

Exam Post-Mortem
Constitutional Law II – Spring 2011
Professor Massey

Below is a brief dissection of the examination. What follows is a repetition of the essay questions and a summary indication of the issues and the approach to be taken in handling those issues. *This is not a model answer.* Rather, it identifies the principal issues, outlines the analytical approach to those issues, and provides some feedback with respect to common errors or omissions. A model answer would analyze these issues thoroughly and persuasively in grammatically correct, well-organized, even elegant, prose. Organizational defects, which blurred inexorably into analytical lacunae, were not uncommon. Many of you tried to deal with every conceivable issue, even when the issues were non-existent or irrelevant. Some of you belabored the obvious, to the detriment of space devoted to the real issues. The range of raw scores was 51 to 22. The median was 31. The median course grade was a B+ .

Question One
(Word Limit: 1750 words)

Arizona enacted the following law for the purpose of preventing public school students from being “taught to resent or hate other races or classes of people,” and to promote teaching students “to treat and value each other as individuals.”

ARS 15-112. Prohibited courses and classes; enforcement

A. A [public] school district ... in this state shall not include in its program of instruction any courses or class that include any of the following:

1. Promote the overthrow of the United States Government
2. Promote resentment toward a race or class of people
3. Are designed primarily for pupils of a particular ethnic group
4. Advocating ethnic solidarity instead of the treatment of pupils as individuals

B. If the State Board of Education or the Superintendent of Public Instruction determines that a school district is in violation of subsection A [the district shall be so notified and, if not in compliance with subsection A within 60 days thereafter, the school district is subject to a loss of up to 10% of the state aid that would otherwise be due the school or district that is not in compliance.]

...

E. This section shall not be construed to restrict or prohibit:

1. Courses or classes for Native American pupils that are required to comply with federal law
2. The grouping of pupils according to academic performance, including capability in the English language, that may result in a disparate impact by ethnicity
3. Courses or classes that include the history of any ethnic group and that are open to all students, unless the course or class violates subsection A
4. Courses or classes that include the discussion of controversial aspects of history

F. Nothing in this section shall be construed to restrict or prohibit the instruction of the Holocaust, any other instance of genocide, or the historical oppression of a particular group of people based on ethnicity, race, or class.

The Tucson, Arizona public school district maintains an instructional program called Mexican American/Raza Studies, open to all students but which has an enrollment that is overwhelmingly Hispanic in ethnicity. The Arizona Superintendent of Public Instruction determined that the Tucson school district was in violation of ARS 15-112(A)(2) and (3) because the program was designed for Hispanic students and promoted resentment of non-Hispanic Americans through the use of a text called *Occupied America* that allegedly contains false claims about the treatment of Mexicans and indigenous peoples by the United States and which contains incendiary and derogatory statements about non-Hispanic Americans. He notified the school district of the violation, and the school district did not comply with ARS 15-112(A) within 60 days. The Superintendent then deprived the Tucson school district of 10% of the state aid it would otherwise receive. The Tucson school district and a group of Tucson public school teachers who teach in the Tucson Mexican American/Raza Studies program have consulted you to determine whether the law is subject to a federal constitutional challenge and, if so, what would be the likely outcome of such a challenge. Please provide your advice on these matters. Ignore any issues of justiciability, standing, or eleventh amendment immunity.

Tucson School District. The suit by the Tucson school district is unlikely to succeed. Tucson has two claims – denial of equal protection and denial of free speech.

Free Speech. The threshold question is whether a government unit, such as the Tucson school district, has any free speech rights. Here, one unit of government (the state) has partially defunded another government unit (the Tucson school district) for the latter's curriculum choices. Governments may control their own speech, and free speech limits do not apply to the government's own speech, so Arizona's funding limit placed upon a subunit of government may simply be an instance of government control of its own speech. But the relation of the state and the local school district is functionally akin to the relation of a government and an independent speaker, in which case free speech principles should apply.

Assuming that Tucson has cognizable speech rights, the principal issue is whether the withdrawal of 10% of the funds that Tucson would otherwise receive from the state of Arizona is a penalty imposed upon the content of speech or whether it is a refusal to subsidize speech that the state does not wish to utter. Tucson remains free to instruct its pupils in Mexican American studies and there is no obligation on the part of the state (or Tucson, for that matter) to offer this program of instruction. As noted, in general governments are free to speak as they desire (speech on religion being the exception, due to limits of the religion clauses, but this law has nothing to do with religion). Absent any requirements of supervening statutory law, Arizona has the constitutional authority to craft the curriculum as it sees fit. It can decide that art is not worth teaching, or abandon chemistry altogether, or cease teach grammar, or not bother with European history. While Arizona need not offer instruction in Hispanic studies at all, Arizona has taken a much less draconian step of providing a monetary incentive to local school districts to cease teaching the subject.

On the other hand, the law is not directed toward elimination of a particular area of study,

such as geology, or arithmetic. Instead, three of the four criteria for disfavored instruction are geared toward particular viewpoints: promoting the overthrow of the United States government, promoting resentment toward a race or class of people, and advocating ethnic solidarity instead of the treatment of pupils as individuals. Were this singling out of viewpoints applicable to private speakers, the law would be presumptively void. The validity of the law hinges on whether the Tucson school district should be treated the same as a private speaker or whether it should be treated as a unit of government. Public school districts are in fact arms of the government and are generally accountable to state officials for their actions. Thus, the better resolution of this problem is to conclude that Arizona is free to advocate or disfavor viewpoints when the government is the speaker, and here the government (through its financial support of local public schools) is the speaker. Just as the United States government need not teach the tenets of radical Islamist jihad to the children of members of the armed services it educates at military bases around the globe, Arizona need not fund the choice of its local school districts to teach these three viewpoints. The fourth criterion is a program of instruction that is designed primarily for pupils of a particular ethnic group. This criterion has nothing to do with speech, but may implicate equal protection, as will be discussed below.

Equal protection. Tucson's equal protection claim hinges on whether the Arizona law is deliberately discriminatory on the basis of ethnicity. The Arizona law does not single out any particular ethnic group; rather, it states a general principle that disfavors instructional programs that are designed to cater to any single ethnic group. In that it is much like California's Proposition 209, which forbade the state from using race or sex as the basis for admission to public universities, hiring or contracting. Proposition 209 mandated strict neutrality on race or sex, and that mandate was treated by the Ninth Circuit, in *Coalition for Economic Equity v. Wilson*, as an axiomatic statement of the general requirement of equal protection. But there are complicating factors present in this case. First, it is not entirely clear whether the Supreme Court will endorse this vision of "color-blindness" as the command of equal protection in every context. It has certainly deviated from strict racial neutrality when it is necessary to do so to remedy past proven invidious racial discrimination. To the extent that equal protection commands the eradication of ethnic subordination, Arizona's displeasure with programs of instruction that might achieve that objective could be presumptively void. Second, though not entirely clear from these facts, it may well be that a motivating factor for the Arizona law was to retaliate against Tucson's Hispanic-oriented program of instruction. Third, the law may have a disparate impact on Hispanic students, but this (by itself) is insufficient to trigger strict scrutiny. If the law was motivated by retaliation, that might be enough to establish intentional discrimination on the basis of ethnicity. If any of those possibilities is the case, strict scrutiny should apply. In that event, Arizona's compelling objective would be to eliminate ethnic consciousness and to promote respect for individuals – the ideal of Martin Luther King's "I Have a Dream" speech: that the content of one's character matters more than the color of one's skin. If that is compelling, the mild disincentive of the law is a narrowly tailored method of achieving the goal. But the putative compelling objective is in conflict with the notion of equal protection as "anti-subordination." This conflict may ultimately require a court to determine whether a law that discourages courses focused on ethnicity is valid because it is "color-blind" or void because it offends "anti-subordination."

Moreover, the law is both over- and under-inclusive with respect to the purported compelling objective. It is over-inclusive because banning teaching about the overthrow of the

government does very little to promote this objective, and it is under-inclusive because there are many other ways that this objective could be promoted. This over- and under-inclusion casts a great deal of doubt that the law is narrowly tailored to achieve its compelling objective. Of course, none of this matters if color-blindness is the operative principle.

The Teachers' Claims. The teachers' claims are also unlikely to succeed, although the teachers have some arguments that have a plausible prospect of success.

Free Speech. The Arizona law does not suppress the teachers' speech; it creates a financial incentive to school districts to shape their curricula to conform to the state's desires. Of course, if the Tucson school district eliminates the Mexican American/Raza program, the teachers have fewer opportunities to deliver in school the speech that comprises that curriculum. As public employees the teachers' speech in the classroom is speech in the course and scope of their employment, and thus deprived of any constitutional protection under *Garcetti v. Ceballos*. Of course, the *Garcetti* majority reserved for another day the question of whether the *Garcetti* rule applies to academic speech. Presumably, academic speech includes not just articles or books, but classroom teaching as well. If so, the operative rule to assess whether public schoolteacher speech has been unconstitutionally squelched is the *Pickering/Connick* test – is the speech of public concern and, if so, does it impede the efficient and effective fulfillment of the mission of the schools? Talk about Hispanic history in America is surely of public concern, even if it contains the content that triggers the funding withdrawal. To apply the latter prong of *Pickering* and *Connick* requires balancing of the teachers' speech interests with the presumptive authority of the government to fashion an appropriate curriculum. But teachers do not have *carte blanche* to do what they like in public school classrooms. A mathematics teacher's insistence on teaching Byron's poetry instead of differential equations impedes the effective mission of the school. And this would be true even if the math teacher had been a poetry teacher reassigned to the math department after the school discontinued poetry instruction. Similarly, if the Mexican American program is discontinued and the plaintiff teachers continue to teach that curriculum in a course that is not appropriate for the topic, they may be properly punished for their disruption of the school's curricular mission. But if the teachers continue to speak in the disapproved fashion in a course in which such sentiments are appropriate, and not an impediment to the school mission, any discipline for the speech is void. But none of this is at issue, because the Arizona law, at most, shapes the district's curriculum and does not foreclose teacher speech.

Equal Protection. The teachers' equal protection claim largely duplicates the district's claim and need not be repeated here.

Due Process. The teachers may claim that they have a constitutionally fundamental right to teach material without government intervention, but this is not a right that has any deep foundation in our history and tradition. While we do have a tradition of academic freedom, that tradition is limited to freedom to utter viewpoints without government control of the viewpoint, but not to express speech that is inconsistent with, or antagonistic to, the thrust of the curriculum to which the teacher is assigned to teach. Indeed, this claim is basically free speech in due process clothing.

Question Two (Word Limit: 1750 words)

Section 107 of the Internal Revenue Code provides in pertinent part: “In the case of a minister of the gospel, gross income does not include (1) the rental value of a home furnished to him as part of his compensation; or (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home and to the extent such allowance does not exceed the fair rental value of the home.” Revenue rulings and case law establish that the term “minister of the gospel” includes all clerics of whatever faith. Treasury regulations limit the provision to clerics who are “duly ordained, commissioned, or licensed” and who receive a home or rental allowance as compensation for his or her “ministry,” which includes {(1) the ministration of sacerdotal functions; (2) the conduct of religious worship; and (3) the control, conduct, and maintenance of religious organizations under the authority of a religious body constituting a church or church denomination.” When Section 107 was first enacted it contained only subpart (1); subpart (2) was added by amendment in 1954 to provide equal treatment for clerics who enjoy a residence next to their clerical sanctuary and those who must find housing elsewhere. .

Section 119 of the Internal Revenue Code exempts from gross income the rental value of housing provided (1) to an employee “for the convenience of the employer” if “the employee is required to accept such lodging on the business premises of his employer as a condition of his employment,” or (2) to an employee of an educational institution if it is made available as the employee’s residence and is “located on, or in the proximity of, a campus of the educational institution.”

Does §107 violate the Constitution? Please explain your conclusion.

The question is whether the exclusion from gross income of the imputed rental value of a residence or a rental allowance provided to clerics as compensation for their clerical duties violates the Establishment Clause. Although battered and beleaguered, the *Lemon* test remains the point of departure for analysis. If any of the three *Lemon* elements is present, *Lemon* dictates a finding that the Establishment Clause is violated.

Purpose. Does section 107 have a secular purpose? To answer this question, one cannot look at section 107 in isolation; it must be examined in the context of the provisions of the Internal Revenue Code that pertain to computation of gross income. Thus, section 119 also become relevant, for when the two sections are considered together it is apparent that Congress has chosen to exempt from income the value of housing supplied to certain types of employees – those who are required to accept lodging as a condition of employment and for the convenience of the employer; those who are not so required but who are employed by educational institutions and given housing on or near campus; clerics who may or may not be required to accept a parsonage as a condition of employment, wherever the parsonage might be located; and clerics who are given a housing allowance.

Walz upheld a property tax exemption for churches, but the exemption was part of a larger exemption for property owned by non-profit charities, whether secular or sectarian. The purpose of aiding all forms of non-profit charities was secular. So, too, was New Jersey’s purpose to provide subsidized bus transit for children to and from school, even though the form of the subsidy for parochial school students was reimbursement for public bus fares, while the

subsidy for public school students may have been in the form of the familiar yellow school bus. *Everson*. To similar effect is *Witters* (the secular purpose was to assist handicapped people to achieve self-sufficiency, though the aid was used for religious education that furthered that end) and *Zobrest* (the secular purpose was to aid deaf students to learn, though the signer was employed to aid a deaf student in a religious school).

Here, the secular purpose of sections 119 and 107 is to assist two distinct types of socially beneficial activities – education and religion – and to accommodate several long-standing cultural traditions – the boarding-school teacher who lives in and supervises a dormitory, the professor who lives on or near campus and thus is woven into the social and educational fabric of the school, and the parsonage. There is no question that fostering education is a secular objective, but fostering religion for the sake of promoting religion is not a secular objective. However, when the two sections are taken together, and it is recognized that their common objective is also to accommodate cultural traditions that are utile to the objective of providing social stability and a sense of community, a secular purpose can be divined. Another secular purpose is the desire to avoid an excessive entanglement with religion by determining the imputed income attributable to whatever housing a cleric may be provided by a religious institution – whether it is a parsonage, a monk’s cell, or a cot in a homeless shelter. So long as either of those secular purposes is genuine – not a sham, feigned, or pretextual – it need not be the dominant purpose. At least one purpose of section 107, when considered in the context of the Code, is secular.

Effect. Is the primary effect of section 107 to aid or inhibit religion? The question can be addressed in several ways. If its primary effect on a reasonably well-informed and objective observer is that it is a governmental endorsement of religion it will seem to aid religion. But if “the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose, ... any aid going to a religious recipient only has the effect of furthering that secular purpose.” *Mitchell v. Helms* (plurality opinion). Here, the aid that is provided to clerics is of the same type and kind that is provided to teachers or professors, except that the scope of the aid is somewhat broader for clerics. Teachers and professors receive the aid only if they live on or near campus; clerics receive the aid no matter where they live. When section 107 was originally enacted it was limited to the classic parsonage – the cleric’s home next to the church. When section 107 was broadened it was to provide parity of treatment between those denominations that provide parsonages adjacent to the church – typically Christian denominations – and those faiths that do not typically provide such housing. Thus, the reasonable, objective, and well-informed observer should be unlikely to ascribe endorsement of any sect to the broadened scope of section 107, but would that person find the broader scope of 107, in relation to 119, to be a governmental endorsement of religion? Clerics may receive tax-free a housing allowance that they may spend on the housing of their choice. Neither teachers, professors, nor employees required to accept employer-provided housing as a condition of employment are so benefitted. Nor is this asymmetry an offer of “aid on the same terms, without regard to religion, to all who adequately further [the government’s secular] purpose.” While 107(2) may have been a laudable attempt to treat all clerics alike, it appears to have had the unintended side effect of making aid to religion its principal effect.

But that leaves section 107(1) to be considered. If construed to be limited to the parsonage adjacent to or in close proximity to the religious institution, it provides the exact same

aid that is afforded under 119 to teachers and professors. If, as stated above, the two forms of aid are in furtherance of a secular objective, the inclusion of clerics in a narrow aid program that treats secular and religious recipients alike is sufficiently neutral that it can be considered as having the effect of furthering the secular purpose. Section 107(1) should be so construed in order to comply with the presumption that Congress intends to enact constitutionally valid legislation and to support the presumption of validity of legislation.

Entanglement. There is no serious argument that section 107's exemption is an excessive entanglement with religion. Indeed, one of its purposes is to avoid any entanglement with religion. In any case, this element is probably subsumed into the effect prong of *Lemon* and, when so considered, buttresses the conclusion that the primary effect of section 107(1) is to further the government's secular purposes.

Coercion. Although the presence or absence of coercion to believe or disbelieve in religion is not, by itself, a sufficient criterion to resolve claims of Establishment Clause violations, it is necessary that government action be non-coercive. There is nothing coercive in section 107. Nobody is forced to profess belief. Nor is the inability of a secular employee of a secular business who receives a rent-free apartment to exclude from gross income the rental value of the apartment coercive. A person who buys a home with all cash is also precluded from taking advantage of the mortgage interest deduction. Deductions and exemptions fall with unequal impact; they are not coercive of anything.

Denominational Favoritism. If section 107(2) is invalid, does that mean that 107(1), as narrowly construed, amounts to a preference for one sect over another? *Larson v. Valente* indicates that sectarian favoritism must be the dominant purpose of the law and deliver those effects. Here, there is unlikely to be any evidence that 107(1) was deliberately designed to benefit any particular religious denomination. Also, it is quite likely that both within specific denominations, and across denominational lines, that some clerics will have parsonages attached to or in close proximity to their sanctuaries, and others will not. This is hardly the sort of religious preference that *Valente* struck down.

Accommodation. Finally, section 107 might be defended as a permissible accommodation of religion. As in *Amos* and *Cutter* the government need not be indifferent to religion so long as it does not differentiate between sects, single out a sect for disadvantageous treatment, promote a particular religious point of view, or impose or increase burdens on those not benefitted. Indeed, each of *Amos* and *Cutter* held that accommodation of religion "need not 'come packaged with benefits to secular entities.'" By this reasoning, the entirety of section 107 might be a permissible accommodation of religion. There is no preference for any sect, no disadvantage visited on any sect, and no promotion of any religious point of view. While the exemption may increase the burden on other taxpayers, the burden is so slight when spread over the mass of income tax payers that is of no consequence. *De minimus non curat lex.* *Locke v. Davey* expanded the "play in the joints" and *Cutter* and *Amos* may simply be examples of the wide discretion given Congress.

The entirety of section 107 may be valid as a non-preferential accommodation of religion. If not, section 107(2) may violate the Establishment Clause, but section 107(1), construed to be limited to the adjacent or nearby parsonage, does not violate the Establishment Clause and is constitutionally valid.

Question Three (Word Limit: 750 words)

Suppose that in the presidential primary elections of 2012, former Vermont Governor Howard Dean challenges President Obama for the Democratic nomination, and in those primary elections Dean publicly promises in his campaign speeches to appoint President Obama to the United States Supreme Court as his first nominee to the Court. After Obama is nominated by the Democratic Party as its candidate for President, Dean is indicted by a federal grand jury for violation of 18 USC §599:

“Whoever, being a candidate, directly or indirectly promises or pledges the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.”

Howard Dean moves to dismiss the indictment. How should the court rule and why?

The law is content-based. The content of the proscribed speech is not within any recognized category of speech that receives no constitutional protection. While it might thus seem axiomatic that the law should be subject to strict scrutiny, there is reason to consider whether some lesser level of judicial scrutiny should apply.

The government’s objective is to prevent corruption in public administration. The specific type of corruption that section 599 targets is quid pro quo corruption – a candidate who promises to use the power of the office he seeks to provide employment to another person in order to secure political support for his election. Although the statute is not explicit on the point, it appears to be directed to the backroom, secret bribe: “I will support you with whatever means are at my disposal if you will appoint me – or my brother – to a lucrative or powerful government position.” In the case of limits upon political contributions to avoid quid pro quo corruption or the appearance of corruption, the Court has said that the government’s interest need not be compelling, but merely a “sufficiently important interest” that “employs means closely drawn to avoid unnecessary abridgment of associational freedoms.” *Buckley*. Yet, in *Citizens United*, the Court ruled that limits on expenditures to fund political speech were subject to strict scrutiny. “Laws that burden political speech are subject to ‘strict scrutiny’” To the extent that section 599 applies to Dean’s speech – and Dean’s speech is literally within the scope of the statute, for it is a promise of appointment made while a candidate and for the obvious purpose of securing support from Obama voters – it applies to political speech. Unlike the backroom quid pro quo deal concluded in secret, Dean has openly promised the appointment to influence the Democratic electorate. That is core political speech.

Thus, the speech restriction in §599, at least as applied to Dean, should be presumed to be void unless the government can prove that the speech restriction is necessary (or narrowly tailored) to achieve a compelling objective. Put another way, the government must prove the existence of a compelling reason for the restriction that cannot be accomplished by any less speech restrictive alternative. The government cannot credibly contend that its objective is to prevent quid pro quo corruption, for there is no serious possibility that the offer would be enough to induce Barack Obama to back Howard Dean. Indeed, even William Howard Taft, who

hungered to be a Justice rather than President, appointed six justices while President, though he could have nominated himself. (Coolidge did it for him.) The lack of a compelling objective should be sufficient reason to dismiss the indictment.

Even if the government's objective of preventing quid pro quo corruption is found to be compelling, the government has adequate alternatives to accomplish that objective that are less speech restrictive. It could limit the scope of section 599 to instances in which the candidate making the promise has bargained for and received something of value in return for the promise. That addition would render Dean's promise outside the scope of such a more limited prohibition, but would seem to serve the objective of preventing quid pro quo corruption equally well. The indictment should be dismissed.

Question Four *(Word Limit: 750 words)*

The State of Collier, a state of the United States, has enacted the following statute:

Section 1. All persons of the age of eighteen or more who are either citizens of the United States or permanent lawful residents of the United States, and who are residents of the State of Collier are entitled to vote.

Section 2. No person may hold elective office in the State of Collier unless he or she is a citizen of the United States and a citizen of the State of Collier.

George Third, a citizen of Canada who is a permanent lawful resident of the United States (though not a citizen of the United States), and resides in the State of Collier, has filed the appropriate papers to be a candidate for election to the office of State Senator. His opponent has filed suit in Collier state court, seeking a declaration that George Third is not eligible to stand for election and an injunction removing Third's name from the ballot. George Third concedes that the statutory bar is applicable to him but has moved for summary judgment on the ground that the statutory bar violates the United States Constitution. You are the judge; please rule on George Third's motion and explain your reasons.

This case presents the novel question of whether a state may extend the franchise to permanent lawfully resident aliens while simultaneously depriving them of the opportunity to hold elective office. George Third claims that this asymmetry violates the Fourteenth Amendment's equal protection clause.

A state may validly exclude aliens from the franchise because it has a paramount objective of preserving the essential notion of a political community. From the beginning of our national experience we have recognized that citizenship is an indispensable criterion for participation in the critical act of self-governance: voting. Nor need you take my word for that proposition; the United States Supreme Court, in *Sugarman v. Dougall*, recognized that a state could validly require citizenship "as a qualification for office" and "to the qualifications of voters." If Collier denied to lawfully resident aliens such as Third the right to vote as well as the right to hold elective office, this case would be simple. Third would lose. But Collier has chosen to grant the franchise to lawful resident aliens and then deny them the ability to hold

office. Collier says, in essence, “We think the basic conception of political community – when it comes to voting – includes lawful resident aliens; but when it comes to exercising the power conferred by the collective exercise of the franchise we think the basic conception of the political community requires that non-citizens be excluded.”

This asymmetry requires this court first to decide what level of scrutiny attaches to Collier’s action. While normally Collier’s action would be exempt from heightened scrutiny under the *Sugarman* distinction of actions designed to preserve the basic conception of the political community, Collier has acted to embrace aliens as part of that community. That could mean that Collier has abandoned its effort to exclude aliens from the polity and thus the office-holding ban should be subjected to strict scrutiny. This court rejects that conclusion. The “basic conception of the political community” is fluid. At one time that community consisted of propertied adult white males. Then it was expanded to include all white male adults, then to male adults, then to all adults (with exceptions, not relevant here, of prisoners and unpardoned felons who have served their sentences). Even the concept of adult has been broadened. There is no Procrustean bed into which the “basic conception of the political community” must be forced to lie. A state is free to expand its conception, and if it takes one small step it need not take a giant leap. The end of that train of logic is that the extension of the franchise does not make every classification by citizenship that pertains to the basic conception of the political community subject to strict scrutiny.

Some lesser degree of scrutiny applies. At the least the classification challenged by Third must be rationally related to the achievement of a legitimate government purpose. Perhaps it should be higher, for in *Sugarman* the Supreme Court cautioned that “in seeking to achieve [the] substantial purpose [of defining its political community] with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose.” This court applies that standard, which it interprets as requiring Collier to prove that its office-holding bar is “precisely drawn” to achieve its purpose of preserving its chosen perception of the political community. Collier’s objective is to permit aliens a voice in governance – selecting representatives and voting on policy matters via initiative or referendum measures – but not to exercise the amplified voice of making laws as a representative of the electorate. The Legislature is a distillation of the *vox populi*; it is legitimate for Collier to decide that lawful resident aliens should have a voice in the choice of who governs them, but not to govern for others, even as elected representatives. If this line is legitimate and within Collier’s constitutional prerogative of self-governance, the fine distinction that Collier has drawn is “precisely drawn” to achieve its objective. And if the classification meets this heightened standard of scrutiny, it is rationally related to its legitimate objective.

The motion is denied.