive civil service positions. Because this legislation was overinclusive and underin...
clusive, it did not withstand the new test of *Graham*. After *Sugarman*, which then seemed a mere extension of *Graham*, and ignoring the leap made and the method used in *Graham*, all seemed constitutionally well and good, consistent at least with fair and generous treatment of aliens, until 1978.

In *Foley v. Connelleie* the relatively new foundation for equal protection analysis in alien cases cracked. The Court was faced with a challenge to another New York statute, this one requiring that state police officers be citizens. The Court did not, however, subject the statute to the heightened judicial scrutiny which *Graham* and *Sugarman* seemed to require. Had the Court used "strict scrutiny" it could perhaps still have upheld the statute by demonstrating that the state had a compelling interest in having important police responsibilities carried out by citizens. To do

31. The legislation included aliens in menial and clerical positions with no important policy-making or sovereign functions. *Id.* at 647.

32. The legislation failed to include aliens in non-competitive government positions or public officers appointed by the governor or legislature. *Id.* at 640.

33. But dictum which would later haunt most of the *Sugarman* majority apologetically lurked in the shadows of the decision. Justice Blackmun stated that the Court's "scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives... [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." *Id.* at 648.

34. See, e.g., *In re Griffiths*, 413 U.S. 717 (1973) (striking down Connecticut's citizenship requirement for lawyers); *Examining Bd. of Eng'rs v. Flores*, 426 U.S. 572 (1976). (Puerto Rico could not prohibit aliens from practice as licensed civil engineers). In 1977, though, the foundation built on *Graham* began to quake slightly. In a 5-4 decision in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), the Court invalidated New York's bar to providing state financial aid to education for aliens. There were, however, four dissenter. Justice Rehnquist argued that alienage classifications need not be "suspect" where the state limitation provides aliens an opportunity to raise themselves from their otherwise powerless state by becoming a citizen or declaring their intention to do so. *Id.* at 20-21 (Rehnquist, J., dissenting). Accepting the authority of the *Carolene Products* footnote, the quality of powerlessness of a class of persons seems at least arguably determinative of their status as a "discrete and insular minority" deserving the protection of heightened judicial scrutiny rather than as a mere class of persons left to fend the tides of discrimination with only the rational basis test.


36. N.Y. EXEC. LAW § 215(3) (McKinney 1972) provided that: "No person shall be appointed to the New York state police force unless he shall be a citizen of the United States." 435 U.S. at 292.

37. No argument for this position is being advanced here; however, the Court could have searched more conscientiously than it did for factors evidencing a substantial connection between citizenship and the responsibilities and discretion invested in police officers. See supra note 26. Chief Justice Burger's discussion emphasized the importance of police officer functions, but provided no connection between those functions and the need for citizens to perform them. He simply concluded that "it would be as anomalous to conclude that citizens may be sub-
so would have been consistent and principled, at least from the standpoint of stare decisis in a constitutional sense.

Nor did the Court reject the principle that aliens are a "suspect class." Nor did the Court reject the principle that aliens are a "suspect class." This would have been harsh but honest. Instead Chief Justice Burger relied upon the dictum from Sugarman that "our scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives," and merely applied a rational basis test to the classification. The Sugarman Court had justified this view as "no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions . . . , and a recognition of a State's constitutional responsibility for the establishment and operation of its own government . . . ." But the use of this dictum, in Sugarman, and more importantly in Foley and later cases, is logically unsound and worse, misleading.

Elevating the Sugarman dictum to such distinction transforms the Sugarman decision itself into an empty contradiction. In Sugarman, the Court did apply strict scrutiny where public functions were involved. If as a result of the dictum the case permits a general public function exception to strict scrutiny in alienage cases, then the dictum decimates the significance of the very holding which it accompanies. The Sugarman Court's primary position is described in the following passage:

We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are

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39. Graham's foundation, as described earlier, is vulnerable, and the mutability of alienage and lack of widespread hostility towards aliens arguably distinguishes the class from race, nationality, and other classes deemed "suspect." See infra notes 102-10 and accompanying text.

40. 435 U.S. at 296 (quoting Sugarman v. Dougall, 413 U.S. at 648).

41. 413 U.S. at 648 (citation omitted).

42. Justice Marshall, dissenting in Foley v. Connellie, 435 U.S. at 303-04 (Marshall, J., dissenting), pointed out that the Court's reading of the Sugarman dictum out of context with the unambiguous holding makes the dictum an exception that swallows the rule. See also Nyquist v. Mauclet, 432 U.S. at 11 (the Court that decided Sugarman emphasized "the narrowness of the exception" by asserting that states could not reserve for their citizens every "vital public and political role") (citing In re Griffiths, 413 U.S. at 729).

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within "the basic conception of a political community." We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose.\(^{43}\)

The Court acknowledged important public or political purposes and still employed strict scrutiny. Beyond that important contradiction, how can a class be sufficiently "discrete and insular" and therefore "suspect" when the state discriminates in economic or social terms and no longer "discrete and insular" or "suspect" when it discriminates in "public function" or "political" terms? Suspectness in no other area depends upon the function of the discriminatory legislation. The class does not mutate as the function of the legislation changes. Perhaps in some cases the state's interest may become compelling. But the nature of the threatened group remains constant as the purposes of the legislation change. The Court should focus upon the quality and the significance of the state's interest in achieving its asserted goal. In demonstrating a compelling interest, the state's evidentiary burdens may admittedly be substantial, but the hurdles of strict scrutiny need not be insurmountable.

Further, how reliable to a burdened minority is a principle of protection if it diminishes whenever the very legislative majority, against whom the principle was designed to protect the minority, chooses to label or characterize the discrimination in a way which relieves that majority of the principle's vigilance? To be useful against majoritarian excesses, a principle protecting minorities cannot shift at the whim of a majority; if it can shift, then it will shift once the majority recognizes how to characterize its discrimination. A principle so infirm cannot function as a principle.

The Court continued its assault on logic and principled decision-making in *Ambach v. Norwick*,\(^{44}\) where Justice Powell took up the cudgel to protect New York public school students from alien teachers. A New York statute\(^{45}\) prohibited non-citizens who did not intend to become citizens from teaching in public schools. This law was challenged by a Scot and a Finn who were married to American citizens and who were otherwise certifiable as public school teachers.\(^{46}\) Justice Powell, for the majority, recited a litany of support "for governmental functions, which is an exception to the general [suspect class] standard applicable to classifications

\(^{43}\) Sugarman v. Dougall, 413 U.S. at 642-43 (citation omitted) (emphasis added).

\(^{44}\) 441 U.S. 68 (1979).


\(^{46}\) 441 U.S. at 71.
based on alienage ...."47 To arrive at the exception to the standard, he characterized public education as a governmental function. Ironically, he quoted Brown v. Board of Education48 in support of the view that "[t]oday, education is perhaps the most important function of state and local governments."49 In answer to this position, it is clear that though education is important and is in part administered by state governments, in its teaching and learning roles it does not function as government or as any part of government. Indeed, except for the expense and general availability of education, the relationship between government and education is unnecessary. In any case, five justices felt that public education should be labeled "a governmental function," applied the rational basis test and sustained the discriminatory legislation,50 confirming Justice Marshall's fear that the exception would swallow the rule.51 The governmental function label was now pasted on education, and a substantial if not engulfing public function exception was engrafted on the suspect class standard for aliens.

Ambach was fairly consistent with Foley,52 but it demonstrated

47. Id. at 75.
49. 441 U.S. at 76 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).


50. Usually the application of the rational basis test is an invitation to sustain the legislation in question. See supra note 25 and accompanying text. Occasionally, however, legislation does not survive the rational basis test. Judge Johnson in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), aff'd, 102 S. Ct. 2382 (1982), struck down the Texas law and school district policy which made public education virtually unavailable to the children of illegal aliens. Judge Johnson perceived no rational justification for the law and policy. On appeal, however, the Supreme Court needed to amend the usual rational basis test in order to justify invalidating the Texas law. The Court, because of the unique factors in the case—the innocence of the children and the significance of education—required that the Texas law not be considered rational "unless it furthers some substantial goal of the state." Plyler v. Doe, 102 S. Ct. 2382, 2398 (1982). Judge Johnson's earlier perception that there was no rational basis for the law may be difficult to support since unimportant, even trivial, bases may be rational.

51. See supra note 42.
52. It may in fact be a more justifiable decision from one standpoint. The class attacked by the New York legislation—those aliens who do not intend to become citizens—involves members who though powerless and immutable given present
the ease with which the Court can label legislative enactments to promote value choices shared by at least the Court's majority. Though stare decisis was paid lip-service in *Ambach*, the infirm mède of adjudication represented by the governmental function gap in equal protection analysis further withered the integrity of the Court and the Constitution.53 The road from *Takahashi* to *Ambach* is fraught with logical potholes and perishable principles. At many turns the Court should have taken the road not taken. One can only stare indignantly at the sight of it.

Still, the Court's retreat from *Graham* continued. In *Cabell v. Chavez-Salido*,54 the reliability of the *Graham* to *Ambach* standard was apparently further diminished.55 In *Cabell*, aliens challenged a California law which precluded all aliens from being employed as deputy probation officers.56 The challenged legislation excluded aliens, in fact, from becoming "peace officers." Deputy probation officers were one of seventy categories of "peace officers" to which the exclusion applied. The United States Supreme Court validated the legislation, reaffirming that under equal protection clause analysis, strict scrutiny of state alienage classifications is not warranted where the state restriction primarily serves a political function.57 The Court relied upon the dicta in *Sugarman v. Dougall*58 and the more recent *Foley v. Connelie*59 and *Ambach v. Norwich*60 decisions in support of this position.

The two-step analysis presumably applied was that legislation properly characterized as serving a political function will be up-

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53. It also begged a series of logical questions: if public school teachers, why not lawyers or applicants for competitive civil service? Why not accountants, pharmacists, and physicians?
54. 102 S. Ct. 735 (1982).
55. The principled basis for the decision is quite unclear. Although the *Ambach* and *Foley* cases are mentioned in the opinion in several contexts, the Court never actually spoke in terms of the rational basis test. The closest Justice White came to identifying the actual standard that the Court applied was a conclusion that "strict scrutiny is out of place when the restriction primarily serves a political function . . . ," 102 S. Ct. at 739, and that the "citizenship requirement may seem an appropriate [legislative] limitation . . . ." Id. at 743.
56. The adjective "all" is used to differentiate the California law from other legislation which discriminates only against those aliens who do not intend to become citizens. The mutability of the class in the latter case is a matter of choice and the discrimination not as unavoidable as in *Cabell*. See *supra* note 52.
57. 102 S. Ct. at 743. The Court's earlier decisions, *Foley* and *Ambach*, had, as noted earlier, *supra* note 3, carved out a "public/governmental function" exception to the rule that strict scrutiny should be applied to test the propriety of state classifications based on alienage.
58. 413 U.S. 634 (1973).
59. 435 U.S. 291 (1978); *see supra* notes 35-41 and accompanying text.
60. 441 U.S. 68 (1979); *see supra* notes 44-53 and accompanying text.
held if it serves any reasonable purpose, that is, any legitimate state objective, and if the classifications described in the legislation "substantially fit" the purpose to be served. The Court found that (1) deputy probation officers could be properly characterized as serving a political function; (2) exclusion of all aliens from law enforcement positions in which discretionary decision-making occurs is a legitimate state objective (a reasonable basis supporting the legislation); and (3) legislation excluding aliens from seventy categories of "peace officers," all with law enforcement functions, however trivial or substantial, classifies in a way which "substantially fits" the purpose of the legislation.

At the outset of Cabell the Court repeated its stock expression that the Court's decisions involving state classifications dealing with aliens over the years have "not formed an unwavering line," but it noted that a pattern, resembling the development of legal principles generally, could be divined. In support of this proposition, the Court resurrected Justice Blackmun's unsupported view of Takahashi as "[casting] doubt on the continuing validity of the special-public-interest doctrine." The Court characterized Graham as an element in a continuum, flowing from Takahashi, and a logical extension of the erosion of the special public interest doctrine, rather than as a leap from one kind of analysis to an entirely different one, wholly unanticipated in Takahashi.

It was apparently important for the Cabell Court to view Graham as part of a continuum rather than as the start of something new. If Graham were simply an extension of Takahashi, then Graham, Takahashi, and their ilk could be labelled as "eco-

61. The Court never actually states this in its opinion, thereby leaving the opinion without any fully stated principle upon which it can rest. See supra note 55. The Court cites dictum from the Sugarman case that in the public function area "our scrutiny will not be so demanding." Cabell v. Chavez-Salido, 102 S. Ct. at 739 (citing Sugarman v. Dougall, 413 U.S. at 649). However, in view of its reliance upon Ambach and Foley, both of which ascribe to a "reasonable basis" test, it may be safe to assume that the Court meant to use a reasonable basis test. On the other hand, in view of the flexibility of the wavering characteristic of these cases, it may not be safe to assume anything, especially where it is unstated.

62. 102 S. Ct. at 741.

63. The Court stated that the legislation "may seem an appropriate limitation." Id. at 743.

64. Id. at 738.

65. Id. at 739.

66. Some of the forerunners of Takahashi involved activities which might easily be characterized as "economic." See supra cases cited in note 2.
nomic activity” cases, separating them from public/political function cases and providing a two-branch doctrine, one branch of which would in time wholly overshadow and sap the vitality of the other. This loose labelling practice is theoretically similar to the “cast doubt” approach the Graham Court virtually invented in order to drain the vitality of the special public interest doctrine. Additionally, by characterizing Graham as merely eroding one public interest exception, the Court further provided itself with a continuing pattern of justification for further erosion in Cabell. From the majority’s view, it is preferable that Graham be a part of a continuum of evolving principles of which Cabell’s exception is only an extension. If Graham, on the other hand, were characterized as the origin of a principle it would be more difficult to justify placing it on the “economic” side of a wavering line, because at its inception the Graham doctrine must be viewed in more absolute terms than merely as one flank in a doctrine of multiple applications.

But the Graham holding did not “flow from Takahashi,” nor was it part of any continuum of principle. Graham applied modern equal protection analysis to alienage classification cases which had not been hinted at earlier. Graham, indeed, was a starting point. And so, to justify its view that Graham and ultimately Cabell are merely subtle waves in the traditional evolution of legal principles, the Court in effect rewrote Graham, and indeed, Takahashi. This demonstrates how very little regard the Cabell Court had for stare decisis in a constitutional sense. This is not surprising in view of the regard shown by the Court in Graham, Foley, and Ambach.

The consequences of the Court’s gerrymandering of legal principles are not trivial. Superimposing an economic/political dichotomy pattern on state alienage classification cases necessarily places the civil servants of Sugarman and the lawyers of In re Griffiths on the opposite side of the line from peace officers and public school teachers and yet on the same side as the fishermen of Takahashi, which, to repeat an earlier sentiment, insistently begs the question: why are lawyers and applicants for competitive civil service more like fishermen and welfare recipients than public school teachers and probation officers? The Court would

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67. The Court stated that Graham and other cases where the Court had applied heightened scrutiny involved “restrictions on lawfully resident aliens that primarily affect economic interests.” 102 S. Ct. at 739.

68. See supra notes 14-22 and accompanying text.

69. 413 U.S. 171 (1973). In In re Griffiths, decided the same day as Sugarman, the Court found that a Connecticut rule barring otherwise qualified aliens from practicing law was unconstitutional.
presumably answer that the latter sufficiently engage in the exercise of power to be considered participants in “political functions.” But surely lawyers and civil servants are as likely as school teachers to exercise sovereign power, whatever that is.

What is most important about this doctrinal dichotomy is that (1) the distinctions between economic and political functions drawn by the Court are quite unclear and therefore subject to the momentary whim of a majority of five of the Court or any lower court judge or panel; and (2) the economic/political dichotomy is improperly attributed to a line of cases which seemed to eradicate the very doctrine from which public interest exceptions earlier arose.

Another major problem with Cabell, as with the earlier Ambach and Foley cases, is that the Court again misconstrued and misapplied the analysis provided by Sugarman. In Sugarman, the Court first recognized “that classifications based upon alienage are ‘subject to close judicial scrutiny’ and that the Court must [t]herefore look to the substantiability of the State’s interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined.” The Sugarman Court then went on to closely scrutinize the New York statute before it. That close scrutiny involved a process by which the Court first considered the statute’s underinclusiveness and overinclusiveness in relation to positions which the state has an interest in limiting to citizens. The analysis in Sugarman, as noted earlier, involved the close scrutiny that the Court applied to classifications affecting “suspect classes.” The Court in Cabell, however, characterized the Sugarman analysis not as an application of heightened scrutiny but merely as an evaluation used to determine whether the particular restriction generally serves political or economic goals in the first place.

Cabell’s two-step evaluation process, on the other hand, first requires an examination of the specificity of the classification to see whether it is substantially overinclusive or underinclusive. If it is either, it would tend “to undercut the governmental claim that the

70. See Cabell v. Chavez-Salido, 102 S. Ct. at 743.
71. 413 U.S. at 642. This is so in spite of tentacled growth of the unfortunate dictum in Sugarman. See supra notes 40-65 and accompanying text.
72. 102 S. Ct. at 739. Apparently, the need to serve merely legitimate political ends is a reflection of the Court’s unannounced use of a rational basis test.
classification serves *legitimate* political ends."

But, to repeat, the *Sugarman* Court in effect assumed a substantial state interest and used its two-step analysis as close scrutiny to determine whether or not the legislation actually served that particular substantial state purpose. A close look at the preciseness of the statute's terms informs the Court of the legislation's breadth of purpose, and in *Sugarman* the Court found that the statute was not confined precisely enough to fit the state's substantial interest. The *Sugarman* Court said nothing about the statute serving economic goals as opposed to political goals; its concern was whether the statute precisely addressed important state interests.

Thus, the validity of the analysis employed in *Cabell* was attributed to *Sugarman*, but then used for an entirely different and much more facile purpose. In *Cabell* the Court either misunderstood or misrepresented the core of the recent *Sugarman* holding. In addition, the *Cabell* Court amended the "purported" *Sugarman* analysis as it applied it. Though Justice White, for the majority, agreed that the California statute was somewhat overinclusive, he stated that "the classifications need not be precise; there need only be a substantial fit." *Sugarman* meant nothing like this. *Sugarman* assumed an important state interest when it applied "strict scrutiny" and it required "narrowly confined" and precisely drawn classifications, a far cry from classifications that need only substantially fit. As a result, unfortunately, in terms of doctrinal consistency, *Sugarman* and *Cabell* do not even loosely fit, yet one is relied upon to support the result in the other.

As a result of all this, where does the law stand? Presumably,

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73. 102 S. Ct. at 740; see supra notes 61-63 and accompanying text.

74. The *Sugarman* Court stated: "We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." 413 U.S. at 643 (emphasis added).

75. Id.

76. The statute at one time required citizenship for cemetery sextons, inspectors, toll service employees, and park and recreation employees, among seventy other "peace officer" positions. 102 S. Ct. at 741 n.9. Justice White acquiesced in the view that the statute might be overinclusive as to these, but, in his view, the district court had been wrong in striking down the statute on that basis and in assuming that if the statute was overinclusive at all it could not stand. Id. at 741.

77. Id.

78. 413 U.S. at 643. Although the *Sugarman* dictum continues to exist, it is wholly unnecessary and contradictory to the analysis of *Sugarman* itself. To give it any credibility, one would have to read *Sugarman* as saying strict scrutiny will be applied to all state legislative classifications involving aliens, including cases where important state interests are asserted except in cases where important state interests are asserted. Since the holding does not rest on the dictum and the dictum read with the holding constitutes nonsense, the only sensible interpretation of the case must ignore the dictum.
(1) aliens remain a "suspect class" when challenging state legislative discrimination, but (2) if the goal of the legislative classification serves a political or public function the legislation will stand unless (3) the classifications do not substantially fit the political function goals. The law is simply stated but susceptible to whimsical application.

Beyond doctrinal and logical difficulties, how does this amalgam of standards affect the capacity of aliens to protect themselves from majority discrimination? When do classifications not substantially fit? In Cabell, about fifteen percent of the positions covered by the "peace officer" category were unrelated to the state's sovereign interests. Presumably, a fit where fifty percent of the positions were unrelated to the legitimate state purpose would be too loose, not a "substantial fit." That leaves a gap, a substantial gap, within which the substantiality of the fit will presumably be defined by lower courts in the future.

Further, the state's interest need only be "reasonable" or "legitimate," not compelling or even important. So a state discrimination which is based upon some state interest so long as it serves some political or public function will stand unless lower court judges find that the state's classification coverage exceeds by some undetermined degree the "substantial fit" found in Cabell.

What this less-than-loose fit leaves us with is a state of constitutional law subject to capricious change at any moment depending upon the sympathies of any majority of five. Stare decisis in a constitutional sense may be flexible but the vacillation seen here brings Supreme Court adjudication "into the same class as a restricted railroad ticket good for this day and train only," not flexible but unreliable.

Realistically, we cannot always expect the decision-makers in our courts or even the United States Supreme Court to be wholly

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79. See supra note 76.
80. The words are Justice Roberts', no stranger to important reversals, in Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). A recent related example of this almost ad hoc use of principles in constitutional adjudication is Plyler v. Doe, 102 S. Ct. 2382 (1982) where the Court, faced with the propriety of invalidating legislation discriminating against illegal alien children under a "suspect class status" analysis and the weakness of a traditional rational basis analysis, required that the legislation meet not merely reasonable but substantial state goals. Though the result in Plyler may be socially and politically just, the loose play with principles that achieves it further weakens the core standards and meaning of the equal protection clause.
free from political, social and economic biases or personal and
collective value choices in decision-making, and we can expect
the results of decisions to reflect these biases and choices in a
general way. It is one thing to suggest ideal solutions from an ac-
dademic perch and quite another to be immediately responsible for
the impact of those solutions in a society bubbling with emo-
tional, social, economic and political reverberations. But some
modicum of doctrinal consistency, some fair representation of
earlier decisions, some logical integrity over more than a few
years, and some fidelity to the Constitution is not too much to ask
of our highest court. The failure of the Supreme Court Justices to
impose doctrinal consistency along with settled and durable prin-
ciples derived from a sound method of adjudication is not only
unsatisfying but may lead to increasingly arbitrary and biased de-
cision-making, and raises serious questions about the fundamen-
tal nature of the purported fundamental law.81

The equal protection clause of the United States Constitution

81. Courts may never wholly employ the wonderful models of interpretation
nor apply the consistent, objective standards the theoreticians deem essential.
This recognition does not mean that because models and standards are sometimes
ignored, there need not be models and standards. This recognition does not mean
that appellate decision-makers should be free to plant the constitutional garden
with their own value choices, or even the value choices that they divine are the
peoples'. The constitutional garden has been planted and can only be planted in a
particularly prudent way if its values are to take root and in time flower and bear
fruit. The judiciary has not been, nor should it be, involved in the planting. The
federal convention and the amendment process are the prudent sowers that serve
this role. Watering, weeding, spadework, and a little careful trimming is more the
judiciary's role.

The late professor Alexander Bickel suggested, in discussing first and four-
teenth amendment questions, that “the answer requires normative choices and
prophetic judgments—much as does the solution of other problems of social pol-
quoted in Wright, Professor Bickel, The Scholarly Tradition, and the Supreme
Court, 84 HARV. L. REV. 769, 784 (1971). Judge J. Skelly Wright asserts that Profes-
sor Bickel “regards constitutional provisions as clearly controlling only the most
painfully obvious and paradigmatic instances of unconstitutional action. His un-
willingness to take more than the most crabbed, narrow view of constitutional lan-
guage...” compels him to require value choices in filling in majestic
constitutional outlines. Wright, supra, at 784. Bickel insists that by balancing, pre-
dicting, and testing values, Supreme Court Justices make policy. A. BICKEL, THE
LEAST DANGEROUS BRANCH 100-03 (1962). He states “[indeed], very often it en-
gages in a Socratic dialogue with the other institutions and with society as a whole
concerning the necessity for this or that measure, for this or that compromise.”
Bickel, Foreward: The Passive Virtues, 75 HARV. L. REV. 40, 50 (1961). This may be
the problem. Perhaps the Court views itself as Bickel thought it should. But it
cannot balance, predict, and test values with any degree of objectivity or validity.
The United States Supreme Court, composed of nine isolated, older, established
persons, of all groups, may be least able to do that. Even if it could, it would
clearly be subverting the Constitution, the amending process, and the respective
roles the Constitution provides for the people, the legislature, and the judiciary in
the process.
contains one of those majestic phrases which tempts the cultivators of the Court. Among its sweeping fertile furrows the Court is tempted to plant and uproot values as it predicts their eventual acceptability. In 1971, in *Graham*, the Court in an expansive and generous environment precipitously announced a new doctrine. It granted aliens “suspect class” status, in effect immunizing aliens from almost any state discriminatory legislation. Then from 1978 to 1982, the value orientation of the Court and perhaps society changed. With it the Court’s view of the equal protection clause’s protection of aliens, among others, changed. Although many with politically and socially generous viewpoints may well agree that an expansive interpretation of the equal protection clause served the ends of justice and morality in 1971, many others, fed up with reflexive liberal values by 1978, believed they had captured the value consensus. But aren’t both viewpoints just that—merely viewpoints, transitory value choices? And as difficult as it is to accept the doctrinally inconsistent turnabout in the later cases, wasn’t the earlier precipitous determination that aliens are a suspect class also unwarranted, and isn’t it still? More importantly, is the responsiveness of the Court to shifting viewpoints any way to run a constitutional system?

CONSTITUTIONAL ADJUDICATION AND THE EQUAL PROTECTION CLAUSE

Equal protection clause analysis generally is a complex area in constitutional adjudication. Even most interpretivists would probably agree that proper interpretation of the clause requires something more than the text itself. It cannot simply mean that

82. *Plyler v. Doe* may represent another momentary value shift. There, where five sets of values would have been offended by traditional rational basis test analysis, the Court supplied the needed adjustment to arrive at the desired value result. The test used in effect equated “rational basis” with “substantial goal,” though it is clear that rational basis means something less. Since the test used there is not only an aberration, but also definitionally erroneous the result seems to be supported solely by the Justices’ collective value judgment.

83. Interpretivists are like positivists. They usually advocate judicial restraint and constitutional decision-making which, in determining constitutional meaning, rely upon the textual language of the Constitution, reasonable inferences drawn therefrom and, in some cases, historical evidence. See J. Elx, *supra* note 7, at 1 (1989); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 706 (1975). Non-interpretivism, on the other hand, permits the courts to provide for constitutional rights where there is no plausible textual source within the Constitution or perhaps even inferrable from its structure. See Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278,
no state can deny any person within its jurisdiction equal protec-

282-83 (1981). Natural law, moral philosophy, American tradition, and well-ac-

There may be a narrower scope for operation of the presumption of con-
stitutionality . . . [than reasonableness] . . . when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced by the Fourteenth.

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amend-
ment than are most other types of legislation. . . .

Nor need we inquire whether similar considerations enter into review of statutes directed at particular religions or national or racial minorities, whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (citations omit-
ted).

Ely’s process-based approach makes the inquiries suggested by the second and third paragraphs of the footnote. He discovers that pure interpretivism is incom-
plete because, in part at least, it would not provide for minorities what our federal democratic system intended to provide. He suggests that where democratic processes have fallen short in their representation of minorities, the Constitution, primarily through the equal protection and due process clauses, virtually compels the conclusion that the textual language be augmented to assure appropriate pro-
tection. This includes the heightened scrutiny afforded “discrete and insular” mi-
norities under the equal protection clause. See J. ELY, supra note 7, at 30-32. Ely allows judges some free-lancing with the equal protection clause though he proba-
bly deems it limited at least to equality in cases of discrimination among classes of persons.

According to Ely, it is appropriate that appellate judges constitutionalize partic-
ipational and representation-reinforcing values, though not substantive values (such as the right to privacy or liberty to contract). Ely perceives that the imposi-
tion of the laws. At some level of justification, states must be able to distinguish among classes of people to provide for the public welfare in areas not preempted by Congress. The Supreme Court, of course, usually requires in its equal protection analysis that the governmental classification be "rationally related" to a legitimate governmental objective. Because the "rational basis" test requires a very low level of justification, where a classification discriminates against a race, religion, national origin or a "discrete and insular minority," the courts, aware of majoritarian dominance in our system, have offered a higher level of scrutiny, "strict scrutiny," by which they usually require that the legislation serve a compelling state interest and be narrowly drawn toward that end. Presumably because racial classifications originally gave rise to the fourteenth amendment and are so obnoxious, the legislative motivation leading to such enactments is deemed "suspect" and the test used seems to provide an almost unleapable hurdle.

A simple but important question for the constitutional adjudication debaters concerning the open-textured equal protection clause is: other than for race, when is the characterization of a group as a "suspect class" appropriate?

Non-interpretivists would apparently permit the suspect class assignment whenever the Court determines that the assignment protects a moral value supported by traditional social ideals, the moral vision of the judge, natural law or general principles of political morality. This generalized position constantly subjects the Constitution to the ebb and flow, or punch and counterpunch, of the values of majorities of five, or less in the case of lower courts. Further, it impeaches the Constitution's integrity as function of process-oriented values does not flaw the integrity of the constitutional process of adjudication. Indeed, it is Ely’s view that this approach has more integrity and is more consistent with representative democracy because it does not permit judges to enshrine values in the open-textured areas of the Constitution generally but permits them to do so only when they are "conspicuously well situated to do so." Id. at 102. Judges know enough about process and representative structure to impose values whereas they are not "better reflectors of [more] conventional values than elected representatives." Id. More conventional interpretivists would not go so far as Ely; non-interpretivists would go much further.

84. This low level of justification may be deemed appropriate by most, but it is certainly not immune to criticism. Legislative discriminations are almost always validated under this test. As is later suggested, an important state interest or at least a significant reasonable basis is more warranted.
Purist interpretivists would go beyond the rational basis test only for "race" and perhaps religion and national origin. This would leave the equal protection clause with a small role indeed. If it is going to mean much at all, the equal protection clause must offer more than the easy-to-overcome rational basis test and the extremely limited "suspect class" category which most interpretivists would use.

Defining the "discrete and insular minorities" of the Carolene Products footnote as broader than race, religion, and national origin, and providing more protection, gives the clause the vitality it needs. At the same time judges should be prevented from imposing personal and collective value choices upon the Constitution. Thus a firm definition—if not clause-bound, at least one fairly projective of the characteristics that the clause unarguably is concerned with—is needed. This duality—vitality plus definitional firmness—also seems compatible with a system characterized by the balances of democratic representation, federalism, separation of powers, due process and equality. This seems especially necessary if no more than a "rational basis" test will otherwise be applied in the usual case.

But who are the "discrete and insular minorities" to be provided this added protection? According to the Carolene Products footnote they are minorities against whom "prejudice ... tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Ely asserts, understandably, that in equal protection cases the footnote suggests that the Court should "concern itself with what majorities do to minorities," for example, enacting laws directed against "religious, national and racial minorities and those infected by prejudice against them." Assuming that a constitutional clause

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85. See supra note 81.
86. Id.; J. ELY, supra note 7 at 30-32; see also R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).
87. See supra note 83.
88. Definitional firmness connected to the core concerns of the clause provides a check against the exposure to value imposition which an inexplicit standard brings; whereas, the controlled elasticity which permits growth beyond historically-limited textual language provides the vitality which accompanies the most democratic of our policy-making institutions. Within the process of the decision-maker resides a duality similar to that featured throughout our system of checks and balances: vitality and vigilance; fairness of process, yet order; equality, yet democratic decision-making.
89. See supra note 83.
90. J. ELY, supra note 7, at 76. Most interpretivists, however, would give short shrift to the "authority" of the footnote and not go beyond a limited reading of the
may have some meaning beyond the precise circumstances which may have motivated its proposal and ultimate ratification, it is reasonable to infer that the clause compels the Court to apply serious scrutiny to classifications which are closely comparable to those which it unarguably addresses. But in the case of the equal protection clause, should strict scrutiny be applied to classifications involving all minorities affected, however momentarily, by prejudice and powerlessness?

Among other standards and mixes of standards which have been offered, one that seems quite appropriate is that heightened scrutiny should be applied whenever the condition that makes an individual a member of a minority is immutable and where the minority has been traditionally subject to widespread hostility and prejudice on account of its condition, a hostility and prejudice deeply rooted in stereotypes. In support of this view, the third paragraph of the Carolene Products footnote suggests a more searching judicial inquiry when prejudice against discrete and insular minorities is a special condition which tends seriously to curtail the political process ordinarily relied upon. This language asks the question: when is prejudice against a wholly separate

equal protection clause. As Justice Rehnquist pointed out in his Sugarman dissent, only four members of the Carolene Products majority joined in that opinion. 413 U.S. at 656 (Rehnquist, J., dissenting). He also referred to a further observation made by Justice Frankfurter that “[a] footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine, and the Carolene footnote did not purport to announce a new doctrine.” Id. (quoting Kovacs v. Cooper, 336 U.S. 77 (1949) (concurring opinion)). Further, Justice Rehnquist suggests that neither language nor historical evidence “suggest to the slightest degree” that the equal protection clause was intended to render any class, other than racial or national origin minorities, “suspect.” 413 U.S. at 649-50 (Rehnquist, J., dissenting); Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting). But why isn't a reading of the clause's meaning which would permit the invalidation of any statutory classification just as reasonable as Justice Rehnquist's reading? Literally the clause provides that no state shall deprive any person equal protection of the laws. A truly literal reading provides no justification for any state legislative classification.

91. “Immutability” need not be limited to physical immutability; that is, color, national origin, gender, et cetera, but characteristics otherwise immutable should satisfy this portion of the suggested test. Cultural identity (Jews, Arabs) and sexual psychological identity (homosexuals, transsexuals), are examples.

Ely questions the general importance of immutability as a fast requirement. See J. Ely, supra note 7, at 149-70; see also Parham v. Hughes, 441 U.S. 347, 363 (1979) (White, J., dissenting) (ability of mother to pursue remedy should not be precluded because she failed to legitimize her child according to statutory procedure).
and isolated minority sufficiently virulent to infect the political majority?

The mere characterization of a group as a group against whom some generally recognized prejudice exists does not seem to be enough. Prejudice or hostility which is widespread and rooted in stereotypes that are unanswerable by reason is the kind which could infect a political body. But unless the process is too infected to respond to reason, then reason rather than prejudice has a fair chance to prevail. And that may be all we can ask for in a democracy.

Further, though, what degrees of discreteness and insularity provide us with a minority toward whom exacting scrutiny is required? Is an individual a member of such a minority if she can change her minority-identifying characteristics or withdraw from the group? Perhaps not. Is transient or less than immutable “minority-ness” sufficient to provoke exacting judicial scrutiny? If the legislation is directed against her only insofar as she chooses to remain within the class, she can alleviate the discriminatory impact by removing herself from the group. Then, the prejudice against the minority no longer seriously infects nor curtails the political process as to her. So, immutability seems to be a desirable quality to retain within the doctrinal definition of discrete and insular minority.

For some, all this makes too much of the footnote. But paragraphs two and three of the footnote at least, though not binding in any precedential sense, provide a constructive doctrinal starting point in adjudication under the open-textured clauses of the Constitution. Paragraph three’s properly-defined guidance in equal protection cases provides vitality on the one hand, and firmness and integrity on the other, to the equal protection clause. The prejudice which triggers exacting scrutiny, to be properly defined, should result from a widespread hostility deeply rooted in unjustified stereotypes and immutable characteristics which define discrete and insular minority-ness. That is a firm

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92. Though Owen Fiss describes the footnote as “[t]he great and modern charter for ordering the relation between judges and other agencies of government,” Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 6 (1979), others question its function as a doctrinal guide. See, e.g., Sugarman v. Dougall, 413 U.S. at 656 (Rehnquist, J., dissenting); see also supra note 90.

93. I say “vitality” because otherwise a general rational basis standard limits application of the clause to infrequent cases; I say “firmness and integrity” because the enlargement of the scope of equal protection by an expansive definition of suspect classes, the alternative, would subject the clause to evolving collective value judgments of judges, in the manner of Lochner and Roe v. Wade. See supra note 7.
and reliable standard—yet one that leaves the clause with vitality beyond "race" and "national origin."

One further step for equal protection analysis may be appropriate. The mere finding of any rational basis for legislation affecting other social minorities not fitting within the suggested definition still provides the most precarious assurance that many people marked as minorities in our society will get a fair shake. Important state goals, not any rational objective, and a requirement that legislative classifications closely fit those important goals constitutes a more appropriate standard against which to measure questioned legislation in many cases. This standard falls intentionally short of calling for expansive "suspect class" categories but does call for a general test of greater vitality even where suspect classes are not involved. The essence of the interpretivist/non-interpretivist/process-oriented debate for constitutional cases generally is constitutional integrity and vitality. As suggested, the application of some serious scrutiny where legislation affects minorities with the described characteristics does not provide judges with an open invitation to impose positive value choices as does a broad application of suspectness. Increasing ju-

94. The test proposed to assess the constitutional appropriateness of state alienage classifications here is similar to the intermediate level of scrutiny applied to gender- and perhaps illegitimacy-based classifications. See Craig v. Boren, 429 U.S. 190 (1976); Caban v. Mohammed, 441 U.S. 380 (1979). The classification is invalidated unless it serves an important governmental interest and there is a substantial relationship between the basis for the classification and the important governmental interest. It is also similar in effect to Justice Brennan's substantial goal requirement in Plyler v. Doe. The Court determined that discrimination could "hardly be considered rational unless it furthers some substantial goal of the state." 102 S. Ct. 2382, 2398 (1982); see also Dandridge v. Williams, 397 U.S. 471, 517-22 (1970) (Marshall, J., dissenting) (more general application is advocated). The important or substantial governmental interest test advocated should be characterized as a general test used whenever the classification applies to socially or politically isolated minorities. Perhaps a rational basis test might be justified in the remaining classes of cases, presumably some wholly economic-based classifications. Further, the test advocated would differ from that accepted by the Court in that closely drawn classifications are required. This presents no unreasonable burden upon state legislatures and contributes to the vitality of the equal protection clause as a meaningful principle. See Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Nowak, Realizing the Standards of Review under the Equal Protection Guarantee—Prohibited, Neutral and Permissible Classifications, 62 Geo. L.J. 1071 (1974).

95. Professor Ely, for example, would not call for such a definitionally tight approach. Though he recognizes the usefulness of the factors described here, his approach is more functional in terms of symptoms, and powerlessness rather than minority-ness seems more significant to him. See J. Ely, supra note 7, at 150-60.
dicial scrutiny in most cases adds vitality, but the definitional standards for exacting scrutiny remain firm. Further, displacement of the rational basis test in cases affecting socially and politically isolated minorities not deemed suspect classes is compatible with the generally understood meaning of the clause. If applied consistently, it would solidly maintain the integrity of the clause, the amendment, and ultimately the Constitution.

A Recommended Approach to Adjudication in the Alienage Cases

Were we starting from a clean slate, formulating a recommendation for constitutional adjudication in this area would be a simpler matter. But the slate is not clean; nor is it constitutionally healthy. And though the Court's own inconsistencies and free-floating standards are no justification for continuing to ignore stare decisis, the needed infusion of constitutional integrity justifies a flexible application of stare decisis which, in any case, would probably represent no graver encroachment than the next decision of the Court itself. The recommendation here involves

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96. Implicit in earlier criticism that the state alienage classification decisions of the Court, beginning with Graham, misrepresent earlier decisions and are inconsistent and sequentially illogical is the failure of those opinions to properly adhere to the principle of stare decisis once the Court had settled upon a general principle of constitutional law. Though not as important as fidelity to the constitutional text, the application of stare decisis once the Court arrives at a constitutional principle is essential to the maintenance of constitutional integrity.

Stare decisis in a constitutional sense is a touchy subject. The Constitution, not judicial reasoning or incantation, is "the ultimate touchstone" and the importance of constitutional meaning and the difficulty in rectifying questionable interpretations calls for flexibility in the application of stare decisis. See Graves v. New York ex rel. O'Keefe, 306 U.S. 466, 491-92 (Frankfurter, J., concurring); see also E. Levi, An Introduction to Legal Reasoning 58-60 (1949); Reed, Stare Decisis and Constitutional Law 9 Pa. Bar Ass'n Q. 131 (1938); Burnet v. Coronado Oil & Gas Co., 295 U.S. 393, 405-13 (1932) (Brandeis, J., dissenting). Some in fact, have asserted that stare decisis has no place in constitutional law. See Armstrong, Mr. Justice Douglas on Stare Decisis: A Condemnation of the Eighth Cardozo Lecture, 35 A.B.A.J. 541, 541 n.3 (1949), in which the author quotes Justice Black when he was a senator that "no doctrine of stare decisis applies to opinions in constitutional interpretation." Justice Douglas also showed little regard for it. Id. at 544. Indeed, between 1960 and 1979 the Supreme Court explicitly overruled itself 47 times. See Maltz, Sane Thoughts on the Death of Stare Decisis in Constitutional Law, 1980 Wis. L. Rev. 467, 494-96.

Nonetheless, the Court generally couches its decisions in terms of precedent. Such adherence is important simply because the Constitution is more than important; it is fundamental. If it is to be more than legislation, or judicial legislation, it must be reliable, fairly certain, and certainly fair and uniform. Stare decisis applied to principles properly arrived at serves this heartening function. Neither stare decisis nor a reasonable interpretivist mode is alone an infallible logical system. If the scientific method or another reassuringly objective method of the application of legal principles to varying factual circumstances were available, stare decisis might be willingly discarded. Courts that are too stare decisis-bound do

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a quasi-interpretivist approach, something like John Ely’s approach but firmer, though not as literal as the interpretivist mode of Raoul Berger or perhaps Justice Rehnquist.

The major question which the Court should seriously review is whether aliens indeed should be deemed “suspect” for equal protection analysis purposes. Professor Ely regards ease of social intercourse and actual political power as very significant in his representation-reinforcing functional approach to determining whether a group is a “discrete and insular minority.” He asserts that alienage discrimination is “an easy case.” He concludes that an inability to vote coupled with time-honored traditional American hostility toward “foreigners viewed through an overlay not take changes in the general social or economic environment into consideration sufficiently to permit the law to evolve in a way which is aligned with social, economic, and scientific evolution. But in a legal environment dominated by positive law (here the Constitution) the frustratingly conservative nature of stare decisis, so significant in a common law environment, is not a great weakness. In fact, stare decisis in a constitutional or legislative sense affirmatively serves both constitutional and legislative fidelity, a rather important judicial function in a constitutional democracy.

97. I say “something like” because I would not agree that it is proper to draw inferences from the general structure of the Constitution or from our federal democratic framework except to the extent that in making choices among reasonable inferences drawn from the text, the compatibility of those inferences with that structure and framework is essential; nor do I agree with an unguided application of the Carolene Products test in an equal protection context. Further, Ely does not seem to think much of “immutability” as necessary to the definition of a suspect minority. See J. Ely, supra note 7, at 150-60. Though I do not view “immutability” alone as a talisman, it is more than relevant. A firm though not unyielding definition of a “discrete and insular” minority is needed. Perhaps immutability as an element of that definition should mean that the challenging minority is not reasonably able to change the characteristics upon which the legislative distinction rests at the time the challenge is made. Assuming that other elements of the test are met, this might then include race, nationality, cultural identity, gender, age, sexual preference, physical or mental condition, and legitimacy. Whether it includes poverty status or alienage generally is more problematic. The latter is the subject of this discussion.


99. It is ironic, if not indeed disingenuous, that the later Court decisions, Foley, Ambach and Cabell, for which interpretivists were responsible, treated the core principles of the earlier decisions with such liberality that they produced a turnabout in the law in less than ten years.

One might understand non-interpretivists ignoring stare decisis. Results supporting judicial value choices are more important objectives for them. But an interpretivist who ignores stare decisis is like a vegetarian who eats cheeseburgers on the sly; the latter is not much of a vegetarian, the former not much of an interpretivist.

100. J. Ely, supra note 7, at 161.
of citizen legislatures resolves the matter of their suspectness.\textsuperscript{101} The case is not so easy though. His conclusion rests on facile assumptions.

The ability to vote may seem to be relevant, but it is more symptom than cause or description of minority-ness. No right to vote exists because the right is denied certain groups; the right to vote does not define a group, it simply confirms the group's inability to block the discriminatory legislation and may be symptomatic of some minorities. Powerlessness is in part a characteristic of most minorities, but again it is an effect, a symptom. It does not tell us much about the characteristics of the group which might lead to prejudicially motivated legislation.

Ely's further assertion of a time-honored traditional American hostility toward foreigners sounds convincing, but it is not. He cites Justice Blackmun's dissent in \textit{Ambach}, in which the Justice attributes much of the discriminating legislation to 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."\textsuperscript{102} Although there has been hostility and prejudice against some groups of immigrants (the Irish in the middle of the nineteenth century,\textsuperscript{103} the Asians beginning in the last two decades of the last century,\textsuperscript{104} and Jews and southern Europeans in the first two decades of this century),\textsuperscript{105} the laws passed in those days, were not hostile to all aliens.\textsuperscript{106} These laws were directed towards certain groups and nationalities. Though infamous in their immediate impact, they do not reflect widespread hostility, based upon traditional and deep-rooted stereotypes and prejudice towards aliens in general. Some significant hostility towards Asians and southern and eastern Europeans is surely reflected, but not towards all aliens historically and continuing. While such hostility is reproachful, and while it may serve as a basis for regarding such immigrant \textit{nationalities} as suspect classes, it does not

\textsuperscript{101} Id. at 161-62.
\textsuperscript{102} Id. at 255 n.87 (citing Ambach v. Norwich, 441 U.S. 68, 76 (1979) (Blackmun, J., dissenting)).
\textsuperscript{103} See, e.g., O. HANDLIN, BOSTON'S IMMIGRANTS (1968).
\textsuperscript{104} See The Chinese Exclusion Case, 130 U.S. 581, 594-96 (1889).
\textsuperscript{105} Restrictive immigration laws were passed in 1917 and 1924 chiefly in response to the south, central, and eastern European waves of immigration between 1890 and 1924. There were over four million Italian immigrants during this period alone.
\textsuperscript{106} National origin quotas, initially based on percentages of that nationality in the population in 1910 (then again in 1920) as well as a literacy requirement, sharply curtailed immigration from southern and eastern Europe. See Act of Feb. 5, 1917, ch. 29, 39 Stat. 874, 877; Act of May 19, 1921, ch. 8, 42 Stat. 5, 6; Act of May 24, 1924, ch. 190, 43 Stat. 153, 159-60.
demonstrate widespread hostility towards aliens generally, particularly today.

Beyond "widespread hostility" it might be quite difficult to further demonstrate that the assumed hostility towards aliens in general is deeply rooted in unwarranted stereotypes. There is no evidence of widespread hostility towards northern Europeans, nor does there seem to be towards central and southern Europeans today.107 Whenever there is present evidence of widespread hostility toward any group of aliens at all, it seems directed more towards a particular nationality, race, or cultural/ethnic group and the circumstances of its arrival, rather than at aliens generally.

There is more to the problem of the criteria used in defining alienage as a suspect class. Alienage is not an immutable quality, at least not when facing discriminatory legislation which is limited to discriminating against those who do not intend to become citizens.108 Many aliens, especially those eligible to enter and reside in the United States, can change their status in three to five years by naturalization.109 Legislation which is qualified by an "intention to become a citizen" exception indeed discriminates against these "mutable" aliens only to the extent they are unwilling to change. To the extent that the legislation addresses all aliens whether they intend to change or not, during the period they are unable to become citizens they are an "immutable" group. If neither aliens generally nor aliens ineligible for citizenship are members of the group addressed by the legislation, then the legislation addresses a group that can change. In this latter case, then, it seems doctrinally and methodologically appropriate

107. Justice Blackmun's apparent contention that the challenged alienage laws were passed in a frantic, emotion-laden environment, though perhaps alluring, especially in 1971, seems misplaced. See Ambach v. Norwick, 441 U.S. at 82 (Blackmun, J., dissenting). Further, continuing aversion to the minority at the time of the challenge rather than merely at time of passage is the relevant factor in considering whether a group is a "discrete and insular minority." The law is being acquiesced in and utilized by the legislature. Therefore, whether it is being presently used to discriminate against a presently "suspect" group seems the more appropriate inquiry.

108. If the animating hostility towards aliens is deemed to be widespread and deeply rooted in stereotypes, then it could be argued that state legislation discriminating on the basis of alienage which is not limited to aliens who do not intend to become citizens is directed towards a "suspect" class. See supra note 52 and accompanying text. In view of the difficulty of satisfying the widespread hostility and stereotype criteria, however, this point should not be reached by the adjudicating court.

for courts to sustain discriminatory legislation upon a lower level of justification than “strict scrutiny.”

If we accept standard equal protection analysis, that is, the rational basis test, such legislation may discriminate rather freely. But, the rational basis test seems particularly inappropriate where legislation affects a classification or group which is politically and socially isolated as a result of the identifying characteristics of the group which are also the subject of the discrimination. Cubans or Mexicans residing in the United States, for example, may arguably be “suspect” groups *qua* Cubans or Mexicans, but merely politically and socially isolated as part of the larger group—aliens. If legislatures can, in effect, discriminate against a group which is not suspect (aliens), *and* reach subgroups within the non-suspect group (Cubans or Haitians), then the high scrutiny of the equal protection afforded particular national minorities will be easily evaded by couching the discrimination in terms of “alienage.” A rational basis requirement is simply no protection because any “legitimate” governmental objective overcomes it.

Where a politically and socially isolated group such as aliens generally is affected, however, a requirement that the governmental objective be important in comparison to the effect of the discrimination, and that the legislative classification be drawn with precision seems to be a fair and sound test. It is fair because it provides vitality to the equal protection clause with respect to legislative discrimination against social minorities not meeting the firm “suspect class” criteria. Though it is recognized that no purely verbal definition provides a talisman to infallibility, the strict scrutiny/compelling state interest test must be limited to legislation affecting those groups who, within the suggested *Carolene Products*-guided definition, share characteristics of race, nationality, religious and cultural identification if the prime role of the clause is to remain meaningful. The second-line test suggested here, a balancing approach, is far from talismanic. It is sound, though, in that it permits the Court to make a searching inquiry, yet does not leave a legislature with an insurmountable compelling state interest hurdle.

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110. The Court’s difficulty applying a traditional rational basis test was notable in *Plyler v. Doe*, 102 S. Ct. 2382, 2394 (1982). Because of the lack of vitality in the traditional test the Court was forced to invent a hybrid for present purposes, adding that rational basis under the circumstances of that case meant that the legislation must serve a “substantial goal.” *See supra* notes 10, 80 & 94 and accompanying text.

111. *See supra* note 94.

112. The compelling state interest test need not be as unleapable a hurdle as the practice of the court suggests. As indicated earlier, citizenship requirements
From a quasi-interpretivist viewpoint, the problem with a broader "suspect" class definition is that it leaves the Court with a wide range of value choices. Courts with certain value orientations will want to protect aliens, women, youth, homosexuals, or radicals. Courts with other orientations may want to protect caucasians, professionals, capitalists and perhaps even opticians. Suspectness applied *ipse dixit* as did the Supreme Court in *Graham* encourages substantive value choices, and moves the primary constitutional role from the Constitution to the present majority on the Court. The integrity of this fundamental law thus becomes too precariously dependent upon the prudence of successive majorities.

Applying the suggested "important state interest" balancing approach to *Cabell*, it may be that the governmental objective underlying the requirement that law enforcement peace officers who actually make public order, arrest, and detention decisions at least intend to become citizens is an important objective. The objective that *all* aliens be excluded from these positions, however, may not be so important. So, to the extent that the *Cabell* legislation deprives aliens intending to become citizens from eligibility for law enforcement positions, it should not survive equal protection clause analysis.

Further, even if the Court were to find that citizenship for some peace officers was an important governmental objective, the legislation may arguably not serve an important objective as applied to the deputy probation officers in *Cabell* because deputy probation officers primarily supervise, maintain records and make recommendations to the court. The decision-making and law enforcement functions of probation officers seem to be rarely exercised, and to the extent citizenship-imposed loyalty may be a desirable quality, it is not a quality high on the list of important ones for the effectiveness of a probation officer.114

Under the suggested equal protection clause analysis, therefore, California can probably legitimately discriminate against aliens in

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113. The Court in *Graham* simply asserted that "[aliens as a class are a prime example of a 'discrete and insular' minority, for whom . . . heightened judicial solicitude is appropriate," 403 U.S. at 372 (citation omitted).

114. To this extent, the statute as a whole is not precise due to its over inclusiveness. See *Cabell* v. *Chavez-Salido*, 102 S. Ct. at 740-41.
some areas where the state interest served is important and the legislation is precisely drawn. It cannot do so with respect to deputy probation officers, however, without demonstrating a more significant connection between citizenship and the actual role of the probation officer. The state must show why the quality "citizenship" is more important in relation to other qualities not legislatively excepted.

Though this solution arguably requires a departure from precedent, the method of adjudication and the constitutional interpretation derived is probably in harmony with all of the recent results except for *Ambach* and *Cabell*; and *Ambach* and *Cabell* can be viewed as uncalled-for departures from precedent since all prior decisions upholding state classifications concerned classifications which did serve important state interests and were narrowly confined to those interests. *Ambach* and *Cabell* were results of ignoring precedent and should themselves perhaps be viewed as aberrations not to be extended rather than as products of well-settled principles. In any case, where constitutional law is concerned, the primacy of faithfully derived constitutional meaning over precedent questionably arrived at is clear.

**CONCLUSION**

This recommendation applies a firm quasi-interpretivist method of adjudication to the equal protection clause, yet leaves it with vitality. Though a platonic guardian of morality would prefer to apply the "suspect" category to aliens as opposed to the present suspect class/reasonable basis hybrid, neither is constitutionally appropriate and both lead to constitutional interpretations ridden with Court-imposed value choices.

The remnants of "reasonable basis" analysis in equal protection cases should be sparse, perhaps limited to purely economic classifications, because reasonable basis seems to constitute virtually any basis and therefore provides no protection.

Finally, can even a literalist argue with the notion that equal protection of the laws means at least that socially and politically isolated groups should be protected from abusive legislation directed at the group when that legislation is not even justified by an important objective? Isn't this notion constitutionally pru-

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115. A literalist/interpretivist must argue for limiting strict scrutiny to race and national origin classifications because historically these categories were all that the framers of the amendment contemplated. But the motives and intent of the framers of the amendment are impossible to ascertain with any degree of certainty, and certainty should be important to literalist/interpretivists. Further, if the clause were to be so limited, couldn't the framers have so provided? We can
dent? And, even though in a democracy the majority should well be able to send itself to the devil, without a good reason should it be able to send others without going along?

only assume that no such specific limitation could have been agreed upon or, if it could have, they decided against using it.

Also, by its terms, the clause states that no state may "deny any person within its jurisdiction equal protection of the laws" (emphasis supplied). These are far-reaching words. To be strictly literal the Court would, upon challenge, be compelled to strike virtually any legislation creating a classification. The logic of the literalist/interpretivist view taken to this extreme would emasculate the usefulness of state legislatures and contradict the goal of prudence to which the literalist/interpretivist type of constitutional adjudication aspires. A literalist/interpretivist approach to the open-textured clauses cannot produce defensible constitutional meaning.