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Ambach v. Norwick

Lewis F. Powell Jr.

File 76-808
Ambach v.
Commissioner

See pp 100, 101

Notes

Aliens' Right to Teach: Political Socialization and the Public Schools

In recent years, aliens[1] have made great strides against state-imposed employment discrimination.[2] Some commentators read recent Supreme Court opinions in *Sugarman v. Dougall*[3] and In re *Griffiths*[4] as invalidating virtually all state laws that require United States citizenship as a prerequisite to employment.[5] Nonetheless, many states still bar aliens from teaching in public elementary and secondary schools.

This Note analyzes the constitutionality of state-imposed restrictions on the employment of alien teachers. It argues that *Sugarman* and *Griffiths*, while greatly limiting the scope of permissible discrimination against aliens, recognize an excepted area for jobs which have a critical relationship to the identity and legitimacy of the political community. Public school teaching might fit within this area of allow-

1. All references are to permanent resident aliens. An alien is "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3) (1970). To acquire permanent residence, an alien must possess an immigrant visa and thus have "been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws . . . ." 8 U.S.C. § 1101(a)(20) (1970). Virtually all aliens permitted to be employed for an indefinite time have permanent residence status. The only other aliens legally permitted to work in the United States do so on a temporary basis. These persons are designated "nonimmigrant" aliens. 8 U.S.C. § 1101(a)(15) (1970). Telephone interview with Ralph Farb, Deputy General Counsel, Immigration and Naturalization Service, Wash., D.C., Sept. 12, 1975.

2. The extent to which state and local law has restricted the employment opportunities of aliens can be seen in the limitations only recently invalidated. Taggart v. Mandel, 391 F. Supp. 733 (D. Md. 1975) (state statute making citizenship a prerequisite to licensing as a notary public); Sundram v. City of Niagara Falls, 77 Misc. 2d 1002, 357 N.Y.S.2d 943 (Sup. Ct., Niagara Co. 1973) (city ordinance making citizenship a prerequisite to licensing as a taxi cab driver); Examining Bd. of Eng'rs, Architects & Surveyors v. Flores De Otero, No. 74-520 (D.P.R., Dec. 19, 1974), *prob. juris. noted*, 95 S. Ct. 1988 (1975) (Puerto Rico statute requiring that applicants be citizens in order to be granted full licenses as engineers, architects or surveyors). The Supreme Court is presently considering whether the *federal* civil service can exclude aliens. Mow Sun Wong v. Hampton, 500 F.2d 1031 (9th Cir.), *cert. granted*, 417 U.S. 944 (1974).

For a discussion of the full scope of these laws, see M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW (1946); Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012 (1957); Note, *Protection of Alien Rights Under the Fourteenth Amendment*, 1971 DUKE L.J. 583; Comment, *Aliens, Employment, and Equal Protection*, 19 VILL. L. REV. 589, 590-95 (1974).

3. 413 U.S. 634 (1973).

4. 413 U.S. 717 (1973).

5. *See* Das, *Discrimination in Employment Against Aliens—The Impact of the Constitution and Federal Civil Rights Law*, 35 U. PITT. L. REV. 499 (1974); Comment, *supra* note 2, at 590.

able discrimination if the state has an interest in using its public schools for such a critical political function—in particular, the education of students for participation in the political community. The necessary assessment is whether the nature of a teacher's role in the process of political socialization creates a substantial state interest which could justify denying teacher certification on the basis of alienage. The Note concludes that the states do have some legitimate interest in the process of political socialization in the public schools. But because of First Amendment considerations and the imprecision of the certification laws in their present form, this interest is insufficient to validate current state laws discriminating against alien teachers.

I. Alienage and Equal Protection

The right of the states to provide for and regulate public education has long been recognized.[6] As part of this responsibility, all of the states supervise the licensing of teachers in the public schools.[7] Twenty-one states use United States citizenship as a qualification for certification as a public school teacher,[8] thus restricting an alien's opportunity to teach.

Two main types of restrictions are imposed.[9] In six states, a resident alien is unable to secure a permanent license to teach whether or not he or she plans to be naturalized.[10] In 12 other states, an alien may

6. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (dictum); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (dictum); Myers v. Nebraska, 262 U.S. 390, 402 (1922) (dictum). Most states have constitutional provisions requiring that the state legislature create a system of public education. *See* A. MORRIS, THE CONSTITUTION AND AMERICAN EDUCATION 113 (1974).

7. All 50 states require that a teacher be certified before teaching in a public school. *See* T. STINNETT, A MANUAL ON STANDARDS AFFECTING SCHOOL PERSONNEL IN THE UNITED STATES 3 (Nat'l Educ. Ass'n 1974). In addition, 29 states require certification of some teaching personnel in private, parochial, or independent schools. *See id.* at 3, 10. Unless otherwise noted, all references below are to certification requirements for public school teachers only.

For purposes of equal protection analysis, discrimination against aliens in the employment of public school teachers constitutes state action by virtue both of the state-imposed certification requirements and the public character of the municipality or school district providing the employment. Although this Note will focus on the mandatory certification requirements, the analysis would apply equally to any local policy to pass over aliens in hiring teachers.

8. The number of states requiring citizenship for certification has declined by one-third in the last eight years. (In 1967 the number was 32.) *See* T. STINNETT, A MANUAL ON CERTIFICATION REQUIREMENTS FOR SCHOOL PERSONNEL IN THE UNITED STATES 28 (Nat'l Educ. Ass'n 1970). In many states, the state board of education is authorized to set requirements for certification. *Id.* at 31. Thus, restrictions on aliens' right to teach are imposed both by statute and by the regulations issued by state departments of education.

9. The following survey of types of citizenship requirements was completed in February, 1975.

10. REGULATIONS OF CONN. STATE AGENCIES § 10-146-2(d) (1971); Mississippi (*see* T.

be certified provisionally upon declaring his or her intent to become a citizen.[11] Cutting across these categories, in 10 states an alien can be certified when participating in a federal or state exchange program.[12] In addition, four states will grant a temporary certificate at the request of a school principal or other official who is willing to employ an alien.[13]

The Supreme Court recognized in 1886 that the equal protection clause extends to aliens.[14] Nevertheless, because of the courts' use of the rational relation standard[15] and acceptance of the states' asserted

STINNETT, *supra* note 7, at 24); MONT. REV. CODES ANN. § 75-6004 (1971); NEV. REV. STAT. § 391.060 (1965); South Carolina (*see* T. STINNETT, *supra* at 24); *cf.* Rhode Island Requirements for Certification (on file with *Yale Law Journal*) (if an alien lacks citizenship only because he or she has resided in the United States for too short a period to be eligible for naturalization, the citizenship requirement may be waived).

11. IDAHO CODE § 33-1202(4) (1963); ILL. ANN. STAT. ch. 122, § 21-1 (Smith-Hurd 1972); MASS. GEN. LAWS ANN. ch. 71, § 38G (1974); MICH. COMP. LAWS ANN. § 340.852 (1975); N.J. REV. STAT. § 6.11-3.10 (1970) (including an exception for foreign language teachers who have not declared their intention of becoming citizens and who have resided in the United States for less than 10 years); N.Y. EDUC. LAW §§ 3001, 3001-a (McKinney Supp. 1974); N.D. CENT. CODE § 15-36-07 (1971); DEP'T OF EDUC., OKLA., TEACHER EDUCATION, CERTIFICATION AND ASSIGNMENT HANDBOOK 56 (1971) (on file with *Yale Law Journal*) (hereinafter cited as OKLAHOMA CERTIFICATION HANDBOOK); TEXAS EDUC. CODE § 13.044 (1972); WASH. REV. CODE ANN. § 28A.67.020 (1970); W. VA. CODE ANN. § 18A-3-1 (1971); Wyoming (*see* T. STINNETT, *supra* note 7, at 24).

12. REGS. OF CONN. STATE AGENCIES § 10-146-2(d) (1971); FLA. STAT. ANN. § 231.17(2) (Supp. 1974); IDAHO CODE § 33-1202(4) (1963); ILL. ANN. STAT. ch. 122, § 21-1 (Smith-Hurd Supp. 1975); MICH. COMP. LAWS ANN. § 340.852 (Supp. 1975); MONT. REV. CODES ANN. § 75-6005 (Supp. 1975); NEV. REV. STAT. § 391.070 (1968); OKLAHOMA CERTIFICATION HANDBOOK, *supra* note 11, at 56; WASH. REV. CODE ANN. § 28A.67.020 (1970); W. VA. CODE ANN. § 18A-3-1 (1971).

8 U.S.C. § 1101(a)(15)(J) (1970) authorizes a nonimmigrant alien to work temporarily in the United States if he or she is part of an exchange program. This applies to any alien

> having a residence in a foreign country which he has no intention of abandoning who is a bona fide student, scholar, trainee, teacher, professor, research assistant, specialist, or leader in a field of specialized knowledge or skill, or other person of similar description, who is coming temporarily to the United States as a participant in a program designated by the Secretary of State, for the purpose of teaching, instructing or lecturing, studying, observing, conducting research, consulting, demonstrating special skills, or receiving training . . . .

13. REGS. OF CONN. STATE AGENCIES § 10-146-2(d) (1971); MONT. REV. CODES ANN. § 75-6005 (1971); N.D. CENT. CODE § 15-36-11 (Supp. 1973); letter to Lon S. Babby from W.H. Jones, Director, Div. of Teacher Educ., State Dep't of Educ., Va., Dec. 24, 1974 (on file with *Yale Law Journal*).

There are two states that do not fit any of the categories above. In Florida, an alien may be certified if his or her services are needed and he or she takes an oath of allegiance. FLA. STAT. ANN. § 231.17(1), (2), (3) (1974). In South Dakota, any alien who meets the usual qualifications may be temporarily certified. S.D. Regs. (on file with *Yale Law Journal*).

14. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating refusal of San Francisco board of supervisors to grant licenses for operation of laundries to Chinese residents of the city).

15. *See* Note, *Protection of Alien Rights Under the Fourteenth Amendment*, *supra* note 2, at 588; Comment, *supra* note 2, at 590-99. The Supreme Court has traditionally used a two-tier approach in evaluating claims that a state statute violates the equal

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interest in preserving jobs for their own citizens,[10] the early successes of aliens in opposing employment discrimination were few and far between.[11] In 1971, the Supreme Court stated in *Graham v. Richard-*

protection clause of the Fourteenth Amendment. *See* Gunther, *Foreword: In Search of Evolving Doctrine On A Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). Under the "rational relation" test, a state must demonstrate that the challenged classification rests on grounds reasonably related to the advancement of a permissible objective. *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1079 (1969). *See* McGowan v. Maryland, 366 U.S. 420, 425 (1961) ("[t]he constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective"). However, a classification based upon a "suspect" criterion invokes a more stringent level of judicial review. (This more stringent standard of protection is also invoked when a classification touches upon a fundamental interest.) The operative effect of declaring a classification suspect is that the state must bear the "heavy burden" of showing a "compelling" interest to justify the law. Loving v. Virginia, 388 U.S. 1, 9 (1967). *See Developments in the Law—Equal Protection*, *supra* at 1087-1120. In addition, the state must demonstrate that the classification advances the interest with precision.

The "precision" of a classification is the manner in which it relates to the purpose of the law. Essentially the question is "whether all and only those persons similarly situated with respect to the purpose of the law" are treated equally by the classification. *Id.* at 1092. A classification may be underinclusive in that it does not include within the class all persons similarly situated. Alternatively, it may be overinclusive in that it includes persons who are *not* similarly situated with respect to the purpose of the law. Quite often a classification is both overinclusive and underinclusive. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949). A perfect classification is virtually impossible to attain. However, the degree of allowable imperfection varies with the criterion of classification. When a suspect category is involved, the courts will tolerate less variance from a perfect classification and may demand that "less drastic means" be used to achieve the statutory purpose. *See* Gunther, *supra* at 21.

10. In the past, the states have tried to justify restriction of alien employment by pointing to a "special public interest" in preserving jobs for state citizens. Heim v. McCall, 239 U.S. 175 (1915); Truax v. Raich, 239 U.S. 33, 39-40 (1915); Rok v. Legg, 27 F. Supp. 243, 245 (S.D. Cal. 1939). *See* Note, *Constitutionality of Restrictions on Aliens' Right to Work*, *supra* note 2, at 1016-18. The rationale was best articulated by Judge Cardozo in People v. Crane, 214 N.Y. 154, 108 N.E. 427, *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915):

> To discredit aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. . . .)

Id. at 161, 108 N.E. at 429.

> The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike.

Id. at 161, 108 N.E. at 430.

11. In Truax v. Raich, 239 U.S. 33 (1915), the Court invalidated a state statute which required that 80 percent of the employees in any business be U.S. citizens. The Court stated that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." *Id.* at 41. The decision was based both on equal protection and on the exclusive constitutional authority of the federal government to regulate immigration and naturalization. *See* note 18 *infra*.

In Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948), the Court rejected the prohibition of commercial fishing licenses to citizens. Again the decision was grounded on both the equal protection clause and the federal government's preemptive regulation of immigration and naturalization.

son that classifications based on alienage were "suspect,"[18] and also rejected the "special public interest" of a state in preserving jobs for its citizens.[19] In so ruling, the Court paved the way for the two decisions that have greatly narrowed the allowable area of restrictions on alien employment.

A. Sugarman v. Dougall: *The Excepted Area*

In 1973, in *Sugarman v. Dougall*,[20] the Supreme Court considered an equal protection challenge to a provision of New York State's civil service law excluding aliens from jobs classified as "competitive."[21] The state asserted a substantial interest in guaranteeing that a civil servant who " 'participates directly in the formulation and execution of government policy' "[22] be unimpaired in the fulfillment of

18. Graham v. Richardson, 403 U.S. 365, 371-72 (1971) (footnotes omitted):
[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular" minority . . . for whom such heightened judicial solicitude is appropriate.

Despite the *Graham* declaration, alienage may be distinguished from race as a suspect category. First, alienage is not an "unalterable trait." Rather, it is a "governmentally created status" from which a permanent resident alien can remove himself voluntarily by applying for naturalization. (Once an alien has secured an immigrant visa and thus has qualified for permanent residency, there are no further numerical quotas to limit his or her chances for naturalization.) *See* Lindsey v. Normet, 405 U.S. 56, 73 (1972) (dictum that earlier cases invoked strict scrutiny where "certain classifications based on unalterable traits such as race and lineage" were used); Diaz v. Weinberger, 361 F. Supp. 1, 8 (S.D. Fla. 1973) ("the fact that alienage is a governmentally created status suggests that it may not constitute such a consistently illegitimate distinction as to warrant mechanical application of the compelling interest test").

Second, alienage is a political status subject to Congress's power to regulate naturalization and immigration. U.S. CONST. art. I, § 8, cl. 4: "The Congress shall have Power . . . To establish an uniform Rule of Naturalization . . . ." Though many alienage cases have turned on an equal protection/suspectness analysis, always remaining in the background is the possibility that a disability accorded aliens by the federal government will be sustained by virtue of federal power to regulate naturalization and immigration and that a disability accorded aliens by a state will be voided by virtue of its interference with that exclusive federal power. *But see* note 37 *infra*.

19. 403 U.S. 365, 374-76 (1971). The Court gave several reasons for rejecting the "special public interest" rationale. For one, it was based on a right/privilege distinction that was no longer viable. Second, the state's concern with limiting expenditures was not sufficiently compelling. Third, the state could have no "special interest" in tax revenues to which the alien also contributed. The rationale was under attack for many years before *Graham;* indeed it was originally undermined by Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420-21 (1948).

20. 413 U.S. 634 (1973).

21. At the time of the action, New York civil service employees were divided into "classified" and "unclassified" positions. Of the four categories of classified positions, only the competitive class (filled on the basis of a competitive examination) required citizenship. The other categories of classified civil service (including upper echelon positions in the state executive, municipal and judicial departments) and the unclassified service (including elective offices, executive and legislative appointments, and teaching positions) did not require citizenship. *Id.* at 639-40.

22. *Id.* at 641 (quoting from appellants' brief).

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23. *Id.* at 642-43.
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24. *Id.* at 646-47.
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his duties by allegiance to a foreign government. Though the Court proceeded to hold that the provision excluding aliens was too imprecise,[23] it did not wholly reject the premise of the state's argument. Rather the Court accepted that there was some limited area of employment for which citizenship constitutionally could be required.[24]

The guidelines provided by the Court to describe this "excepted area" were put in terms which, though ambiguous, may be broad reaching. The Court noted the states' interest in preserving " 'the basic conception of a political community' "[25] and suggested that citizenship as a qualification was permissible not only for voters, but for elective positions and *"important nonelective executive, legislative, and judicial positions . . . ."*[26] The Court reasoned that incumbents of such positions are "officers who participate directly in the formulation, execution, or review of broad public policy" and thus *"perform functions that go to the heart of representative government."*[27]

Sugarman did not make clear whether aliens may be flatly excluded from some positions of state or municipal employment which cannot be categorized as "offices"[28] and which do not involve the formulation

23. *Id.* at 642-43. In view of the proffered justification, the restriction was both underinclusive and overinclusive. It was underinclusive because it did not require citizenship for the upper-level jobs in the classified and unclassified civil service where citizenship was arguably essential to effective performance. Similarly the restriction was overinclusive because it indiscriminately excluded aliens from jobs far removed from the formulation and execution of governmental policy, such as sanitation workers and typists. *Id.* at 643.

24. *Id.* at 646-47. Despite the diffident wording of the last section of *Sugarman* ("Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship . . . ." 413 U.S. at 647), the Court's description of the excepted area was not really dicta. Rather it was critical to the Court's holding that the New York civil service statute excluding aliens was underinclusive. *See id.* at 642-43.

25. *Id.* at 647, *quoting* Dunn v. Blumstein, 405 U.S. 330, 344 (1972). *See* 413 U.S. at 642-43 (citation omitted):

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

26. 413 U.S. at 647 (emphasis added).

27. *Id.* (emphasis added).

28. Which nonelective positions constitute offices under state law varies considerably from state to state. Among the characteristics considered in determining whether a position is an office or employment are (1) the delegation of sovereign powers; (2) participation in important policymaking and decisionmaking in the governmental unit; (3) the requirement of an official oath and official bond; and (4) appointment for a definite term, with authority conferred by law. *See* E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 12.30 (rev. 3d ed. 1973). The lack of any clear standard for determining who is an "officer" and who is a mere "employee" is a strong reason for not reading *Sugarman*'s reference to "officers" as exhausting all permissible areas of discrimination.

Teachers are generally considered to be employees rather than officers. *See* cases cited

of high-level policy. However, *Sugarman*'s emphasis on the state's substantial interest in defining and preserving a political community does suggest that exclusion is permissible when the position is, in some sense, essential to preserving the identity of the political community. The Court's explicit exception for "officers" may fairly be read as a consequence of this underlying concern; the excepted area thus might also include other jobs having a critical relationship to the preservation of the political community, even if those jobs cannot be classified as "offices."[29]

B. *In re* Griffiths

In re *Griffiths*,[30] decided the same day as *Sugarman*, may seem to narrow the excepted area of employment for which citizenship is a permissible state-imposed qualification. The case concerned the exclusion of an alien, a Netherlands woman named Fre Le Poole Griffiths, from admission to the bar in Connecticut.[31] In an effort to meet the " 'heavy burden' "[32] required to justify a classification based on alienage, the Connecticut Bar Examining Committee pointed to the attorney's role as an officer of the court. The Court in turn recognized the state's interest in ensuring that licensed attorneys be qualified, but concluded that an attorney's powers, whether to sign writs or take depositions, "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens."[33] The Court in *Griffiths* also refused to hold that the mere licensing of a lawyer by the state was sufficient to place him "so close to the core of the

in 56 AM. JUR. 2D *Municipal Corporations* § 234, at 295 n.6 (1971); 68 *id.*, *Schools* § 129, at 459 n.79 (1973); E. MCQUILLIN, *supra* § 12.31, at 184-85 n.49.

29. This reading of *Sugarman* is reinforced by the Court's cryptic comment that it was not ruling out the possibility that

> on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee.

Id. at 646-47.

One might attempt to narrow *Sugarman* by pointing to the fact that it anchored the right of states to control the qualifications of officers and voters in the text of the Tenth Amendment and Article IV, § 4. *See* 413 U.S. at 648. But the states' interest in political socialization, if equally essential to effective government, could be given the very same textual support.

30. 413 U.S. 717 (1973).

31. The plaintiff had lived in Connecticut for five years. She was eligible for naturalization, but had taken no steps toward becoming a citizen. *Id.* at 718. The Connecticut supreme court upheld the exclusion. *In re* Fre Le Poole Griffiths, 162 Conn. 249, 294 A.2d 281 (1972).

32. 413 U.S. at 721, *quoting* McLaughlin v. Florida, 379 U.S. 184, 196 (1964); *cf.* 413 U.S. at 730 (Burger, C.J., dissenting). *See* note 15 *supra*.

33. 413 U.S. at 724.

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On its face, *Griffit* narrowly defined. Hc ment in *Griffiths* ma mittee relied heavily attempting to analog The Court in *Griffit* excepted area of *off* the political commu proper mode of anal positions which cann that exception.

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34. *Id.* at 729.

35. *Id.* at 723-25, 727-29

36. Lawyers do indeed that impose on them d Yet, they are not officia 413 U.S. at 729.

37. The "excepted are against aliens is probably ernment's power to regu did not formally reach a mittee restrictions were v U.S. 638, 646 (1973); *In r* explicit recognition of th has satisfied the standard challenge of the supremac

So long as the states on the basis of the state citizens, the conflict with gration and Naturalizatic ment by the Secretary o employment. 8 U.S.C. § forming skilled or unskill that "there are not suf qualified, and available the alien is destined to on the "special public in ment in the state was said in striking down a may apply as well to bri

The assertion of an a lihood when lawfully of the right to deny

political process as to make him a formulator of government policy."[34]

On its face, *Griffiths* suggests that the *Sugarman* exception will be narrowly defined. However, the nature of the bar committee's argument in *Griffiths* may limit the reach of the decision. The bar committee relied heavily upon a lawyer's status as an officer of the court, attempting to analogize an attorney's role to regular public office.[35] The Court in *Griffiths* clearly held that the lawyer is not within the excepted area of *official* governmental positions closely related to the political community,[36] but the opinion fails to illuminate the proper mode of analysis for determining whether other state-licensed positions which cannot be characterized as official might fall within that exception.

C. Perkins v. Smith

In view of *Graham*'s rejection of the "special public interest" rationale and *Sugarman*'s definition of the excepted area, a state's justification for alien discrimination must apparently shift from economic to political interests.[37] An important example of successful reliance on

34. *Id.* at 729.

35. *Id.* at 723-25, 727-29; Brief for Appellee at 19-21.

36. Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their right of access to the courts. . . . Yet, they are not officials of government by virtue of their being lawyers.

413 U.S. at 729.

37. The "excepted area" allowed by *Sugarman* and *Griffiths* for state discrimination against aliens is probably not narrowed by any preemptive effect of the federal government's power to regulate immigration and naturalization. *Sugarman* and *Griffiths* did not formally reach any question of preemption, as the civil service and bar committee restrictions were voided on equal protection grounds. Sugarman v. Dougall, 413 U.S. 638, 646 (1973); *In re* Griffiths, 413 U.S. 717, 718 n.3 (1973). However, the Court's explicit recognition of the excepted area in *Sugarman* seems to imply that once a state has satisfied the standards of equal protection, it will have no difficulty in meeting the challenge of the supremacy clause.

So long as the states sought to justify broad exclusion of aliens from employment on the basis of the state's "special public interest" in preserving employment for state citizens, the conflict with federal power was potentially more acute. Under the Immigration and Naturalization Act, the admission of some aliens is dependent on an assessment by the Secretary of Labor of the labor market conditions in the alien's field of employment. 8 U.S.C. § 1182(a)(14) (1970) (aliens seeking entry "for the purpose of performing skilled or unskilled labor" are excluded unless the Secretary of Labor determines that "there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application . . . and at the place to which the alien is destined to perform such skilled or unskilled labor"). Reliance by a state on the "special public interest" rationale involved a conflicting conclusion that employment in the state was needed for state citizens. In addition, what the *Truax* Court said in striking down a broad state-imposed restriction of aliens' private employment may apply as well to broad restrictions of state and municipal employment:

The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot

political interests to uphold a restrictive statute is *Perkins v. Smith*, decided by a three-judge district court in Maryland and now on appe *Perkins* concerned the exclusion of aliens from service on state an federal juries, an exclusion imposed respectively by state and feder statutes.

The *Perkins* court sustained the exclusion, holding that a jur largely unreviewable role as the arbiter of factual issues in crimin and civil cases made it a critical decisionmaking body, "one of th institutions at the heart of our system of government."[39] Citizensh was necessary for effective performance as a juror because aliens, a a class, were less "conversant with the social and political institution of the society" and with the "nuances of local tradition and language." In addition, an alien's foreign allegiance might distort the way he or she chose to apply the laws.[40] Since any independent attempt a ascertaining loyalty would undercut existing naturalization procedure the use of citizenship as a gauge of allegiance was "compelled by cir cumstances."[41]

> live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress . . . would be segregated in such of the States as chose to offer hospitality.

Truax v. Raich, 239 U.S. 33, 42 (1915).

38. 370 F. Supp. 134 (D. Md. 1974), *appeal docketed*, 43 U.S.L.W. 3001 (U.S. June 21, 1974).

39. 370 F. Supp. at 137.

40. A juror "who lacked any concern for the fairness of the outcome could severely obstruct or distort the course of justice." *Id.* at 138. Indeed, a "single persuasive and unprincipled juror could even direct the course of justice into channels deliberately chosen for their deleterious effect on this country." *Id.* The fact that *Perkins* deal with what is arguably a political right and not with economic discrimination seems significant to the validation of the restriction. One can view jury service as a political right in that the jury, by utilizing its power of nullification, can modify the substantive law passed by the legislature. Thus, one can argue that restricting an alien's right to serve on a jury is merely a recognition of "a State's constitutional responsibility for the establishment and operation of its own government . . . ." Sugarman v. Dougall, 413 U.S. 634, 648 (1973).

41. Judge Winter, in his concurrence, differed with the majority by finding that there were "less drastic means" of ensuring that alien jurors were fluent in English and familiar with American laws and institutions; nonetheless Winter strongly agreed that allegiance and "commitment" to the United States were fundamental to a juror's qualification. 370 F. Supp. at 140. "Citizens, as a rule, harbor positive feelings toward their sovereign and possess a sense of identity with their fellow citizens." *Id.* at 141. Where American law "resolves a question of public policy" or "defin[es] interpersonal relationships" differently than the law of an alien's own country, it is

> not unreasonable to believe that resident aliens may be likely to permit their positive feelings toward their foreign sovereigns and their sense of identity to their fellow-countrymen to impair their commitment to the enforcement and application of American law in those situations . . . .

Id. In addition, native-born and naturalized jurors who are eligible to vote and run for public office "have, at least theoretically, some influence upon the content of the laws" and would reasonably be expected to "have a greater commitment to their proper application and enforcement than those lacking such influence." And of course such

Perkins, recently echoed by a Fifth Circuit decision in *United States v. Gordon-Nikkar,*[42] has an important bearing on an alien's right to teach because it establishes that at least some state positions which are not high-level governmental appointments may fall within the *Sugarman* exception. The opinion recognizes that critical functions going " 'to the heart of representative government' "[43] are sometimes delegated to positions outside the upper levels of any governmental or bureaucratic hierarchy. The *Perkins* court does fit jury service within the explicit language of the *Sugarman* exception for offices, noting that jurors hold " 'important nonelective . . . judicial positions' " and "participate directly in the execution" of the law.[44] But *Perkins* makes no mention of the term "office," and thus puts a more functional gloss on *Sugarman*'s language, judging the bounds of the excepted positions by their actual relationship to the political community.

II. Teachers and the State's Interest in Education

In order to place teachers within the *Sugarman* exception, the states will have to show[45] a close relationship between education, the teacher,

personal commitment "is not susceptible of objective measurement." *Id.* at 141. Thus *Perkins* recognizes that formal allegiance may be important as a signal of the attitude of persons involved in making judgments that depend on an intangible sense of commitment.

42. 518 F.2d 972 (5th Cir. 1975). *Gordon-Nikkar* concerned the exclusion of aliens from federal juries only. The issue was raised by the motion of a criminal defendant to quash a jury panel on the ground that the exclusion of resident aliens deprived her of the Sixth Amendment right to trial before a jury representative of the community.

The *Gordon-Nikkar* court noted the Supreme Court's dictum in Carter v. Jury Comm'n, 396 U.S. 320, 332 (1970), that states are "free to confine the selection [of jurors] to citizens . . . ." 518 F.2d at 976 n.4. But it also relied heavily on *Perkins's* equal protection analysis:

> We agree with the [*Perkins*] court's conclusion that there was a compelling interest "in ensuring that persons who serve as jurors are personally committed to the proper application and enforcement of the laws of the United States" which therefore justifies the exclusion of aliens.

518 F.2d at 976. Though the *Gordon-Nikkar* decision cited as an additional justification Congress's plenary authority to regulate the entry and residence of aliens, a ground peculiar to *federal* measures excluding aliens, the court explicitly noted that the *Perkins* ground was sufficient. *Id.* at 977. An interest in ensuring that jurors are committed to the "proper application of the laws" is applicable of course both to state and federal juries.

43. 370 F. Supp. at 137, *quoting* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

44. *Id., quoting and paraphrasing* Sugarman v. Dougall, 413 U.S. 634, 647 (1973).

45. The arguments that follow in the text, which might support the denial of teacher certification to aliens, have not been offered by any state in litigation. However, these arguments are probably the only grounds left for a justification in light of *Sugarman v. Dougall* and In re *Griffiths.* The arguments are dubbed the "state's position" throughout the remainder of the Note.

There is only one court decision dealing with the restriction of the alien's right to be certified as a public school teacher. In Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), *aff'd mem.,* 413 U.S. 902 (1973), a three-judge district court invalidated both a state constitutional provision which denied aliens the opportunity to be employed in any state, county or municipal job, and a state law enacted under the authority of that

and the political community. The validity of the restrictions against aliens will depend in the first instance on whether a public school teacher performs functions that are so intimately involved with the maintenance and identity of the political community as to make an alien unsuitable in the part.

Education does have an essential role in forming and preserving the character of the political community.[46] One primary function of edu-

provision which made aliens ineligible for employment in any public institution, including public schools. 351 F. Supp. at 739-40. The court based its decision on both equal protection and preemption grounds. *Id.* at 740. The state's only apparent argument in support of the laws was the "special public interest" rationale (*see* note 16 *supra*), which had been treated with little sympathy by the Supreme Court less than two years earlier in Graham v. Richardson, 403 U.S. 365, 372-75 (1971).

While *Miranda* voided an alien employment restriction grounded on the state's proprietary interest in preserving jobs for its citizens, it sheds little light on the general status of restrictions against alien teachers. For one, *Miranda* dealt with a broad, imprecise exclusion of aliens from all state employment, including teaching. Thus, while the litigation happened to involve a teacher, the state's argument and the court's analysis did not focus in any way on the special functions of the teacher in political society. Secondly, the case preceded *Sugarman* and *Griffiths;* hence the state's justification was not tailored to the standards articulated in those cases. Finally, the fact that *Miranda* was affirmed without opinion by the Supreme Court limits the precedential value of the case. *See* Edelman v. Jordon, 415 U.S. 651, 671 (1974) (Summary affirmances which preceded *Edelman* "obviously are of precedential value . . . . Equally obviously, they are not of the same precedential value as would be an opinion of this Court treating the question on the merits"); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) ("When we summarily affirm, without opinion, the judgment of a three-judge District Court we affirm the judgment but not necessarily the reasoning by which it was reached. . . . Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established."); Note, *Summary Disposition of Supreme Court Appeals: The Significance of Limited Discretion and a Theory of Limited Precedent,* 52 B.U.L. Rev. 373 (1972). As a result, *Miranda* cannot be said to provide much guidance for analyzing a carefully drawn state statute requiring citizenship for teacher certification.

The only other determinations of the constitutionality of statutes denying aliens teaching certificates are the formal opinions of three states' attorneys general. The Attorney General of California found a provision of the California Education Code excluding alien teachers to be unconstitutional. 53 Op. Cal. Att'y Gen. 63 (1970) (on file with *Yale Law Journal*). The opinion was based entirely upon the equal protection reasoning of Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969), where the California supreme court struck down a broad exclusion of aliens from public employment because of the imprecision of the exclusion. As in *Miranda,* the Attorney General's analysis was not peculiar to the teaching profession; hence the opinion provides little guidance for resolving the present problem. The attorneys general of Pennsylvania and New Jersey have also concluded that statutes excluding alien teachers are void. The Attorney General of Pennsylvania, writing prior to *Sugarman* and *Griffiths;* reached the significant conclusion that teaching, like medicine, "is not a central governmental function . . ." and hence could not support a citizenship requirement. 3 Pa. Bull. 204 (Jan. 27, 1973). The opinion of the Attorney General of New Jersey relied on *Sugarman* and *Griffiths* to find the statute unconstitutionally imprecise. N.J. Att'y Gen. Formal Op. No. 10, Sept. 23, 1974.

For a related challenge to restrictions on granting tenure to alien teachers on a college faculty, see Younus v. Shabat, 336 F. Supp. 1137 (N.D. Ill. 1971).

46. In *The Republic,* Socrates praises the role of education in determining the character of a political community:

> Indeed . . . when a state once has a proper start, it grows as a circle would

cation is to provide the citizen with intellectual skills sufficient for effective participation in the political system. A second function is to transmit common values, attitudes, and political knowledge.[47]

A. *Literacy and Political Participation*

For a citizen to participate effectively in a political system that relies on the evaluation of ideas and on informed choice, it is important that he possess at least minimal skills of reading and writing.[48] But the restriction of teacher certification to those qualified to teach reading and writing can more effectively be accomplished by testing all applicants, including aliens, for verbal and written fluency. Exclusion of aliens from teaching positions in the public schools thus is not substantially related to the educational task of ensuring that citizens are literate.

B. *Political Socialization*

A more fundamental way in which education affects the political community is in the process of political socialization—the transmission of political knowledge, attitudes, and values from one generation to

grow. Training and education being kept good engender good natures; and good natures holding fast to the good education become even better than those before . . . . Then to put it shortly, this one thing needful—training and education—is what the overseers of the city must cleave to, and they must take care that it is not corrupted insensibly. They must guard it beyond everything . . . .

PLATO, THE REPUBLIC Book IV, 424B (W. Rouse transl. 1956). The United States has recognized since its inception the importance of public education to the political community. *See, e.g.*, the Ordinance of 1787, art. III, 1 Stat. 51-52 n.(a): "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." One reason frequently suggested for providing public education is its role in nurturing "good" citizenship. *See* D. JAROS, SOCIALIZATION TO POLITICS 9-12 (1973); A. MORRIS, *supra* note 6, at XIV (1974); Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 569 (1970).

47. These purposes of education often are not differentiated explicitly by the courts. *E.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.

48. The importance of general intellectual skills to political participation has been a primary justification for the promotion of compulsory public education. *See, e.g.*, MINN. CONST. art. VIII, § 1:

The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature to establish a general and uniform system of public schools.

See In re Shinn, 195 Cal. App. 2d 683, 686, 16 Cal. Rptr. 165, 168 (1961) (dictum). Educa-

another.[49] This shaping of political culture can be critical to the character and stability of the political community, for each new generation "emerges upon the political scene as a *tabula rasa* . . . upon which a political system must seek to imprint its image . . . if it is to persist in some form."[50]

With the family and the peer group, the school is recognized as a crucial agent of political socialization.[51] A teacher's role in the process of political and cultural learning becomes critical because a teacher is quite often the first nonfamilial spokesman of society that a child regularly encounters, and functions in the classroom as a model for

tion seems to be positively correlated with various indices of political participation, such as following politics and election campaigns, engaging in political discussions, belonging to voluntary organizations, and believing oneself capable of influencing the government. G. ALMOND & S. VERBA, THE CIVIC CULTURE 317-18 (1965). Of course, such correlation does not establish that literacy is the cause of or prerequisite to political participation.

49. Fred I. Greenstein, a leading sociologist, has defined political socialization as follows:

> Narrowly conceived, political socialization is the deliberate inculcation of political information, values and practices by instructional agents who have been formally charged with this responsibility. A broader conception would encompass all political learning, formal and informal, deliberate and unplanned, at every stage of the life cycle, including not only explicitly political learning but also nominally nonpolitical learning that affects political behavior, such as the learning of politically relevant social attitudes and the acquisition of politically relevant personality characteristics.

Greenstein, *Political Socialization*, 14 INT'L ENCYCLO. OF THE SOCIAL SCI. 551 (1968). *See* Easton & Hess, *The Child's Political World*, 6 MIDWEST J. OF POLI. SCI. 229, 230 (1962).

50. Easton & Hess, *supra* note 49, at 232. *See* Greenstein, *supra* note 49, at 551.

51. On the role of the school in the political socialization process, see EDUCATION AND POLITICAL DEVELOPMENT (J. Coleman ed. 1965); R. DAWSON & K. PREWITT, POLITICAL SOCIALIZATION (1969); D. EASTON & J. DENNIS, CHILDREN IN THE POLITICAL SYSTEM: ORIGINS OF POLITICAL LEGITIMACY (1969); R. HESS & J. TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN (Anchor Books 1968); M. JENNINGS & R. NIEMI, THE POLITICAL CHARACTER OF ADOLESCENCE (1974); R. MERELMAN, POLITICAL SOCIALIZATION AND EDUCATIONAL CLIMATES (1971); C. MERRIAM, THE MAKING OF CITIZENS (1931); *cf.* Tapp & Levine, *Legal Socialization: Strategies for an Ethical Legality*, 27 STAN. L. REV. 1 (1974).

Indeed because the school is the only major agent of the process subject to formal control and direction by the community, some commentators view it as the most important means of introducing a child to the political system. *See* R. HESS & J. TORNEY, *supra* at 120; Greenstein, *supra* note 49, at 553-54. The school deals with children throughout impressionable and formative periods of development and is instrumental in conveying early concrete perceptions of the political institutions, values, and attitudes upon which the community is based. R. DAWSON & K. PREWITT, *supra* at 178. Justice Douglas was quite likely correct in describing the school as the "cradle of our democracy." Adler v. Board of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

Dawson and Prewitt have identified several ways in which the public school acts as an agent of political socialization. "Classroom ritual life"—saluting the flag, patriotic songs, discussion of national heroes and events, and systematic exposure to other symbols and ceremonies—may produce an attachment to the nation and its political values and institutions. R. DAWSON & K. PREWITT, *supra* at 155-58. A second major instrument of political socialization is the school curriculum. In deciding on the subjects which are to be taught and the materials to be used, the school system consciously attempts to provide the student with formal political knowledge. *Id.* at 147-55.

acceptable behavior and social attitudes.[52] This special task of the teacher could place his or her employment within the excepted area recognized by *Sugarman* for functions essential to a representative political community.[53] The premise of the discrimination against aliens would be that an alien, who often has not been fully exposed to American political culture, cannot serve as effectively as the citizen as an agent of political socialization.[54]

To examine the validity of that premise, it may be helpful to use the models suggested by Robert Hess and Judith Torney[55] to describe the ways in which a teacher influences the political orientation of his or her students.

52. [F]or the child the teacher represents an authoritative spokesman of society. The teacher is often the first model of political authority the beginning student encounters. How new this kind of authority is to a child can be seen by comparing the parent and the teacher. When a child responds to his parent as an authority figure, he does not separate the role from the incumbent of the role. . . . The public school teacher as an authority figure, on the other hand, is much more like a political authority. The child learns that the authority role and incumbent of the role are separate factors. . . . [H]e discovers that rewards and punishments from authorities are affected by identifiable constraints that operate on the particular person in the role. The teacher, like the policeman, president, or mayor, is part of an institutional pattern, a constitutional order.

R. DAWSON & K. PREWITT, *supra* note 51, at 158. In addition,

attitudes toward achievement, toward change, toward fair play, toward manipulability of the environment, toward cooperation, as well as toward obedience and competitiveness, can be shaped by the culture of the classroom. . . . [S]uch components of one's world have important "spill-over" effects and shape political outlooks.

Id. at 165.

The courts have recognized the extraordinary responsibility that our society places on the teacher. *See, e.g.*, Shelton v. Tucker, 364 U.S. 479, 485 (1960), *quoting* Adler v. Board of Educ., 342 U.S. 485, 493 (1952) ("'A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern.'") Justice Frankfurter decribed teachers as "the priests of our democracy" and emphasized their "special task" in society which must be fulfilled "by precept and practice." Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

53. The states would have to show that a purpose of the discriminatory statutes was to ensure effective political socialization. They might point to provisions in their educational laws concerned with the promotion of good citizenship. For example the state of Washington might point to the following rather straitlaced provision:

No person, whose certificate or permit authorizing him to teach in the common schools of this state has been revoked due to his failure to endeavor to impress on the minds of his pupils the principles of patriotism, or to train them up to the true comprehension of the rights, duty and dignity of American citizenship, shall be permitted to teach in any common school in this state.

WASH. REV. CODE § 28A.67.030 (1970).

54. *See, e.g.*, R. DAWSON & K. PREWITT, *supra* note 51, at 160-61:

One major reason why teachers operate so effectively in this connection [as conveyors of consensus values] is that they are products of the same political socialization for which they serve as agents. Teachers generally do not need to be taught to laud the virtues of the nation. Their own political selves have been shaped in accordance with the very consensus values they now transmit.

55. R. HESS & J. TORNEY, *supra* note 51, at 22-26.

1. *Identification with the Teacher*

The "identification" model emphasizes imitation by the student of the behavior and attitudes of the teacher.[56] In exchanges with the student, a teacher inevitably conveys many of his or her own cultural attitudes, influencing political orientation well beyond the formal curriculum and any conscious effort to impart political information.[57] The states' concern would be that regardless of any conscious attempt by an alien teacher to avoid affecting the political outlook of students, they will be so influenced. Thus an alien teacher would "distort" the process of socialization, if one accepts the premise that aliens are likely to have political and cultural attitudes different from those of citizens that cannot feasibly or constitutionally be "tested for" as part of the certification process. A second concern might be that an alien, who by definition has a formal foreign political allegiance, may impede the usual socialization of pupils to a domestic political allegiance. This concern for undivided allegiance underlies statutes which allow an alien to teach once he or she has declared an intention to become a United States citizen.[58]

2. *Acquiring Political Knowledge*

An attempt to exclude aliens from public school teaching could also rely on the "accumulation" model of political socialization. This model views political socialization as proceeding by an accretion of political knowledge and information. Unlike the identification model, accumulation concerns the conscious, direct, and formal transfer of information.[59]

The argument that an alien teacher is less effective than a citizen in fulfilling this part of political socialization might be two-fold. First, it could be argued that an alien is not sufficiently conversant with the American political system to effectively teach formal aspects of political culture. Second, there is some evidence that civic education is more successful when the formal content of the curriculum is in harmony with the political orientation of the teacher, so that his or her more casual statements about politics and government are consonant with the formal curriculum.[60] Thus, the states could assert that even if the

56. *Id.* at 24.

57. For example, the manner in which the class is conducted, whether authoritarian or democratic, may affect the political views of the students. R. DAWSON & K. PREWITT, *supra* note 51, at 166-67.

58. For a listing of such statutes, see note 11 *supra*.

59. R. HESS & J. TORNEY, *supra* note 51, at 23; Greenstein, *supra* note 49, at 551.

60. *See* R. DAWSON & K. PREWITT, *supra* note 51, at 149-50; R. HESS & J. TORNEY, *supra* note 51, at 127-32; Litt, *Civic Education, Community Norms and Political In-*

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alien has the requisite knowledge of the subject matter, his or her presentation of the material will likely be less effective than that of the citizen.

III. An Alien's Right to Teach

In view of the narrowing of the field of permissible discrimination against aliens in *Sugarman* and *Griffiths,* the argument in support of denying teacher certification to aliens must rest principally on the state's assertion of a compelling interest in using its public schools for political socialization. The courts may view the statutory requirements for naturalization—including five years' residence and demonstrated familiarity with American history and government—as support for the proposition that an alien is not sufficiently conversant with American mores and political institutions to act as an effective agent of political socialization in the public schools.[61] As Justice Rehnquist argued in his dissent in *Sugarman,* the major goal of the naturalization process is to ensure that aliens demonstrate the familiarity with American culture which citizens as a class are presumed to gain from "formal education and basic social contact."[62] The courts also may look to the rationale used in *Perkins* and in *Gordon-Nikkar,* where aliens were excluded from jury service because they were assumed to be less familiar with national and local institutions.

Yet the state's interest must be deemed sufficient to justify a suspect classification. One consideration that might demote a legitimate state interest from status as a compelling one is the First Amendment problem raised in the state's attempt to control the process of socialization. In addition, the means used by the state to advance the interest may not be sufficiently precise.

Because the teacher's role in the process of socialization encompasses

Socialization, 28 AM. SOC. REV. 69, 73, 74 (1963). Litt studied civic education in three Boston high schools, in upper middle class, lower middle class, and working class neighborhoods. He concluded that the influence of the formal civics curriculum was greatest when it was congruent with the attitudes towards government and political participation generally held in the community.

61. 8 U.S.C. § 1423 (1970) provides that an alien seeking naturalization must show "an understanding of the English language" and "a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States." The House Judiciary commented on this provision:

> Through the system of citizenship classes sponsored by the Immigration and Naturalization Service and the local school system, the alien is aided in preparing himself for citizenship, and every effort is made to give him fundamental and uniform knowledge of our political and social structure.

H.R. REP. No. 1365, 82d Cong., 2d Sess. 78 (1952).

62. Sugarman v. Dougall, 413 U.S. 634, 659 (1973) (Rehnquist, J., dissenting from the majority in both *Sugarman* and *In re* Griffiths, 413 U.S. 717 (1973)).

the distinct phenomena of identification and direct political teaching, the character of the state's interest should be assessed in light of each.

A. *First Amendment Considerations*

In educating the young in citizenship, there should be unusually scrupulous attention to the First Amendment,[63] "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."[64] In evaluating the requirements of the First Amendment in the present context,[65] a distinction may be made between attempts by the state to *exclude* from its public schools political influences deemed to be unfavorable and efforts to *include* socializing influences that transfer political information thought to be important.

1. *Identification with the Teacher*

A fundamental value which lies at the core of the political system is freedom of speech and thought. It would be ironic indeed for states concerned with the education of a critical citizenry to exclude influences from the public schools that might cast doubt on the unthinking acceptance of generally held political values and attitudes. Yet, at the heart of the argument based on the identification model is the fear that the unconscious transfer of foreign political and cultural values will "distort" the political socialization process. Denying teacher certification to aliens on this ground necessarily amounts to an effort to exclude "unfavorable" influences from the process of political socialization.

In *Pierce v. Society of Sisters,* in recognizing parents' right to have their children educated in private schools, the Court rejected the state's use of the public schools to "standardize" the next generation of citizens.[66] Similarly, in *Meyer v. Nebraska,*[67] the Court invalidated

63. The rights guaranteed by the First Amendment, including freedom of speech, are protected against state action by the due process clause of the Fourteenth Amendment. Fiske v. Kansas, 274 U.S. 380 (1927); Gitlow v. New York, 268 U.S. 652 (1925); Duncan v. Louisiana, 391 U.S. 145, 148 (1968). Thus they are applicable to state regulation of the public schools.

64. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

65. The arguments made below in regard to the limits placed by the First Amendment on a state's interest in political socialization in the public schools apply a fortiori to any attempt to require citizenship for teaching in nonpublic schools.

66. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925) (emphasis added):

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to *standardize* its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State . . . .

67. 262 U.S. 390 (1923). *Meyer* preceded the express incorporation of First Amendment rights into the Fourteenth Amendment.

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a Nebraska statute prohibiting the teaching of foreign languages in the public schools, spurning Nebraska's contention that allowing foreign-born students to be taught their native language would "inculcate in them the ideas and sentiments foreign to the best interests of this country."[66] Interpreting *Meyer* in a later decision, the Court has asserted that a state may not conduct its schools to deliberately "foster a homogeneous people."[69] The Court's strong support for academic freedom[70] and careful restriction of loyalty oaths for teachers[71] also reflect the view that the First Amendment will not tolerate laws that "cast a pall of orthodoxy over the classroom."[72] Rather, students should be exposed to "that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' "[73]

The exclusion of alien teachers out of a fear of the unconscious transfer of foreign attitudes and values is an effort to standardize and

66. *Id.* at 398. *See* Farrington v. Tokushige, 273 U.S. 284 (1927) (invalidating restrictions on foreign language schools in the Territory of Hawaii).

68. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969). In *Tinker*, the Court restrained the defendant school district, on First Amendment grounds, from disciplining two high school students for wearing black arm bands protesting the Viet Nam War in violation of a school regulation. In citing *Meyer*, the Court noted that the decision "expressed this Nation's repudiation of the principle that a state might so conduct its schools as to 'foster a homogeneous people.' " *Id.*

70. *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589 (1967), invalidating New York State's Feinberg Law. The law required the state board of regents to issue regulations for the disqualification or removal of faculty in the state educational system who were "disloyal" and to make a list of "subversive" organizations, membership in which would constitute prima facie evidence of disqualification for employment. The Supreme Court found the statute and implementing regulations invalid on First Amendment grounds and stressed the value of academic freedom: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendant value to all of us . . . ." *Id.* at 603.

In Sweezy v. New Hampshire, 354 U.S. 234 (1957), the Court reversed a contempt citation against a university professor who refused to testify about the content of his lectures in an investigation conducted by the state attorney general. While the Court based its holding on the vagueness of the New Hampshire statute authorizing the attorney general to conduct such an inquiry, the Court also emphasized the importance of academic freedom:

> No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250. *See Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

71. The Supreme Court has consistently held the statutes requiring such oaths to be overbroad and vague. *See, e.g.*, Elfbrandt v. Russell, 384 U.S. 11 (1966); Baggett v. Bullit, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); *cf.* Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See* Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841; Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U.L. REV. 1176 (1973).

72. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

73. *Id.* at 603, *quoting* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

homogenize the process of political socialization. As such, it is inconsistent with First Amendment values. Though there are some difficulties with arguing that the citizenship requirements themselves violate the First Amendment,[74] the inconsistency may well render illegitimate any state interest based on the identification model of political socialization. At the very least, such a justification is sufficiently opposed to the spirit of the First Amendment to be properly disqualified from status as a compelling interest.[75]

2. *Acquiring Political Information*

The accumulation model of socialization is concerned not with the unconscious transfer of values and attitudes, but rather with the direct and formal imparting of political information. The states would assert that the alien teacher performs this function less effectively than the citizen for two reasons. First, aliens, as a class, are presumed to be less conversant with the political information to be transferred. Second, because the presentation of this material is more effective when the content is in harmony with the political orientation of the teacher, aliens may be less successful in their presentation even if they have the requisite knowledge. This aspect of political socialization focuses not so much on the exclusion of unfavorable influences as on the affirmative task of conveying political information.

74. The difficulties are several. For one, there is no explicit speech or line of thought being repressed. Secondly, and more significantly, a decision invalidating these laws as violative of the First Amendment would call into question all efforts at political socialization. For in a real sense, *all* political socialization involves an imposition of values.

75. The Supreme Court used analogous reasoning in Williams v. Rhodes, 393 U.S. 23 (1968). In *Williams*, the Court invalidated several Ohio election laws that made it virtually impossible for any political party other than the Republicans or Democrats to be placed on the state ballot used to choose electors pledged to candidates for the presidency and vice presidency. *Id.* at 24. Two political parties challenged the statutes on the ground that they denied equal protection to the parties' supporters. The Court found that the questioned statutes "place[d] burdens" on the First Amendment right of freedom of association. *Id.* at 30. As a result, the Court demanded that Ohio demonstrate a "compelling interest" in order to justify the laws.

In an effort to meet this test, the state asserted that it had a compelling interest in the promotion of a two-party system. However, the Court refused to classify this interest as compelling for purposes of the equal protection analysis because the interest itself was inconsistent with First Amendment values. Justice Black, writing for the Court, stated:

> [Ohio] claims that the State may validly promote a two-party system in order to encourage compromise and political stability. The fact is, however, that the Ohio system does not merely favor a "two-party system"; it favors two particular parties . . . and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms. . . .

Id. at 31-32.

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The legitimacy of the state's concern with the harmonious relationship between the content of the curriculum and the personal political orientation of the teacher is open to question, because of general judicial disfavor for state inquiry into personal political beliefs. However, the Supreme Court has recognized the legitimacy of the state's interest in using its schools for the shaping and preservation of the political community by transfer of important political information.[76] Therefore, the state's interest in ensuring that its teachers possess the requisite knowledge of the political system and political institutions would appear to be compelling.

B. *Imprecision*

The Supreme Court in *Sugarman* noted that a statute restricting alien employment must be drawn with great precision, excluding aliens only where necessary to the protection of the state's compelling

76. Take, for instance, the flag salute cases. In Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), the Supreme Court upheld a state regulation requiring that pupils in public school participate in a daily flag salute ceremony. Justice Frankfurter, writing for the Court, emphasized the state's interest in using its schools for the promotion and preservation of the political community.

> The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization.
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> . . . .
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> . . . The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate.

Id. at 596, 598. It was for this reason that the Court would not "exercise censorship over the conviction of legislatures that a particular program or exercise will best promote in the minds of children who attend the common schools an attachment to the institutions of their country." *Id.* at 599.

In West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), the Court overruled *Gobitis* on the question of *compelling* students to salute the flag. However, the Court seemed to question only the means by which the state sought to use its schools for political socialization and not the legitimacy of the end itself. Justice Jackson, writing for the Court, asserted:

> As the present CHIEF JUSTICE [Stone] said in dissent in the *Gobitis* case, the State may "require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country." 310 U.S. at 604. Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short cut by substituting a compulsory salute and slogan.

Id. at 631 (footnotes omitted). The courts traditionally have been reluctant to interfere extensively with the curriculum of the public schools, emphasizing that they are ill-equipped to substitute for school boards or legislatures in the determination of what is essential to a successful program of compulsory public education. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 234 (1972); Epperson v. Arkansas, 393 U.S. 97, 104 (1968); Meyer v.

interest.[77] Therefore, even if one concedes that the state's interest in the accumulation aspect of political socialization is compelling and that it places public school teaching within the *Sugarman* exception, the analysis still is not complete. Discriminatory state statutes, as presently enacted, generally exclude aliens from *all* teaching positions in the public schools, without regard to grade level or subject matter. There are several more precise and "less drastic means"[78] for advancing the state's interest.

The statutes in their present form exclude alien teachers at all grade levels. While the process of political socialization continues throughout life, the most critical period seems to be between the ages of three and 13.[79] The state's interest in political socialization, though arguably compelling in elementary school education, thus wanes considerably in the high school. The varying interest of the state in primary and secondary education was recognized in *Wisconsin v. Yoder*,[80] where the Court held that a state could not compel the attendance of Amish children in the public schools beyond the eighth grade. One commentator concludes that this decision struck a severe blow to *any* state interest in secondary education.[81] As such, the precision demanded by use of a suspect classification would limit the permissible exclusion of alien teachers to the elementary school level.

If the state's compelling interest in political socialization is limited to the formal transfer of political information, it would also appear that the exclusion of alien teachers must be limited to subjects in which

Nebraska, 262 U.S. 390, 402 (1922.) Though the reluctance of the courts to intervene in public school operations has been waning (*see, e.g.*, Goss v. Lopez, 419 U.S. 565 (1974); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)), one still might expect considerable deference as to the content of curriculum.

77. *See* p. 95 & note 23 *supra*.

78. *See* note 15 *supra*.

79. *See, e.g.*, R. Hess & J. Torney, *supra* note 51, at 131; M. Jennings & R. Niemi, *supra* note 51, at 181-206; Easton & Hess, *supra* note 49, at 236; Greenstein, *supra* note 49, at 554. These works suggest that much of one's basic political socialization occurs before the end of the elementary school years. This, of course, is not to suggest that political attitudes and orientation do not change after the eighth grade, but only that the state's interest is stronger in primary education.

80. 406 U.S. 205, 227 (1972) ("[T]here is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education [beyond the eighth grade].")

81. Kurland, *The Supreme Court, Compulsory Education, and the First Amendment's Religious Clauses*, 75 W. Va. L. Rev. 213, 229-30 (1973). It should be noted that even on the elementary school level, the state's interest in public education may be outweighed by other concerns. Thus, in 1925, in Pierce v. Society of Sisters, 268 U.S. 510, the Court held that the state's interest in public education must yield to the parents' right to provide for equivalent education in private schools. The Court affirmed an injunction restraining the state of Oregon from requiring compulsory attendance at public schools. Similarly, in concluding that teaching is not a "central governmental function" and hence unable to support a citizenship requirement, the Attorney General of Pennsylvania noted that teaching is often "entrusted to private institutions." 3 Pa. Bull. 204 (Jan. 27, 1973).

this information is most central, such as civics and history.[82] Therefore, the statutes in their present form are overbroad in a second way, for they exclude alien teachers regardless of the subject matter they are to teach. Since, at the elementary school level, one teacher most often teaches all subjects, if the state wishes to exclude aliens it should be required to create specialist positions for teachers of history and civics. Indeed, the state can probably protect its interest in the teaching of these subjects by testing the competence of individual teachers at the certification stage,[83] thus invalidating any automatic exclusion of aliens from public school teaching.

82. Even in these subjects there is some controversy as to the impact of the teacher on the political orientation of his students. *See* Jennings, Ehman & Niemi, *Social Studies Teachers and Their Pupils*, in M. JENNINGS & R. NIEMI, *supra* note 51, at 207.

83. All states require teachers to attend an accredited teacher education institution to be eligible for certification. *See* T. STINNETT, *supra* note 7, at 35. This alone may make unnecessary the exclusion of alien teachers from the public schools, for it ensures an opportunity for the state to monitor competency.

TR/sn

Held for 76-205 Nyquist v. Mauclet

3 J/Ct invalidated N.Y. statute excluding aliens, who do not apply for citizenship, from teaching positions in public schools.

3 J/Ct found, properly I think, that Sugarman & Griffiths control

PRELIMINARY MEMORANDUM

February 18, 1977 Conference
List 1, Sheet 1

No. 76-808

NYQUIST

v.

NORWICK

Appeal from D.C. for S.D.N.Y. (Feinberg, C.J., Pierce; Connor; DJs)

Federal/Civil

Timely

Back Page

SUMMARY:

This appeal presents the question whether the 3J DC erred in holding unconstitutional a NY statute which excludes from public school teaching all aliens other than those who have applied for United States citizenship.

FACTS AND DECISIONS BELOW:

Appees brought this action under §1983 to contest the validity of Section 3001(3) of the New York Education Law, which provides that

no alien may be employed to teach in the public schools of NY unless and until that alien has made application to become a United States citizen and thereafter proceeds, in due course, to become a citizen.

Petrs, aliens who have elected to retain their native citizenship (non-applicant aliens), have both applied for certification to teach in the public schools. However, because they do not fit within the limited exceptions to Section 3001(3) petrs have been denied certification. It is undisputed that, in both cases, the denial of certification has borne no relation to petrs' general character or qualifications, but rather, is soley the product of their status as non-applicant aliens.

In a portion of the opinion not challenged here, the 3JC considered the question whether it should consider the constitutional issues in light of this Court's admonition in Hagans v. Lavine, 415 U.S. 528 (1974), that a 3 JC should consider such issues only if non-constitutional statutory Supremacy Clause issues, within the jurisdiction of a single judge, prove not to be dispositive. Because of the sweeping nature of the challenge here, the 3 JC, after extensive citation of authority, concluded that Supremacy Clause claim here was more properly viewed as a true "constitutional" argument beyond the jurisdiction of the single judge. The 3JC then proceeded to the equal protection argument which it found dispositive.

Citing this Court's recent decisions involving discrimination against aliens, the 3 JD concluded that "any challenged State statute or regulation placing aliens, as a class, at a disadvantage vis-a-vis citizens must withstand the rigors of close judicial scrutiny." JS, App. at 10a. The 3 JC recognized the state's interest in the qualifications of those who shape the minds of the young and cited the suggestion in Sugarman v. Dougall, 413 U.S. 634, 646-47 (1973), that a

state might require citizenship in "an appropriately defined class of positions." The 3 JC nevertheless concluded that the NY statute failed Sugarman's requirement that the "means the State employs must be precisely drawn in light of the acknowledged purpose." Id., at 653. The court found the state's argument that a citizen presumptively has an undivided allegiance while a resident alien has a potential conflict of loyalties insufficient to save the statute. The court found both Sugarman and In re Griffiths, 413 U.S. 717 (1973), inconsistent with such a sweeping justification. The weaknesses of the argument in this particular setting were described as follows:

> "As with the statute challenged in Sugarman, Section 3001(3) is damned by its imprecision. It excludes all non-applicant aliens, regardless of nationality, from all teaching positions in the public school system, regardless of grade level or subject matter. It thus bars British subjects seeking certification to teach mathematics or physical education as well as Soviet citizens seeking to teach civics or economics. The statute's imprecision becomes even more glaring when one considers that the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section 3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring 'skills or competencies not readily available among teachers holding citizenship.' " JS, App. at 13a.

The court noted finally that the position of NY seemed "repugnant to the very heritage the State is seeking to inculate" in that it would tend to "cast a pall of orthdoxy over the classroom." JS, App. at 15a. The court concluded that nothing that could save the statute would come from an evidentiary hearing. Accordingly, the further enforcement of the statute was enjoined.

CONTENTIONS:

Appants argue that because both citizens and aliens can obtain

teaching certificates close judicial scrutiny is inappropriate here. Appants further argue that this case falls within the area mentioned in Sugarman where a state can require citizenship. This second position is based on the general radiations about citizenship that are likely to result from teacher/pupil contact, regardless of the subject matter taught. Finally, appants argue that the exceptions to the citizenship requirement are only temporary. For full-time employment a teacher must meet the standards of the challenged statute.

DISCUSSION:

The inclusion of aliens who are well on their way to abandoning that status hardly justifies the application of a less searching scrutiny. I think that the argument that all teachers necessarily are involved in teaching citizenship, even if only indirectly, is not enough to save the statute. The 3 JC was right that Griffiths and Sugarman require the rejection of the argument.

There is a motion to affirm.

1/19/77
SN

Baker

DC Op in
JS, App.

When I wrote this, I was unaware of the decision to note 76-208, Nyquist v Mauclet, which involves a similar alienage provision in the context of state assistance to education. The cases are distinguishable - this one is harder for the state - but a hold is in order. DAB

Hold for

Denial of educational assistance to resident aliens

SUPPLEMENTAL MEMO

February 18, 1977 Conference
List 1, Sheet 1

No. 76-808

NYQUIST

v.

NORWICK

Appeal from D.C. for S.D.N.Y. (Feinberg, CJ; Pierce; Connor; DJs)

Federal/Civil

Timely

I made a notation to this effect on the memo to you.

At the time I prepared the memo in the above case I was not aware of the Court's decision on October 29, 1976, to note Nyquist v. Mauclet, No. 76-208, which presents a challenge to a NY statute denying educational financial assistance to resident aliens under similar circumstances to those in the instant case. Although the cases can be distinguished in certain respects, they are the same in that the discrimination against aliens can be avoided by the

alien's decision to apply for citizenship. Because that element is likely to be a central consideration in Mauclet, the instant case is an appropriate hold for that case.

1/24/77 Baker

II. No. 76-808 - Nyquist v. Norwick (NPJ or reverse summarily)

Appellees brought this action before a three-judge District Court under § 1983 to contest the validity of § 3001(3) of the New York Education Law, which provides that no alien may be employed to teach in the public schools of New York unless and until that person has made application to become a United States citizen and thereafter proceeds, in due course, to take steps to become a citizen. Appellees are aliens who have applied for certification to teach in New York public schools; certification was denied, however, because appellees have elected to retain alien status and citizenship of their native country.

The District Court declared the New York law unconstitutional. Although that court recognized that under Dougall the State may require citizenship for "an appropriately defined class of positions," it concluded that New York's complete ban on teaching by aliens was not "precisely drawn in light of the acknowledged purpose". In particular, the District Court observed:

> "As with the statute challenged in Sugarman, Section 3001(3) is damned by its imprecision. It excludes all non-applicant aliens, regardless of nationality, from all teaching positions in the public school system, regardless of grade level or subject matter. It thus bars British subjects seeking certification to teach mathematics or physical education as well as Soviet citizens seeking to teach civics or economics. The statute's imprecision becomes even more glaring when one considers that the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section 3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring 'skills or competencies not readily available among teachers holding citizenship.'"

Note. This is not like Foley, in which police officers make life or death decisions. Summary reversal would be improper.

Bob

I think that a state could legitimately exclude aliens from certain types of teaching positions; it seems undeniable that many classes of teachers play an important -- and highly discretionary -- role in forming the values of young students and as "role models". Foley may not provide the District Court with much guidance in this area. People can select their doctors and lawyers but neither parents nor students can pick their teachers.

Accordingly, I will vote either to note probable jurisdiction or reverse summarily.

Heretofore Held for No. 76-208 - Nyquist v. Mauclet

4. No. 76-808 - Nyquist v. Norwick. The case is an appeal from a three-judge court determination of the unconstitutionality of a New York statute that excludes aliens from teaching in the public schools unless the alien has applied to become a citizen and thereafter proceeds to become one. Appellants claim that the statute does not discriminate against aliens since some applicants for citizenship can qualify and that the exclusion is valid since it is related to the inculcation of citizenship in schools. These arguments echo arguments made in Mauclet. I think, however, the choice is between affirming or holding for No. 76-839, Foley v. Connelie. I am inclined now to favor the hold. YCS

Hold

lfp/ss 9/ '78

Sept. 18, 1978

76-808 Ambach, Commissioner of Education v. Norwick, et al

A three-judge court invalidated the New York statute that prohibited resident aliens from teaching in the public school unless they had made application - as they were privileged to do - to become American citizens.

As would be expected, the three-judge court relied heavily on In re Griffiths, Graham v. Richardson, and our decision during the 1976 Term in Nyquist v. Mauclet, 423 U.S. 1 (1977)(involving New York scholarships and student loans) in holding that "strict scrutiny" is the standard of analysis.

In Mauclet, that involved student scholarship and loans, I dissented because I thought the New York plan of financial assistance to college students did not discriminate against a suspect class, and that therefore strict scrutiny was not the standard. The line New York had drawn was not between aliens and citizens, but merely between aliens who elected to retain foreign citizenship and all others. Although my view was subscribed to by the Chief Justice and Justices Stewart and Rehnquist, a majority of the Court differed. Thus, unless last Term's decision in Foley v. Connelie (see below) affords a distinguishing precedent, stare decisis normally would

require that I follow Mauclet in determining the applicable standard of analysis.

At this time, and subject to further thought and discussion, I believe I could sustain this New York statute. I could elect - as I rarely ever have - not to follow stare decisis where I believe, as I do on a constitutional question, that the Court is dead wrong.

I also might be persuaded that the exception recognized in Foley v. Connelie - viewing police officers as having essentially "political" responsibilities - is applicable to public school teachers. Although their role is not political in the sense either of making or enforcing laws, it is quite fundamental in responsibility for educating young minds in the fundamentals of democracy and in understanding and respecting the rule of law. Absent this education and respect, neither the holders of political office who enact our laws nor those responsibility for its enforcement can function effectively in preserving our system of freedom under law.

This is an area in which the sheer logic of past opinions can be viewed as pointing in directions that are not easily harmonized. I am not, certainly at this time, entirely comfortable with any resolution of this case in terms of how one would write an opinion. I have a rather definite view (perhaps based on my long years of association with public education) that a state should have the right to impose a citizenship qualification on

its teachers, especially where provision is made to accommodate the resident alien who makes the choice available to him or her to become citizens.

L.F.P., Jr.

ss

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L.F.P., Jr.

ss

TB/sn

Hold for

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Federal/Civil

Timely

I made a notation to this effect for the memo to you.

At the time I prepared the memo in the above case I was not aware of the Court's decision on October 29, 1976, to note Nyquist v. Mauclet, No. 76-208, which presents a challenge to a NY statute denying educational financial assistance to resident aliens under similar circumstances to those in the instant case. Although the cases can be distinguished in certain respects, they are the same in that the discrimination against aliens can be avoided by the

alien's decision to apply for citizenship. Because that element is likely to be a central consideration in Mauclet, the instant case is an appropriate hold for that case.

1/24/77 Baker

MAY 11 1978

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 76-808

Submitted ....., 19... *Announced* ....., 19...

NYQUIST

vs.

NORWICH

This is an appeal. Also motion to affirm. Heretofore held for decision in No. 76-839 - Foley v. Connelie.

Noted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓									
Brennan, J.							✓						
Stewart, J.						G	V	&	R				
White, J.				✓									
Marshall, J.							✓						
Blackmun, J.							✓						
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.							✓						

FEB 18 1977

Court USDC, S.D. N.Y. *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 76-808

Submitted ....., 19... *Announced* ....., 19...

EWALD NYQUIST, INDIVIDUALLY AND AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF EDUCATION, ET AL., Appellants

vs.

SUSAN M. W. NORWICK, ET AL.

12/11/76 - Appeal

Hold for Nyquist v Mandel 76-208

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stevens, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

JUN 16 1977

Court ..... *Voted on*....., 19...

Argued ....., 19... *Assigned* ....., 19... No. 76-808

Submitted ....., 19... *Announced* ....., 19...

NYQUIST

vs.

NORWICK

This is an appeal. Also motion to affirm. Heretofore held for 76-208 - Nyquist v. Mauclet.

Hold for

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Stevens, J.	✓												
Rehnquist, J.	✓												
Powell, J.	✓												
Blackmun, J.	✓	for		Foley				76-839				(involving police jobs for aliens)	
Marshall, J.	✓												
White, J.	✓												
Stewart, J.	✓												
Brennan, J.	✓												
Burger, Ch. J.	✓												

II. No. 76-808 - Nyquist v. Norwick (NPJ or reverse summarily)

Appellees brought this action before a three-judge District Court under § 1983 to contest the validity of § 3001(3) of the New York Education Law, which provides that no alien may be employed to teach in the public schools of New York unless and until that person has made application to become a United States citizen and thereafter proceeds, in due course, to take steps to become a citizen. Appellees are aliens who have applied for certification to teach in New York public schools; certification was denied, however, because appellees have elected to retain alien status and citizenship of their native country.

The District Court declared the New York law unconstitutional. Although that court recognized that under Dougall the State may require citizenship for "an appropriately defined class of positions," it concluded that New York's complete ban on teaching by aliens was not "precisely drawn in light of the acknowledged purpose". In particular, the District Court observed:

> "As with the statute challenged in Sugarman, Section 3001(3) is damned by its imprecision. It excludes all non-applicant aliens, regardless of nationality, from all teaching positions in the public school system, regardless of grade level or subject matter. It thus bars British subjects seeking certification to teach mathematics or physical education as well as Soviet citizens seeking to teach civics or economics. The statute's imprecision becomes even more glaring when one considers that the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section 3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring 'skills or competencies not readily available among teachers holding citizenship.'"

Note. This is not like Foley, in which police officers make life or death decisions. Summary reversal would be improper.

Bob

I think that a state could legitimately exclude aliens from certain types of teaching positions; it seems undeniable that many classes of teachers play an important -- and highly discretionary -- role in forming the values of young students and as "role models". Foley may not provide the District Court with much guidance in this area. People can select their doctors and lawyers but neither parents nor students can pick their teachers.

Accordingly, I will vote either to note probable jurisdiction or reverse summarily.

Heretofore Held for No. 76-208 - Nyquist v. Mauclet

4. No. 76-808 - Nyquist v. Norwick. The case is an appeal from a three-judge court determination of the unconstitutionality of a New York statute that excludes aliens from teaching in the public schools unless the alien has applied to become a citizen and thereafter proceeds to become one. Appellants claim that the statute does not discriminate against aliens since some applicants for citizenship can qualify and that the exclusion is valid since it is related to the inculcation of citizenship in schools. These arguments echo arguments made in Mauclet. I think, however, the choice is between affirming or holding for No. 76-839, Foley v. Connelie. I am inclined now to favor the hold. YCS

Hold

Reviewed: Altho Brnn views the case as "close", I judge his view to be that teaching in public schools is within the "governance" concept that the Court applied in Foley v Connelie (state police) last Term. Thus rational basis - not strict scrutiny - is standard for E/P analysis.

Appellees question the "means-end" fit (claiming "over" & "under" inclusiveness), altho I do not find them as close as the drawing the "governance" line.

BB 11/7/78

BENCH MEMORANDUM

To: Mr. Justice Powell

Re: No. 76-808, Ambach v. Norwick

I. The Equal Protection Claim

A. Applicability of the Rational Relationship Test.

I judge from your memorandum of September 18, 1978, that no discussion of the caselaw background for the dispute over the proper equal protection standard is necessary.

1. Nyquist v. Mauclet.

The distinction you drew in Mauclet between a statute excluding all aliens and one excluding only aliens who may but

choose not to become citizens applies with equal force in this case.

2. Foley v. Connelie.

The appellants suggest that in view of the central role that the public school teacher plays in the civic education of children, Foley v. Connelie, 98 S.Ct. 1067 (1978), indicates that the proper standard of review for the equal protection challenge is the rational relationship test. In Foley, the Court upheld the constitutionality of New York's statute limiting eligibility for appointment as a state trooper to citizens of the United States. After reviewing many of this Court's decisions on the rights of aliens, Chief Justice Burger's opinion for the Court reached the following conclusion:

> "[W]e have recognized that citizenship may be a relevant qualification for fulfilling those 'important nonelective executive, legislative and judicial positions,' held by 'officers who participate directly in the formulation, execution, or review of broad public policy.' [Sugarman v.] Dougall, [413 U.S. 634,] 647 [(1973)]. ... [W]e must necessarily examine each position in question to determine

> whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.
>
> "The essence of our holdings to date is that although we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens."

"Right to govern"

98 S.Ct. at 1071 (footnote omitted). If the classification in question affects eligibility for a position within the "governance" category, the rational relationship test is applicable. Id. at 1070, 1073.

"governance category"

In concluding that policemen fall within the governance category because of their participation in the execution of broad public policy, the Court stressed that the police function is "one of the basic functions of government" and that "[t]he police function fulfills a most fundamental obligation of government to its constituency." Id. at 1071. While police officers in the ranks do not formulate policy, the Court observed, they have broad discretionary powers affecting many people in significant ways. The Court especially stressed the authority of police officers to intrude, through searches

police function

Required (by State Law) Curriculum

and arrests, on the privacy of individuals.

Relationship of State to schools

New York has provided for public education since it became a State; the State constitution has mandated free public education since 1894. The public education function has a direct and fundamental impact on the lives of all the students that are educated in the public schools. Under New York law, the public schools are charged not only with scholastic education but also with (1) education in "democratic values", attitudes, and principles of behavior. This latter charge is expressed in the State laws governing curriculum. These require courses in civics, and New York and United States history. Children over eight years of age are required to participate in (2) courses in "patriotism and citizenship", including study of the federal and state constitutions and Declaration of Independence in order to promote "patriotic and civic service and ... foster ... qualities ... essential ... to meet the objectives of citizenship in peace or in war." N.Y. Education Law §801(1), (2), and (3). In secondary education, there must be instruction in (3) "the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States", N.Y. Education Law §3204(3)(a)(2); "instructional exercises" on the federal and state bills of rights, the flag, and patriotic holidays are also required in all public schools.

Schools charged with education in democratic values

There is no need to belabor the discretion of the

teacher within these broad curricular requirements. Even where local school boards add further details to these requirements, the teacher necessarily retains a great deal of control over what is taught and how it is presented. To some extent, the teacher's discretion in the teaching of academic subjects is checked systematically by the use of standardized achievement tests at various stages in the educational process, e.g., the Regents Examination in New York. But the teaching of democratic values and attitudes is not susceptible to such systematic measurement, and consequently it is difficult to impose any check on the teacher's discretion in this area of instruction.

I am doing some reading on the role of the public school teacher in the political socialization of students, and will summarize my findings in a supplemental memorandum.

The appellees offer several reasons why public school teachers should not be regarded as similar to policemen under the standard laid down in Foley v. Connelie. They suggest that all of the positions that can be reserved for citizens -- jurors, voters, and police officers -- are governmental monopolies, in contrast with those that cannot be so reserved, such as civil servants, attorneys, and engineers. They point out that teaching (or education) is not such a monopoly, because New York allows private schools.

In each instance referred to by appellees, including

those in which the appellees say that the government "has no monopoly," the case arose because the government controlled access to the particular job or jobs in question. The same is true of certification as a public school teacher; I do not see that the possibility that some teachers may teach in a private school without certification affects the function of the public school teacher in executing the broad policies of public education.

The appellees also note that under New York law, public school teachers are considered "employees" rather than "officers" in determining their eligibility to hold elective public office. In addition, they cite San Antonio School District v. Rodriquez, 411 U.S. 1, 37 (1973), where the Court concluded that education is not a fundamental right. Though the appellees do not articulate the conclusion to be drawn from this premise, I assume that it is that activity in the execution of a public function not satisfying a fundamental right cannot come within the "governance" exception of Foley. Finally, the appellees argue that teaching, unlike policing, is a "common occupation of the community" and therefore falls outside of the Foley exception.

The state law distinction between "officers" and "employees" noted supra has no obvious bearing on the Foley classification, since Foley applies to non-elective positions.

Though not a fundamental right in Const. sense, education is a fundamental activity of state govt.

The important inquiry is whether the position of public school teacher "involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." Foley, 98 S.Ct. at 1071.

I am not aware of any decision holding that there is a fundamental right to law enforcement. It is nonetheless true that the police function is a fundamental activity of state government. It seems to me that the same is true of public education.

Teaching like policing is fundamental activity of state govt.

In Truax v. Raich, 239 U.S. 33 (1915), the Court invalidated an Arizona statute requiring any business employing more than five persons to employ not fewer than 80% qualified electors or native-born citizens of the United States. Other than using the terms "common occupations of the community" and "ordinary means of earning a livelihood" interchangeably, the Court does not give any indication of what counts as a "common occupation." In Foley v. Connelie, the Court indicated that working as a policeman does not count as working at a "common occupation." 98 S.Ct. at 1072.

To the extent that some types of public employment may count as employment in a "common occupation of the community," the relevant distinction between such public employment and other public employment that is more governmental in nature is drawn by Foley v. Connelie. Any public employment that does not fall within the Foley principle may be considered a "common

occupation." I prefer approaching the problem from the Foley end, and leaving "common occupations" as the residual category, because the criterion in Foley is defined more fully than the Truax "common occupation" notion.

The appellees fail to stress their best argument against the application of Foley in the present case. Public school teachers have nothing to do with governing the community, that is, with making and applying laws, except to the extent that they must obey the laws detailing their duties as teachers. and except teachers are responsible for teaching the young most of what young people know about the law, duty to obey, consequences of disobedience, & duties as citizens.

B. The State's Purpose in Adopting §3001(3)

The State says that its purpose in adopting §3001(3) is to ensure that public school teachers are qualified to impart effectively to their students the values and attitudes fundamental to American social and political life.

The appellees do not attack the legitimacy of this purpose. They do make a diversionary attack by arguing that the State has no legitimate purpose in encouraging aliens to become citizens. The State, however, has never claimed this as a purpose underlying §3001(3).

The appellees do make several arguments intended to show that the State has no substantial interest in the exclusion of non-applicant aliens from certification. First,

they point out that since 1967, the legislature has given the Commissioner of Education the authority to alter by regulation the exclusion at issue. The appellees contend that this delegation of authority to the Commissioner indicates that the State has no strong interest in the maintenance of the exclusion. Second, appellees refer to the New York law allowing alien parents of public school students to serve on local boards of education. They argue that if aliens can govern the schools, the state interest in excluding them from teaching in the schools cannot be substantial.

Alien parents may serve on S/Bds

The appellants have not addressed these two points in their Brief, but I imagine their rejoinders would be the following. The Commissioner of Education is the official charged with implementing the Education Law. Since the only purpose of §3001(3) is to advance the purpose of civic education in the public schools, it makes sense to place control over the exclusion in the Commissioner. This delegation in no way reflects on the substantiality of the

State's interest in civic education.* The curricular requirements regarding civic education that are contained in state law, and the exclusion of non-applicant aliens from certification under state law, are immune from interference by local school boards. Admission of aliens to membership in local school boards, though responsive to other purposes than civic education of public school students, is not inconsistent with the State's announced purpose for §3001(3).

---

* The appellees also argue that a decision by the Commissioner to retain the certification exclusion cannot be regarded as a decision by the State that the State has a substantial interest in the exclusion. In support of this view, the appellees cite Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). The plaintiffs in that case challenged the constitutionality of the Civil Service Commission's rule excluding aliens from the competitive civil service. The Court noted that adoption of the rule had not been required by Congress or the President. The Court therefore refused to allow the Commission to rely on policy justifications for the rule that were drawn from outside the scope of the Commission's responsibility for promotion of an efficient civil service. This left only a single proffered justification for the rule -- since some important and sensitive civil service positions must be restricted to citizens, administrative expenses are minimized by excluding all aliens from the civil service. For reasons not here important, the Court rejected this justification for the rule.

The contrasts between Hampton v. Mow Sun Wong and the present case are apparent. Here the State legislature has explicitly delegated the authority over the exclusion of alien from teacher certification to the Commissioner of Education. Further, the reasons proffered by the Commissioner to justify the exclusion fall within the area of responsibility with which he is charged. He argues that given his responsibility for educating public school pupils in the attitudes and values of democratic society, the exclusion of non-applicant aliens is a necessary rule.

C. The Fit Between the State's Purpose and §3001(3)

The appellants claim that §3001(3) is related rationally to the achievement of the State's purpose. The statute excludes a group of teachers who are unqualified to impart the values and attitudes of American social and political life to their students. Instruction in civic values and attitudes, just as in any other sets of values, must be as much by example as by discourse. Aliens who may but refuse to become citizens cannot provide that example.

The appellees argue that §3001(3) is not related rationally to the State's purpose because it allows the certification of aliens who are ineligible to become citizens or to declare their intent to become citizens. But the failure to exclude all unqualified teachers does not make a statute that excludes some of them less than rational. Further, aliens who are ineligible for citizenship receive only temporary certifications.

The Court defined the required fit between ends and means, under the strict scrutiny test, in Nyquist v. Mauclet, supra, 432 U.S. at 7. "In undertaking this [close] scrutiny, 'the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn.'" (quoting Examining Bd. v. Flores de Otero, 426 U.S. 572, 605 (1976)). The appellees raise several arguments directed at showing that

§3001(3) is neither necessary to the State's purpose nor precisely drawn to serve that purpose.

The appellees argue that the §3001(3) restriction on certification is unnecessary because the oath required of all teachers is sufficient to ensure that the State gets teachers who are committed to American political principles. The oath, prescribed by §3002, is the following:

> "I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the ...(title of position and name or designation of school, college, university or institution to be here inserted), to which I am assigned."

The State imposes many of the same requirements for instruction in civics and State and national history on private schools as it imposes on public schools. Appellants' Brief, pp. 12-13. The appellees argue that if the State does not need to exclude non-applicant aliens from teaching in private schools, it does not need to exclude them from public schools either. The appellants respond that the interests of the State in private education are different from those it seeks to realize in public education. In particular, it recognizes that private elementary and secondary education is devoted to the inculcation of different kinds of values in students, particularly religious values. While the State imposes some

requirements regarding civic education, it recognizes and respects the different function filled by private schools, and so requires only that their teachers by "competent."

The appellees argue that §3001(3) is under-inclusive because it allows the certification of aliens who have not identified with and become a part of American political society. Appellees refer to several provisions of New York law, including those allowing "temporary certification of aliens" ineligible for citizenship and of aliens with skills not available among previously certified teachers. The appellants respond that because of the small numbers and limited duration of these exceptional certifications, their impact on the accomplishment of the State's purposes in civic education are small.

The appellees also contend that §3001(3) is over-inclusive because it excludes non-applicant aliens who by reason of their own national heritage are qualified to impart to public school students the requisite civic values and attitudes. One of the appellees, for example, is a citizen of Great Britain, and she argues that there is little or no difference in the values and attitudes of social and political behavior in that country and the United States.

The appellees assert that §3001(3) is over-inclusive also because it bars non-alien applicants from teaching any subject, including subjects such as mathematics and foreign

requirements regarding civic education, it recognizes and respects the different function filled by private schools, and so requires only that their teachers by "competent."

The appellees argue that §3001(3) is under-inclusive because it allows the certification of aliens who have not identified with and become a part of American political society. Appellees refer to several provisions of New York law, including those allowing "temporary certification of aliens" ineligible for citizenship and of aliens with skills not available among previously certified teachers. The appellants respond that because of the small numbers and limited duration of these exceptional certifications, their impact on the accomplishment of the State's purposes in civic education are small.

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The appellees assert that §3001(3) is over-inclusive also because it bars non-alien applicants from teaching any subject, including subjects such as mathematics and foreign

languages where there is little or no place for civic education. The appellants point out that under the early childhood and upper elementary certificate sought by appellees, teachers instruct in all subjects, including reading, writing, English, geography, United States and New York history, civics, arithmetic, and science. Teachers certified to teach at the secondary level can be required to instruct outside of their certification one day per week. The appellants also argue that every teacher, whatever his certification, teaches by example on such matters as patriotism and citizenship. The appellants concludes that no practicable system of certification could exclude resident aliens who have not applied for citizenship from positions where they will shape the political values of public schools pupils.

The appellees also point out that only ten other states presently have and enforce a requirement that public school teachers be citizens or aliens who have declared their intent to become citizens.

II. Other Constitutional Objections to §3001(3) not considered by 3d/Ct — that relied solely on E/P

The three-judge DC based its holding on the Equal Protection Clause, and did not consider the other objections to the statute advanced by the appellees. I will describe and discuss those claims briefly.

A. Due Process Claim.

Citing Vlandis v. Kline, 412 U.S. 441 (1973),

Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974), and Stanley v. Illinois, 405 U.S. 645 (1972), appellees argue that the New York statute creates an unconstitutional irrebutable presumption that they are unqualified to teach in the public schools. They contend that because the operation of the presumption turns on a classification -- alienage -- that the Court has marked for special scrutiny, the presumption violates the Due Process Clause.

All legislative classifications create irrebutable presumptions. The Due Process question in Vlandis, La Fleur, and Stanley was not the existence of a legislative classification, but the fundamental fairness of the challenged classification. The question in the present case, under the Due Process Clause, is whether it is fundamentally unfair to create an irrebutable presumption that non-applicant aliens are unqualified to be public school teachers.

B. First Amendment Claim.

The appellees argue that by excluding non-applicant aliens from positions as public school teachers, New York stifles the expression of various points of view, "cast[ing] a pall of orthodoxy over the classroom." Keyshian v. Board of Regents, 385 U.S. 589, 603 (1967). New York does not exclude, however, all aliens from serving as public school teachers, so it is unclear what unique contribution to the exchange of ideas would be made by non-applicant aliens. The appellees do not

claim that they would put forth to their pupils the suggestion that it is better not to be a citizen, or that it is better not to adopt the civic attitudes and values that are held out to school children as normative in our society.

Further, to the extent that appellees might claim the First Amendment right to make this unique contribution, I would conclude against such a right. The notion that "[t]he classroom is peculiarly the 'marketplace of ideas'", Keyshian, supra, 385 U.S. at 603, rests on the assumption that all of those participating in the market come to it with a common basic understanding about the way the market works. Ideas of majoritarian rule within certain limits fixed to protect minorities from abuse and exploitation, of attention to and discussion of differing points of view, and of toleration for those with differing ideas, are the essential groundrules of the marketplace. To a large extent, these are the civic principles and values that are imparted to school children in the elementary grades, at least. At this level, I do not think that we are interested in exposing children to other potential sets of groundrules, since we do not want to offer them a choice. It is no coincidence that Keyshian involved university teachers.

C. Supremacy Clause Issue.

The appellees contend that the New York statute is at odds with the federal laws regulating immigration, and is

therefore invalid by reason of the Supremacy Clause. They argue, in general terms, that Congress has not disabled aliens from employment -- from "paying their way" -- and that a state law that does burden the employment prospects of aliens is inconsistent with the federal law. The federal law provides for consideration of questions of political allegiance and intention to become a citizen at the time that an alien is admitted to the country. For the State to make an inconsistent determination, appellees contend, is also inconsistent with federal law.

Appellees contend, more particularly, that the New York statute is inconsistent with federal law governing the admission of alien teachers to the country. Since 1976, 8 U.S.C. §1182(a)(14) has provided that alien teachers with qualifications superior to available resident teachers may be admitted. The New York statute, according to appellees, is inconsistent with this statute since it forbids certification of such teachers in preference for less qualified resident teachers.

This argument was raised in the appellees complaint, but was not considered or decided by the three-judge DC. In the Jurisdictional Statement and the Motion to Affirm, all of the parties treated this case as raising only equal protection claims. The Appellants' Brief on the merits continues with this approach.

Appellees argument that the New York statute is pre-empted by federal immigration laws does not seem to me to have much to recommend it. The appellees do not cite any provision of the federal law that is inconsistent with the New York statute. As the three-judge DC put it, "the purported conflict underlying plaintiffs' Supremacy Clause argument is not between Section 3001(3) and any specific enactment of Congress, but rather, between Section 3001(3) and the exclusive power to regulate immigration and naturalization vested in the federal government by ... the Constitution." (JS 5a). Appellees general pre-emption argument proves too much, for it leads to the conclusion that no alien, once admitted to the country, could be excluded from any position because of alienage. And the more narrow argument, resting on 8 U.S.C. §1182(a)(14), does not show any real conflict between the federal and state laws. The federal statute does not purport to measure the qualification of alien teachers to provide the civic education that concerns New York and is said by it to underlie §3001(3).

Summary: Though the appellees raise other constitutional bases for sustaining the judgment of the DC, I think that the case should be decided on Equal Protection grounds.

The Equal Protection question is a difficult one. As to the standard to be applied, the governance exception of

Foley is not an exact fit, since public school teachers do not participate in making or applying laws. But the role of public school teachers in instilling civic values and attitudes is important to the maintenance of the political community.

The appellees strongest point is their criticism of the fit between the State's purpose and the means adopted, §3001(3). I think it is a close question whether the classifications established by the statute will survive strict scrutiny.

BB 11/21/78

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: Ambach v. Norwick, No. 76-808: Teacher's Role in Political Socialization

The role of the public school and the teacher in the political education and socialization of children has been the subject of a number of studies by political scientists. My review of some of this literature did not uncover any consensus on the major questions.

Not all of the observers agree that the school is of any particular importance in teaching political attitudes and values. H. Hyman, Political Socialization 69-74 (1959), attributes political attitudes and values to a child's family experience. Diamond, "Studies and Projects in Citizenship," in F. Patterson, ed., Adolescent Citizen 72 (1960), attributes political value formation more to community structure, and the "morale and spirit" of the school, than to classroom

instruction.

Other writers appear to be convinced of the central importance of the public school in political socialization. V.O. Key, Public Opinion and American Democracy 316 (1961), comments that "all national education systems indoctrinate the coming generation with the basic outlooks and values of the political order." Hess and Torney, Development of Political Attitudes in Children 365 (1967), conclude that "the public school is the most important and effective instrument of political socialization in the United States."

As for the particular role of the teacher in fulfilling whatever place the school may have in political socialization, I have discovered nothing helpful. Those writers who view the school as important not surprisingly tend to attach some importance to the teacher's part in the project. E.g., Hess and Torney, supra, at 217-18. This linkage accords with one's commonsense expectations, but I have not found any convincing empirical confirmation of that intuition.

My reading has been limited to about a dozen books. Perhaps more extensive research would turn up more helpful information, but I doubt it. Everything of recent vintage appears to be the work of political "scientists" more concerned with measuring something than establishing precisely what it is that we need to have the measure of. As a consequence, the studies tend to go off in various directions, and even the

general summary statements in the foregoing paragraphs mask significant differences in the purposes of the studies from which they spring.

It does seem to me that many of the statements that minimize the importance of the school stem from studies focused on the transmission of fairly specific political information and allegiances, e.g., political party allegiances. The schools may be concerned in the early years (though not in the high school years) with much more basic political socialization, especially in early years. In those grades, it seems to me, the primary purpose of civic education in the schools is to inculcate basic attitudes about law, society, public discourse, majority rule, and tolerance of minorities. At least two of the studies that I read characterized the civic education of the early years in just this way. E. Friedenburg, Coming of Age in America: Growth and Acquiesence 221-26 (1967), comments that schools attempt to generate support for the political system by inculcating the most inclusive values espoused by the system. This approach to political socialization limits the school's influence, but at the same time strengthens it within that limited scope because it stresses values, attitudes, and behavior that is approved widely. Similarly, Hess and Torney, supra, at 217, notes that "[c]ompliance to rules and authorities is a major focus of civic education in elementary school. Teachers' ratings of the

importance of various topics clearly indicate that the strongest emphasis is placed upon compliance to law, authority, and school regulations."

Several of the studies cited supra, along with other works by social scientists, are discussed in the attached Note from the Yale Law Journal. I think that you will find it of interest.

76-808 AMBACH v. NORWICK (appeal from 3 J/Ct - N.Y.) Argued 1/10/79

E/P case in which 3 J/Ct invalidated N.Y. statute that ~~#~~ required public school teachers to be citizens or aliens who are eligible to apply for citizenship ~~and~~ who have applied.

The two appellants here are qualified aliens who have declined to apply for citizenship.

In Nyquist, I drew distinction bet. aliens who could become citizens but who elect not to qualify for the position, & ~~the~~ aliens who are wholly disqualified. Not "discrete".

Rational basis standard applies.

Public school teachers serve in a "governance" related position.

Education - next to public safety - is principal function of state govt.

(I think N.Y. statute is silly but I'm by no means sure it is beyond power of state)

Reverse 5-4

76-808 AMBACH V. NORWICK Conf. 1/12/79

The Chief Justice Reverse

Mr. Justice Brennan Affirm

Even on rational basis standard, this statute is invalid.

Mr. Justice Stewart Reverse

Acknowledges her votes have not been consistent. A distinction might be made bet. what a Govt can do with employees that it could not do with citizens - but this would not distinguish all prior cases.

In any event, at least where an alien can qualify by applying for citizenship the state may enact this type of legn.

Mr. Justice White Reverse

Beginning to share P. S. view ~~about~~ as to E/P, but may be too late to turn clock all way back

Mr. Justice Marshall Affirm

Mr. Justice Blackmun Affirm

Mr. Justice Powell Reverse

Not suspect class in this case { my op. in Mauclet

Under rational basis analysis statute is valid

Silly statute but not irrational

Mr. Justice Rehnquist Reverse

Mr. Justice Stevens Affirm

PBS-2/9/79

DRAFT OPINION

TO: Mr. Justice Powell

FROM: Paul

RE: Ambach v. Norwick, No. 76-808

DATE: February 9, 1979

Mr. Justice Powell delivered the opinion of the Court.

This case presents the question whether a State may, consistently with the Equal Protection Clause of the Fourteenth Amendment, refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

I

New York Education Law § 3001(3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship.[1] The Commissioner of Education is authorized to create exemptions from this prohibition, and has done so with respect to aliens who are not yet eligible for citizenship.[2] Unless a teacher obtains certification, he may not work in a public elementary or secondary school in New York.[3]

Appellee Norwick was born in Scotland and is a subject

of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to ~~obtain~~ seek apply for citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975.[4] Both applications were denied because of appellees' failure to meet the requirements of § 3001(3). Norwick then filed suit in federal district court seeking to enjoin the enforcement of § 3001(3), and Dachinger obtained leave to intervene as a plaintiff.

A three-judge district court was convened pursuant to 28 U.S.C. § 2281. After briefing and the stipulation of certain facts, but before the presentation of evidence, the parties filed cross-motions for summary judgment. Applying the "close judicial scrutiny" standard of Graham v. Richardson, 403 U.S. 365, 372 (1971), the court held that § 3001(3) discriminated against aliens in violation of the Equal Protection Clause. 417 F. Supp. 913 (S.D.N.Y. 1976). The

court believed that the statute was overbroad, because it excluded all resident aliens from all teaching jobs regardless of the subject sought to be taught, the alien's nationality, the nature of the alien's relationship to this country, and the alien's willingness to substitute some other sign of loyalty to this nation's political values, such as an oath of allegiance. Id., at 921. We noted probable jurisdiction over the state's appeal, 436 U.S. 902 (1978), and now reverse.

II

A

The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years. State regulation of the employment of aliens long has been subject to constitutional constraints. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the Court struck down an ordinance which was ~~used~~ applied to prevent aliens from running laundries, and in Truax v. Raich, 239 U.S. 33 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's "right to work for a living in the common occupations of the community . . ." Id., at 41. At the same time, however, the Court also has recognized a greater degree of latitude for the States when

aliens were sought to be excluded from public employment. At the time Truax was decided, the governing doctrine permitted States to exclude aliens from various activities when the restriction pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, . . ." Id., at 39. Hence, as part of a larger authority to forbid aliens from owning land, Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923); Blythe v. Hinkley, 180 U.S. 333 (1901); Hauenstein v. Lynham, 100 U.S. 483 (1880), harvesting wildlife, Patsone v. Pennsylvania, 232 U.S. 138 (1914); McCready v. Virginia, 94 U.S. 391 (1877), or maintaining an inherently dangerous enterprise, Clarke v. Deckebach, 274 U.S. 392 (1927), States permissibly could exclude aliens from working on public construction projects, Crane v. New York, 239 U.S. 195 (1915), and, it appears, from engaging in any form of public employment at all, see Truax, at 40.

Over time, the Court's decisions gradually have ~~diminished the area in~~ restricted the activities from which States are free to exclude aliens. The first sign that the Court would view with increased skepticism discrimination against aliens even in areas affected with a "public interest" appeared in Oyama v. California, 332

U.S 633 (1948). The Court there held that statutory presumptions designed to discourage evasion of California's ban on alien landholding discriminated against the ~~aliens'~~ citizen children of aliens. The same Term, the Court held that the "ownership" a State exercises over fish found in its territorial waters "is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 421 (1948). This process of withdrawal from the former doctrine culminated in Graham v. Richardson, 403 U.S. 365 (1971), which for the first time treated classifications based on alienage as "inherently suspect and subject to close judicial scrutiny." Id., at 372. Applying Graham, this Court has struck down statutes that prevented aliens from entering a State's classified civil service, Sugarman v. Dougall, 413 U.S. 634 (1973), practicing law, In re Griffiths, 413 U.S. 717 (1973), working as an engineer, Examining Bd. v. Flores de Otero, 426 U.S. 572 (1976), and receiving state educational benefits, Nyquist v. Mauclet, 432 U.S. 1 (1977).

Although our more recent decisions have departed substantially from the public interest doctrine of Truax's day, they have not abandoned the general principle that some state

functions are so bound up with the ~~maintenance~~ operation of the State as a political entity as to permit the exclusion from those functions of all persons who have not become part of the polity that comprises the State. In Sugarman, we recognized that a State could, "in an appropriately defined class of positions, require citizenship as a qualification for office." We went on to observe:

> "Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." Id., at 647 (citation omitted).

The exclusion of aliens from such positions would not ~~invite~~ require as demanding scrutiny from this Court. Id., at 648. See also Nyquist v. Mauclet, supra, at 11; Perkins v. Smith, 370 F. Supp. 134 (Md. 1974), aff'd, 426 U.S. 913 (1976).

Applying this standard, we held last Term that New York could exclude aliens from the ranks of its police force. Foley v. Connelie, 435 U.S. 291 (1978). Because the police

function fulfilled "a most fundamental obligation of government to its constituency" and by necessity cloaked policemen with substantial discretionary powers, we ~~regarded~~ viewed the police force as being one of those appropriately defined classes of positions for which a citizenship requirement could be imposed. Id., at 297. Accordingly, the State was required to justify its classification only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." Id., at 296.

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. Broad-based classifications that exclude aliens from various walks of private life ordinarily serve no legitimate state interest, but the distinction between citizens and aliens lies ~~at~~ close to the heart of the definition of a state and its government. The Constitution itself refers to the distinction no less than 11 times, see Sugarman, at 651-652 (Rehnquist, J., dissenting), indicating that the status of citizenship was meant to have ~~some~~ significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the

powers of governance. See Foley, at 295. The form of this association is important: An oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when ~~they~~ exercising the functions of government, ~~properly may limit~~ have widest latitude in limiting the participation of non-citizens.[5]

Paul - There is a key sentence. I suggest the changes as qualifying its full sweep. What do you think?

B

In determining whether teaching in public schools constitutes a governmental function that may be limited to citizens, we look to the role of public education in our democratic society and to the degree of responsibility and discretion teachers possess in fulfilling that role. See id., at 297. Each of these considerations support the conclusion that public school teachers may be regarded as performing a task "that go[es] to the heart of representative government." Sugarman, at 647.

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." Foley, at 297. The importance of public schools in the preparation of individuals for participation in our democratic society, and in the preservation of the values on which this society rests, long has been recognized by our decisions:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." Brown v. Board of Education, 347 U.S. 483, 493 (1954).

See also Keyes v. School Dist. No. 1, 413 U.S. 189, 246 (1973) (Powell, J., concurring); San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 29-30 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); id., at 238-239 (White, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring); Adler v. Board of Education, 342 U.S. 485, 493 (1952); McCollum v. Board of Education, 333 U.S. 203, 212 (1948) (Frankfurter, J., concurring); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); Interstate Consolidated Street R. Co. v. Massachusetts, 207 U.S. 79 (1907).[6] Other authorities have perceived public schools as an "assimilative force" by which

diverse and conflicting elements in our society are brought together on a broad but common ground. See, e.g., J. Dewey, Democracy and Education 26 (1929); N. Edwards & H. Richey, The School in the American Social Order 623-624 (1963). These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. See R. Dawson & K. Prewitt, Political Socialization 146-167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 114, 158-171, 217-220 (1967); V.O. Key, Public Opinion and American Democracy 323-343 (1961).[7]

Within the public school system, teachers play a critical part in developing the ~~values the system is designed to promote~~. Alone among employees of the system, teachers are in direct, day-to-day contact with students in the classrooms. In shaping the ~~classroom~~ experience to achieve ~~teaching~~ goals, teachers by necessity have ~~considerable~~ discretion over the way ~~the~~ course material is ~~communicated to students~~. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in

achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. By adopting certain attitudes as his own, a teacher encourages the development of similar attitudes on the part of his students.

The discretion and control necessarily exercised by a teacher extends to all his classroom functions, including the development of attitudes and values critical to participation in a democratic society. Through both the presentation of course materials and the example he sets, a teacher has substantial power to affect his students' attitudes toward and perceptions of government, the political process, and a citizen's social responsibilities.[8] This influence, as the educational process itself, is crucial to the formation of skills and values on which the continued good health of a democracy depends.[9]

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, help fulfil the critical social function of the school system.[10] First, most teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to poltical and social subjects.[11] Second,

and perhaps more importantly, a State properly may regard all teachers as having an obligation to promote civic virtues in their classes, regardless of the subject taught. Certainly a State may take account of a teacher's function as a role model, which exists independently of particular classroom topics. In light of these considerations, we believe that public school teachers fit within the "governmental function" rule recognized in Sugarman and Foley. Accordingly, the Constitution requires only that a citizenship requirement applicable to these jobs bear a rational relationship to a legitimate state interest.

III

When analyzed under a rational relationship standard, it seems clear that the restriction embodied in § 3001(3) and the related regulations is constitutional. The restriction is carefully tailored to its purpose, as it bars from teaching only those aliens who have affirmatively demonstrated their unwillingness to obtain United States citizenship.[12] As such, it represents a judgment by the people of New York that a person who has manifested his unwillingness to join the political community of which they are part should not ordinarily be entrusted with the responsibilities and powers a teacher enjoys in the classroom.[13] This decision reflects a rational weighing of the alternatives, rejecting the advantages

III

As the state's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether §30001(3) bears a rational relationship to this interest. The restriction in carefully tailored to the state's purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[12] Appellees, and aliens similarily situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty.[13] They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a threshold qualification for teaching and instructing by example the young of the state, and §3001(3) directly furthers that judgment.[14]

Reversed.

a more cosmopolitan and culturally diverse class of teachers might provide in favor of the promotion of the patriotic and civic values of which citizenship is an affirmation.[14] Whatever the wisdom of such a judgment, it is one the State is entitled to make, and accordingly its constitutionality must be sustained.

Reversed.

lfp/ss 2/12/79

MEMORANDUM

TO: Paul DATE: Feb. 12, 1979

FROM: Lewis F. Powell, Jr.

76-808 Ambach v. Norwick

I like your draft of 2/9/79, which I have reviewed with some care. In addition to editing, and a suggested revision of Part III, I add the following comments and suggestions.

1. The dissent undoubtedly will use In re Griffiths against me. I agree that we should deal with this after we see exactly what the dissent says.

2. The dissent also probably will make a "big thing" over the fact that §3001(3) applies only to public school teachers when a high percentage of New York children attend parochial and other private schools. In addition to the answer you have in the draft, I suggest - possibly in the text - relying on the doctrine that a state does not have to embrace an entire area or utilize the limit of its power in furthering a state interest. There are a number of cases on this point. I do not recall having made it in any of my decisions, although you might take a look at McGinnis v. Royster which may be a "see also".

3. As an old hand as a school board member, I have expanded note 13 as a rider to page FN-6.

4. I also have dictated a none too artful footnote that should be a counter-weight against inferences in our opinion that appellants' loyalty to the United States may not be of the highest order. This is marginal, and I would like your independent judgment - as usual.

5. The draft uses the word "he" to refer to teachers. It is a bit awkward to use "he or she" throughout an opinion, but I do not want to offend the female contingency - which no doubt substantially outnumbers male teachers in the New York system as elsewhere. In this connection, it might be worthwhile to ask our library to obtain from the Library of Congress the most recent annual report of the Superintendent of Education in the State of New York. This should give us the total number of public school teachers, and their division between the sexes.

Subject to the foregoing, I suggest that you proceed with the customary review by an editor, bringing

to me before a Chambers draft only substantive changes.

L.F.P., Jr.

ss

[2/12/79]

Paul—
I leave to you
where to put
this note

6/ Appellees argue that the state cannot rationally exclude aliens from teaching positions and yet permit them to vote for and sit on certain local school boards. See App., pp. 27, 29. We note, first, that the state's policy as to service on school boards applies only in New York City and to aliens who are parents of students in the public schools. Furthermore, the argument misconceives the distinction between the role and function of teachers and school board members. Although board members possess substantial responsibility for the administration of the schools, they teach no classes, and rarely if ever are known or identified by the students. Their influence on students is effected indirectly only through textbooks and teachers. It is true that normally, local boards, within limits prescribed by the legislature and regulations of the state board of education, select or approve textbooks and instruction materials. Without minimizing this responsibility, it is one necessarily discharged by reliance in major part on recommendations from committees of professional educators composed of teachers and public school officials. As noted above, the textbook - particularly in the social science classroom - usually is less influential than how the material therein is taught and interpreted by the classroom

teacher.

Moreover, the number of teachers in the New York public school system for the 19 totalled . See Annual Report, NY Superintendent of Public Education (??) The number of school board members is, by comparison, almost minimal.

As our cases have emphasized (Paul - here cite cases including, as I recall, In re Griffith), resident aliens pay taxes, serve in the armed forces (?), and have made significant contributions to our country in private and public endeavors. No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state and local governments, see Brown v. Board of Education, supra, at 493, may determine eligibility for the key role in discharging this function on the assumption that generally citizens of the United States are better qualified than are citizens of a foreign country. We note in this connection that regulations promulgated pursuant to Section 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 NY Code, Rules and Reg., Section 80.2(i)(1). Although one may think that in certain disciplines (such as mathematics, the physical sciences, and foreign languages) at the high school level, an alien often would bring to the teaching of the subject highly desirable qualifications. The state informs us, however, that the authority conferred by this regulation has not been exercised. Brief for appellant 7 n.*.

III

As the state's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether §30001(3) bears a rational relationship to this interest. The restriction in carefully tailored to the state's purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[12] Appellees, and aliens similarily situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty.[13] They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a threshold qualification for teaching and instructing by example the young of the state, and §3001(3) directly furthers that judgment.[14]

Reversed.

13. As our cases have emphasized (Paul - here cite cases including, as I recall, In re Griffith), resident aliens pay taxes, serve in the armed forces (?), and have made significant contributions to our country in private and public endeavors. No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state and local governments, see Brown v. Board of Education, supra, at 493, may determine eligibility for the key role in discharging this function on the assumption that generally citizens of the United States are better qualified than are citizens of a foreign country. We note in this connection that regulations promulgated pursuant to Section 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 NY Code, Rules and Reg., Section 80.2(i)(1). ~~Although~~ one may think that in certain disciplines (such as mathematics, the physical sciences, and foreign languages) at the high school level, an alien often would bring to the teaching of the subject highly desirable qualifications. The state informs us, however, that the authority conferred by this regulation has not been exercised. Brief for appellant 7 n.*.

10. At the primary school level, for which both appellees sought certification, teachers are responsible for all of the basic curriculum.

11. All certified teachers, including those in the secondary schools, are required to be available for up to five hours of teaching a week in subjects outside their specialty. 8 N.Y. Code Rules & Reg. § 80.2(c).

12. See n. 2 infra.

13. ~~Appellees~~ argue that the State could not rationally have made this judgment, as it permits aliens to vote for and sit on certain local school boards. See app. 27, 29. But the State's policy ~~about~~ as to participation in school boards, which applies only to New York City and extends only to aliens who are parents of students in the public schools, is not necessarily inconsistent with its restrictions on alien teachers. Members of local school boards, although possessing substantial responsibility for the administration of the schools, do not enjoy direct, individual contact with students. They accordingly do not have the same opportunity immediately to influence students as do teachers.

14. The regulations promulgated pursuant to § 3001(3) do provide for the case where a particular alien's special qualifications as a teacher outweigh the policy which the

Paul - see new note 13. Also, I redrafted the "school board" note. Find another place for it.

general prohibition serves. See 8 N.Y. Code Rules & Reg. § 80.2(i)(1). The State informs us, however, that no certificates have been issued pursuant to this exception. Brief for Appellant 7 n. *.

1. The statute provides:

> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> "3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by the Commissioner of Education permitting such employment." N.Y. Educ. Law § 3001(3).

The statute contains an exception for persons who are ineligible for United States citizenship solely because of an oversubscribed quota. Id., § 3001-a. Because this statutory provision is in all respects narrower that the exception provided by regulation, see n. 2, infra, as a practical matter it has no effect.

The State does not certify the qualifications of teachers in the private schools, although it does require that such teachers be "competent". N.Y. Educ. Law § 3204(2).

2. The following regulation governs here:

> "Citizenship. A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons." 8 N.Y. Code of Rules and Regulations § 80.2(i)

3. Although § 3001 by its literal terms appears to apply to all New York public schools, including colleges and universities, certification by the Commissioner of Education is not required of teachers at state institutions of higher education and the citizenship restriction accordingly does not apply to them. Brief for Appellants 13 n. *. We express no view as to the permissibility of a citizenship requirement applicable to the faculty of such ~~schools~~ institutions.

Paul - I don't think "school" in this context would be construed to include colleges & above

4. At the time of her application Norwick had not yet met the post-graduate educational requirements for a permanent certificate and accordingly applied only for a termporary certificate, which also is governed by § 3001(3). She since has obtained the necessary graduate degree for full certification. Dachinger previously had obtained a temporary certificate, which had lapsed at the time of her 1975

application. The record does not indicate whether Dachinger previously had declared an intent to obtain citizenship or had obtained the temporary certificate because of some exception to the citizenship requirement.

5. That the significance of citizenship has constitutional dimensions also has been recognized by several of our decisions. In Trop v. Dulles, 356 U.S. 86 (1958), a plurality of the Court held that the expatriation of an American citizen constituted cruel and unusual punishment for the crime of desertion in time of war. In Afroyim v. Rusk, 387 U.S. 253 (1967), the Court held that the Constitution forbade Congress from involuntarily depriving a person of his citizenship for any reason.

6. As San Antonio Ind. School Dist. v. Rodriguez, supra, recognized, there is no inconsistency between our recognition of the ~~great~~ vital significance of public education and our holding that access to education does not constitute a fundamental right for purposes of the Equal Protection Clause. We observed in Rodriguez that "social importance is not the critical determinant for subjecting state legislation to strict scrutiny." Id., at 32.

7. The curricular requirements of New York public school system reflect some of the ways a public school system promotes

the development of the basic values necessary for participation in a democratic society. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, . . ." N.Y. Educ. L. § 801(1). Flag and other patriotic exercises also are prescribed, Id., § 802. In addition, required courses includes classes in civics, United States and New York history, and principles of American government. Id. § 3204(3)(a)(1),(2). Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

8. The findings of scholars who have studied the phenomenon, although far from conclusive, reinforce the commonsense impression that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be termed political. See, e.g., R. Dawson & K. Prewitt, Political Socialization 158-167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 162-

163, 217-218 (1967). Cf. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L.J. 90, 99-104 (1975).

9. Appellees contend that restrictions on aliens' freedom to teach in public schools are contrary to principles of diversity of thought and academic freedom embodied in the First Amendment. See also Note, supra n. 8, at 106-109. We think the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark. New York's citizenship requirement limits classroom diversity no more than any other measure designed to inculcate particular social and civic values. Section 3001(3) does not seek to punish potential teachers for expressing any particular opinion or political views. Cf. Givhan v. Western Line Consol. School Dist., ___ U.S. ___, ___ (1979); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977); Pickering v. Board of Education, 391 U.S. 563 (1968). Nor are applicants discouraged from joining with others to advance particular political ends. Cf. Shelton v. Tucker, 364 U.S. 479 (1957).

The only liberty of appellees which is infringed is their freedom to decline United States citizenship, a privilege which cannot be made the subject of invidious discrimination but which in and of itself enjoys no constitutional protection. The Founding Fathers

Paul - I may be missing the point here. Nor do these cases seem very relevant

inhibit appellees from freely expressing their political views or from associating with whomever they please.

asserted liberty of appellees is withheld by the N.Y. statute

opportunity to teach in the state's schools

so long as they elect not become citizens of this country. This is hardly a liberty that ever was intended to be accorded constitutional protection.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

10

From: Mr. Justice Powell

Circulated: 16 FEB 1979

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-808

Gordon M. Ambach, Individually and as Commissioner of the New York State Department of Education, et al., Appellants, *v.* Susan M. W. Norwick et al.	On Appeal from the United States District Court for the Southern District of New York.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a State may, consistently with the Equal Protection Clause of the Fourteenth Amendment, refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

I

New York Education Law § 3001 (3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship.[1] The Commissioner of

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Education is authorized to create exemptions from this prohibition, and has done so with respect to aliens who are not yet eligible for citizenship.[2] Unless a teacher obtains certification, he may not work in a public elementary or secondary school in New York.[3]

Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to seek citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a

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the Commissioner of Education permitting such employment." N. Y. Educ. Law § 3001 (3).

The statute contains an exception for persons who are ineligible for United States citizenship solely because of an oversubscribed quota. *Id.*, § 3001–a. Because this statutory provision is in all respects narrower than the exception provided by regulation, see n. 2, *infra*, as a practical matter it has no effect.

The State does not certify the qualifications of teachers in the private schools, although it does require that such teachers be "competent." N. Y. Educ. Law § 3204 (2) (McKinney 1970). Accordingly, we are not presented with the question of, and express no view as to, the permissibility of a citizenship requirement pertaining to teachers in private schools.

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teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975.[4] Both applications were denied because of appellees' failure to meet the requirements of § 3001 (3). Norwick then filed this suit seeking to enjoin the enforcement of § 3001 (3), and Dachinger obtained leave to intervene as a plaintiff.

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281. Applying the "close judicial scrutiny" standard of *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971), the court held that § 3001 (3) discriminated against aliens in violation of the Equal Protection Clause. 417 F. Supp. 913 (SDNY 1976). The court believed that the statute was overbroad, because it excluded all resident aliens from all teaching jobs regardless of the subject sought to be taught, the alien's nationality, the nature of the alien's relationship to this country, and the alien's willingness to substitute some other sign of loyalty to this Nation's political values, such as an oath of allegiance. *Id.,* at 921. We noted probable jurisdiction over the State's appeal, 436 U. S. 902 (1978), and now reverse.

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Although our more recent decisions have departed substantially from the public interest doctrine of *Truax*'s day, they have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government. In *Sugarman,* we recognized that a State could, "in an appropriately defined class of positions, require citizenship as a qualification for office." We went on to observe:

> "Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly

> in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Id.*, at 647 (citation omitted).

The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. *Id.*, at 648. See also *Nyquist* v. *Mauclet, supra,* at 11; *Perkins* v. *Smith,* 370 F. Supp. 134 (Md. 1974), aff'd, 426 U. S. 913 (1976).

Applying this standard, we held last Term that New York could exclude aliens from the ranks of its police force. *Foley* v. *Connelie,* 435 U. S. 291 (1978). Because the police function fulfilled "a most fundamental obligation of government to its constituency" and by necessity cloaked policemen with substantial discretionary powers, we viewed the police force as being one of those appropriately defined classes of positions for which a citizenship requirement could be imposed. *Id.*, at 297. Accordingly, the State was required to justify its classification only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." *Id.*, at 296.

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, see *Sugarman* v. *Dougall, supra,* at 651–652 (REHNQUIST, J., dissenting), indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. See *Foley* v. *Connelie, supra,* at 295. The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for

the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.[5]

B

In determining whether teaching in public schools constitutes a governmental function that may be limited to citizens, we look to the role of public education in our democratic society and to the degree of responsibility and discretion teachers possess in fulfilling that role. See *id.*, at 297. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that go[es] to the heart of representative government." *Sugarman* v. *Dougall, supra,* at 647.

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." *Foley,* at 297. The importance of public schools in the preparation of individuals for participation in our democratic society, and in the preservation of the values on which this society rests, long has been recognized by our decisions:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very founda-

[5] That the significance of citizenship has constitutional dimensions also has been recognized by several of our decisions. In *Trop* v. *Dulles,* 356 U. S. 86 (1958), a plurality of the Court held that the expatriation of an American citizen constituted cruel and unusual punishment for the crime of desertion in time of war. In *Afroyim* v. *Rusk,* 387 U. S. 253 (1967), the Court held that the Constitution forbade Congress from depriving a person of his citizenship against his will for any reason.

> tion of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education,* 347 U. S. 483, 493 (1954).

See also *Keyes* v. *School Dist. No. 1,* 413 U. S. 189, 246 (1973) (POWELL, J., concurring); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972); *id.,* at 238–239 (WHITE, J., concurring); *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring); *Adler* v. *Board of Education,* 342 U. S. 485, 493 (1952); *McCollum* v. *Board of Education,* 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts,* 207 U. S. 79 (1907).[6] Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. See, *e. g.,* J. Dewey, Democracy and Education 26 (1929); N. Edwards & H. Richey, The School in the American Social Order 623–624 (1963). These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. See R. Dawson & K. Prewitt, Political Socialization 146–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in

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[6] As *San Antonio Ind. School Dist.* v. *Rodriguez, supra,* recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education does not constitute a fundamental right for purposes of the Equal Protection Clause. We observed in *Rodriguez* that "social importance is not the critical determinant for subjecting state legislation to strict scrutiny." *Id.,* at 32.

Children 114, 158–171, 217–220 (1967); V. O. Key, Public Opinion and American Democracy 323–343 (1961).[7]

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence his students' attitudes toward government, the political process, and a citizen's social responsi-

[7] The curricular requirements of New York public school system reflect some of the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, . . ." N. Y. Educ. L. § 801 (1) (McKinney 1970). Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. *Id.*, § 802. In addition, required courses include classes in civics, United States and New York history, and principles of American government. *Id.*, § 3204 (3) (a) (1), (2).

Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

bilities.[8] This influence is crucial to the continued good health of a democracy.[9]

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system.[10] Most teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedi-

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[8] Although the findings of scholars who have written on the subject are not conclusive, they generally reinforce the commonsense judgment, and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political. See *e. g.*, R. Dawson & K. Prewitt, Political Socialization 158–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 162–163, 217–218 (1967). Cf. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 99–104 (1975).

[9] Appellees contend that restriction of an alien's freedom to teach in public schools is contrary to principles of diversity of thought and academic freedom embodied in the First Amendment. See also Note, *supra*, n. 8, at 106–109. We think the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government. Section 3001 (3) does not inhibit appellees from expressing freely their political or social views or from associating with whomever they please. Cf. *Givhan* v. *Western Line Consol. School Dist.*, — U. S. —, — (1979); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274 (1977); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). Nor are ~~applicants~~ APPELLEES discouraged from joining with others to advance particular political ends. Cf. *Shelton* v. *Tucker*, 364 U. S. 479 (1957). The only asserted liberty of appellees withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection.

[10] At the primary school level, for which both appellees sought certification, teachers are responsible for all of the basic curriculum.

cated to political and social subjects.[11] More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as a role model, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bears a rational relationship to a legitimate state interest.

III

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether § 3001 (3) bears a rational relationship to this interest. The restriction is carefully tailored to its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[12] Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty.[13] They have rejected the open

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[11] In New York, for example, all certified teachers, including those in the secondary schools, are required to be available for up to five hours of teaching a week in subjects outside their specialty. 8 N. Y. Code of Rules & Regulations § 80.2 (c).

[12] See n. 2, *infra*.

[13] As our cases have emphasized, resident aliens pay taxes, serve in the armed forces, and have made significant contributions to our country in private and public endeavors. See *In re Griffiths*, 413 U. S. 717, 722 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634, 645 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971). No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state

invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001 (3) furthers that judgment.[14]

Reversed.

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and local governments, see *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), may determine eligibility for the key position in discharging that function on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens. We note in this connection that regulations promulgated pursuant to § 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 N. Y. Code of Rules & Regulations § 80.2 (i) (1). The State informs us, however, that the authority conferred by this regulation has not been exercised. Brief for Appellant 7 n. *.

[14] Appellees argue that the State cannot rationally exclude aliens from teaching positions and yet permit them to vote for and sit on certain local school boards. See App. 27, 29. We note, first, that the State's policy as to service on school boards applies only in New York City and only to aliens who also are parents of public school students. Further, the argument misconceives the distinction between the role and function of teachers and school board members. Although board members possess substantial responsibility for the administration of the schools, they teach no classes, and rarely if ever are known or identified by the students. It is true that local boards, within limits prescribed by the legislature and state board of education, normally select or approve textbooks and instruction materials. Without minimizing this responsibility, it is one necessarily discharged in large part by reliance on recommendations from professional educators, including teachers. And as noted above, the textbook—particularly in the social science classroom—usually is less influential than how the material therein is taught and interpreted by the teacher.

L.F.P.

Paul - apart from a couple of typos - p 10, I think my other suggested changes can await a second draft. Lets circulate 2/16

1st DRAFT
2/16/79

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No. 76-808

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The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, see *Sugarman* v. *Dougall*, *supra*, at 651–652 (REHNQUIST, J., dissenting), indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. See *Foley* v. *Connelie*, *supra*, at 295. The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for

the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.[5]

B

In determining whether teaching in public schools constitutes a governmental function that may be limited to citizens, we look to the role of public education in our democratic society and to the degree of responsibility and discretion teachers possess in fulfilling that role. See *id.*, at 297. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that go[es] to the heart of representative government." *Sugarman* v. *Dougall, supra,* at 647.

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." *Foley,* at 297. The importance of public schools in the preparation of individuals for participation in our democratic society, and in the preservation of the values on which this society rests, long has been recognized by our decisions:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very founda-

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See also *Keyes* v. *School Dist. No. 1,* 413 U. S. 189, 246 (1973) (POWELL, J., concurring); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972); *id.,* at 238–239 (WHITE, J., concurring); *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring); *Adler* v. *Board of Education,* 342 U. S. 485, 493 (1952); *McCollum* v. *Board of Education,* 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts,* 207 U. S. 79 (1907).[6] Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. See, *e. g.,* J. Dewey, Democracy and Education 26 (1929); N. Edwards & H. Richey, The School in the American Social Order 623–624 (1963). These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. See R. Dawson & K. Prewitt, Political Socialization 146–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in

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[6] As *San Antonio Ind. School Dist.* v. *Rodriguez, supra,* recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education does not constitute a fundamental right for purposes of the Equal Protection Clause. We observed in *Rodriguez* that "social importance is not the critical determinant for subjecting state legislation to strict scrutiny." *Id.,* at 32.

Children 114, 158–171, 217–220 (1967); V. O. Key, Public Opinion and American Democracy 323–343 (1961).[7]

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence his ~~students'~~ attitudes toward government, the political process, and a citizen's social responsi-

[7] The curricular requirements of New York public school system reflect some of the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, . . ." N. Y. Educ. L. § 801 (1) (McKinney 1970). Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. *Id.*, § 802. In addition, required courses include classes in civics, United States and New York history, and principles of American government. *Id.*, § 3204 (3) (a) (1), (2).

Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

bilities.[8] This influence is crucial to the continued good health of a democracy.[9]

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system.[10] Most teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedi-

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[8] Although the findings of scholars who have written on the subject are not conclusive, they generally reinforce the commonsense judgment, and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political. See *e. g.*, R. Dawson & K. Prewitt, Political Socialization 158–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 162–163, 217–218 (1967). Cf. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 99–104 (1975).

[9] Appellees contend that restriction of an alien's freedom to teach in public schools is contrary to principles of diversity of thought and academic freedom embodied in the First Amendment. See also Note, *supra*, n. 8, at 106–109. We think the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government. Section 3001 (3) does not inhibit appellees from expressing freely their political or social views or from associating with whomever they please. Cf. *Givhan* v. *Western Line Consol. School Dist.*, — U. S. —, — (1979); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274 (1977); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). Nor are applicants discouraged from joining with others to advance particular political ends. Cf. *Shelton* v. *Tucker*, 364 U. S. 479 (1957). The only asserted liberty of appellees withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection.

[10] At the primary school level, for which both appellees sought certification, teachers are responsible for all of the basic curriculum.

cated to political and social subjects.[11] More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as a role model, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bears a rational relationship to a legitimate state interest.

Cite Mustgia

III

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether § 3001 (3) bears a rational relationship to this interest. The restriction is carefully ~~tailored to~~ framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[12] Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty.[13] They have rejected the open

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[11] In New York, for example, all certified teachers, including those in the secondary schools, are required to be available for up to five hours of teaching a week in subjects outside their specialty. 8 N. Y. Code of Rules & Regulations § 80.2 (c).

[12] See n. 2, *infra*.

[13] As our cases have emphasized, resident aliens pay taxes, serve in the armed forces, and have made significant contributions to our country in private and public endeavors. See *In re Griffiths*, 413 U. S. 717, 722 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634, 645 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971). No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state

invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001 (3) furthers that judgment.[14]

Reversed.

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and local governments, see *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), may determine eligibility for the key position in discharging that function on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens. We note in this connection that regulations promulgated pursuant to § 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 N. Y. Code of Rules & Regulations § 80.2 (i) (1). The State informs us, however, that the authority conferred by this regulation has not been exercised. Brief for Appellant 7 n. *.

[14] Appellees argue that the State cannot rationally exclude aliens from teaching positions and yet permit them to vote for and sit on certain local school boards. See App. 27, 29. We note, first, that the State's policy as to service on school boards applies only in New York City and only to aliens who also are parents of public school students. Further, the argument misconceives the distinction between the role and function of teachers and school board members. Although board members possess substantial responsibility for the administration of the schools, they teach no classes, and rarely if ever are known or identified by the students. It is true that local boards, within limits prescribed by the legislature and state board of education, normally select or approve textbooks and instruction materials. Without minimizing this responsibility, it is one necessarily discharged in large part by reliance on recommendations from professional educators, including teachers. And as noted above, the textbook—particularly in the social science classroom—usually is less influential than how the material therein is taught and interpreted by the teacher.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 17, 1979

Re: 76-808 - Ambach v. Norwick

Dear Lewis,

Please join me.

Sincerely yours,

Mr. Justice Powell

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 20, 1979

Re: No. 76-808 Ambach v. Norwick

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 21, 1979

Re: No. 76-808 - Ambach v. Norwick

Dear Lewis:

In due course, I shall try my hand at a dissent in this case.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 22, 1979

Re: No. 76-808 - Ambach v. Norwick

Dear Lewis:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 22, 1979

Personal

Re: 76-808 - Ambach v. Norwich

Dear Lewis:

I am in agreement with your opinion except for FN 14. The anomalous situation in New York City where aliens can vote for and sit on school boards results from rulings of the City Boards of Elections and of Education. I do not understand the State to have sanctioned this interpretation of the pertinent statute, §2590-c. If the State were to expressly prohibit service on school boards by aliens, I would have no trouble applying your reasoning in this case to sustain them.

I wonder if you would be willing to change FN 14 so that it observes the New York City situation but does not imply that we would treat statutes governing aliens' service on school boards different from the way we have those covering teachers and police. I would even be willing to go so far as to signal that we would not.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 23, 1979

Re: 76-808 - Ambach v. Norwick

Dear Lewis:

In shall await Harry's dissent.

Respectfully,

John

Mr. Justice Powell

Copies to the Conference

2/26/79

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-808

Gordon M. Ambach, Individually and as Commissioner of the New York State Department of Education, et al., Appellants, *v.* Susan M. W. Norwick et al.

On Appeal from the United States District Court for the Southern District of New York.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

I

New York Education Law § 3001 (3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship.[1] The Commissioner of

[1] The statute provides:

"No person shall be employed or authorized to teach in the public schools of this state who is:

"3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by

Education is authorized to create exemptions from this prohibition, and has done so with respect to aliens who are not yet eligible for citizenship.[2] Unless a teacher obtains certification, he may not work in a public elementary or secondary school in New York.[3]

Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to seek citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a

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the Commissioner of Education permitting such employment." N. Y. Educ. Law § 3001 (3).

The statute contains an exception for persons who are ineligible for United States citizenship solely because of an oversubscribed quota. *Id.*, § 3001–a. Because this statutory provision is in all respects narrower than the exception provided by regulation, see n. 2, *infra*, as a practical matter it has no effect.

The State does not certify the qualifications of teachers in the private schools, although it does require that such teachers be "competent." N. Y. Educ. Law § 3204 (2) (McKinney 1970). Accordingly, we are not presented with the question of, and express no view as to, the permissibility of a citizenship requirement pertaining to teachers in private schools.

[2] The following regulation governs here:

"*Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons." 8 N. Y. Code of Rules and Regulations § 80.2 (i)

[3] Certification by the Commissioner of Education is not required of teachers at state institutions of higher education and the citizenship restriction accordingly does not apply to them. Brief for Appellants 13 n. *.

teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975.[4] Both applications were denied because of appellees' failure to meet the requirements of § 3001 (3). Norwick then filed this suit seeking to enjoin the enforcement of § 3001 (3), and Dachinger obtained leave to intervene as a plaintiff.

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281. Applying the "close judicial scrutiny" standard of *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971), the court held that § 3001 (3) discriminated against aliens in violation of the Equal Protection Clause. 417 F. Supp. 913 (SDNY 1976). The court believed that the statute was overbroad, because it excluded all resident aliens from all teaching jobs regardless of the subject sought to be taught, the alien's nationality, the nature of the alien's relationship to this country, and the alien's willingness to substitute some other sign of loyalty to this Nation's political values, such as an oath of allegiance. *Id.,* at 921. We noted probable jurisdiction over the State's appeal, 436 U. S. 902 (1978), and now reverse.

II

A

The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years. State regulation of the employment of aliens long has been subject to constitutional

[4] At the time of her application Norwick had not yet met the postgraduate educational requirements for a permanent certificate and accordingly applied only for a temporary certificate, which also is governed by § 3001 (3). She since has obtained the necessary graduate degree for full certification. Dachinger previously had obtained a temporary certificate, which had lapsed at the time of her 1975 application. The record does not indicate whether Dachinger previously had declared an intent to obtain citizenship or had obtained the temporary certificate because of some applicable exception to the citizenship requirement.

constraints. In *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886), the Court struck down an ordinance which was applied to prevent aliens from running laundries, and in *Truax* v. *Raich,* 239 U. S. 33 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's "right to work for a living in the common occupations of the community . . . ." *Id.,* at 41. At the same time, however, the Court also has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment. At the time *Truax* was decided, the governing doctrine permitted States to exclude aliens from various activities when the restriction pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, . . ." *Id.,* at 39. Hence, as part of a larger authority to forbid aliens from owning land, *Frick* v. *Webb,* 263 U. S. 326 (1923); *Webb* v. *O'Brien,* 263 U. S. 313 (1923); *Porterfield* v. *Webb,* 263 U. S. 225 (1923); *Terrace* v. *Thompson,* 263 U. S. 197 (1923); *Blythe* v. *Hinkley,* 180 U. S. 333 (1901); *Hauenstein* v. *Lynham,* 100 U. S. 483 (1880), harvesting wildlife, *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914); *McCready* v. *Virginia,* 94 U. S. 391 (1877), or maintaining an inherently dangerous enterprise, *Clarke* v. *Deckebach,* 274 U. S. 392 (1927), States permissibly could exclude aliens from working on public construction projects, *Crane* v. *New York,* 239 U. S. 195 (1915), and, it appears, from engaging in any form of public employment at all, see *Truax,* at 40.

Over time, the Court's decisions gradually have restricted the activities from which States are free to exclude aliens. The first sign that the Court would question the constitutionality of discrimination agianst aliens even in areas affected with a "public interest" appeared in *Oyama* v. *California,* 332 U. S. 633 (1948). The Court there held that statutory presumptions designed to discourage evasion of California's ban

on alien landholding discriminated against the citizen children of aliens. The same Term, the Court held that the "ownership" a State exercises over fish found in its territorial waters "is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." *Takahashi* v. *Fish & Game Comm'n,* 334 U. S. 410, 421 (1948). This process of withdrawal from the former doctrine culminated in *Graham* v. *Richardson,* 403 U. S. 365 (1971), which for the first time treated classifications based on alienage as "inherently suspect and subject to close judicial scrutiny." *Id.,* at 372. Applying *Graham,* this Court has held invalid statutes that prevented aliens from entering a State's classified civil service, *Sugarman* v. *Dougall,* 413 U. S. 634 (1973), practicing law, *In re Griffiths,* 413 U. S. 717 (1973), working as an engineer, *Examining Bd.* v. *Flores de Otero,* 426 U. S. 572 (1976), and receiving state educational benefits, *Nyquist* v. *Mauclet,* 432 U. S. 1 (1977).

Although our more recent decisions have departed substantially from the public interest doctrine of *Truax*'s day, they have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government. In *Sugarman,* we recognized that a State could, "in an appropriately defined class of positions, require citizenship as a qualification for office." We went on to observe:

> "Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly

> in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Id.*, at 647 (citation omitted).

The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. *Id.*, at 648. See also *Nyquist* v. *Mauclet, supra,* at 11; *Perkins* v. *Smith,* 370 F. Supp. 134 (Md. 1974), aff'd, 426 U. S. 913 (1976).

Applying the rational basis standard, we held last Term that New York could exclude aliens from the ranks of its police force. *Foley* v. *Connelie,* 435 U. S. 291 (1978). Because the police function fulfilled "a most fundamental obligation of government to its constituency" and by necessity cloaked policemen with substantial discretionary powers, we viewed the police force as being one of those appropriately defined classes of positions for which a citizenship requirement could be imposed. *Id.*, at 297. Accordingly, the State was required to justify its classification only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." *Id.*, at 296.

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the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.[5]

B

In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. See *id.*, at 297. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that go[es] to the heart of representative government." *Sugarman* v. *Dougall, supra,* at 647.

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See also *Keyes* v. *School Dist. No. 1,* 413 U. S. 189, 246 (1973) (POWELL, J., concurring); *San Antonio Ind. School Dist.* v. *Rodriguez,* 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder,* 406 U. S. 205, 213 (1972); *id.,* at 238–239 (WHITE, J., concurring); *Abington School Dist.* v. *Schempp,* 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring); *Adler* v. *Board of Education,* 342 U. S. 485, 493 (1952); *McCollum* v. *Board of Education,* 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts,* 207 U. S. 79 (1907).[6] Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. See, *e. g.,* J. Dewey, Democracy and Education 26 (1929); N. Edwards & H. Richey, The School in the American Social Order 623–624 (1963). These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. See R. Dawson & K. Prewitt, Political Socialization 146–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 114, 158–171, 217–220 (1967); V. O. Key, Public Opinion and American Democracy 323–343 (1961).[7]

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[6] As *San Antonio Ind. School Dist.* v. *Rodriguez, supra,* recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education is not guaranteed by the Constitution. *Id.,* at 30–35.

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Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.[8] This influence is crucial to the continued good health of a democracy.[9]

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understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, . . ." N. Y. Educ. L. § 801 (1) (McKinney 1970). Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. *Id.*, § 802. In addition, required courses include classes in civics, United States and New York history, and principles of American government. *Id.*, § 3204 (3) (a) (1), (2).

Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

[8] Although the findings of scholars who have written on the subject are

[*Footnote 9 is on p. 10*]

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system.[10] Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects.[11] More importantly, a State

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not conclusive, they generally reinforce the commonsense judgment, and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political. See *e. g.*, R. Dawson & K. Prewitt, Political Socialization 158–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 162–163, 217–218 (1967). Cf. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 99–104 (1975).

[9] Appellees contend that restriction of an alien's freedom to teach in public schools is contrary to principles of diversity of thought and academic freedom embodied in the First Amendment. See also Note, *supra*, n. 8, at 106–109. We think the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government. Section 3001 (3) does not inhibit appellees from expressing freely their political or social views or from associating with whomever they please. Cf. *Givhan* v. *Western Line Consol. School Dist*, — U. S. —, — (1979); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274 (1977); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). Nor are appellees discouraged from joining with others to advance particular political ends. Cf. *Shelton* v. *Tucker*, 364 U. S. 479 (1957). The only asserted liberty of appellees withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection.

[10] At the primary school level, for which both appellees sought certification, teachers are responsible for all of the basic curriculum.

[11] In New York, for example, all certified teachers, including those in the secondary schools, are required to be available for up to five hours of teaching a week in subjects outside their specialty. 8 N. Y. Code of Rules & Regulations § 80.2 (c).

properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bears a rational relationship to a legitimate state interest. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976).

III

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether § 3001 (3) bears a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[12] Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty.[13] They have rejected the open

[12] See n. 2, *infra*.

[13] As our cases have emphasized, resident aliens pay taxes, serve in the armed forces, and have made significant contributions to our country in private and public endeavors. See *In re Griffiths*, 413 U. S. 717, 722 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634, 645 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971). No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state and local governments, see *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), may determine eligibility for the key position in discharging that function on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship,

invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001 (3) furthers that judgment.[14]

Reversed.

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are better qualified than are those who have elected to remain aliens. We note in this connection that regulations promulgated pursuant to § 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 N. Y. Code of Rules & Regulations § 80.2 (i) (1). The State informs us, however, that the authority conferred by this regulation has not been exercised. Brief for Appellant 7 n. *.

[14] Appellees argue that the State cannot rationally exclude aliens from teaching positions and yet permit them to vote for and sit on certain local school boards. See App. 27, 29. We note, first, that the State's policy as to service on school boards applies only in New York City and only to aliens who also are parents of public school students. Further, the argument misconceives the distinction between the role and function of teachers and school board members. Although board members possess substantial responsibility for the administration of the schools, they teach no classes, and rarely if ever are known or identified by the students. It is true that in many jurisdictions local boards, within limits prescribed by the legislature and state board of education, are involved in the selection or approval of textbooks and instruction materials. Without minimizing this responsibility, it is one often discharged in large part by reliance on recommendations from professional educators, including teachers. And as noted above, it is not irrational for New York to conclude that textbooks—particularly in the social science classroom—may be less influential than how the material therein is taught and interpreted by the teacher.

February 28, 1979

76-808 Ambach v. Norwick

Dear Chief:

Thank you for your letter commenting on fn 14 in my opinion.

As Harry is writing a dissent, and probably will address the school board argument (relied upon by appellees), I will await his circulation before making any change in my note.

I see your point, and believe I can accommodate you.

Sincerely,

The Chief Justice

lfp/ss

Paul - Lets talk

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 7 MAR 1979

Recirculated: _____

No. 76-808 - Ambach v. Norwick

MR. JUSTICE BLACKMUN, dissenting.

Once again the Court is asked to rule upon the constitutionality of one of New York's many statutes that impose a requirement of citizenship upon a person before that person may earn his living in a specified occupation.[1/] These New York statutes, for the most part, have their origin in the frantic and overreactive days of the first World War when attitudes of parochialism and fear of the foreigner were the order of the day. This time we are concerned with the right to teach in the public schools of the State, at the elementary and secondary levels, and with the citizenship requirement that N. Y. Educ. Law § 3001.3 (Mc Kinney), quoted by the Court, at 1, n. 1, imposes.[2/]

As the Court acknowledges, ante, at 3, its decisions regarding the permissibility of statutory classifications concerning aliens "have not formed an unwavering line over the years."[3/] Thus, just last Term, in Foley v. Connelie, 435 U.S. 291 (1978), the Court upheld against equal protection challenge the New York statute limiting appointment of members of the state police force to citizens of the United States. The touchstone, the Court indicated, was that citizenship may be a relevant qualification for fulfilling "'important nonelective executive, legislative, and judicial positions' held by 'officers who participate directly in the formulation, execution, or review of broad public policy.'" Id., at 296, quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973). For such positions, a State need show only some rational relationship between the

interest sought to be protected and the limiting classification. Police, it then was felt, were clothed with authority to exercise an almost infinite variety of discretionary powers that could seriously affect members of the public. 435 U.S., at 297. They thus fell within the category of important officers who participate directly in the execution of "broad public policy." The Court was persuaded that citizenship bore a rational relationship to the special demands of police positions, and that a State therefore could constitutionally confine that public responsibility to citizens of the United States. Id., at 300. The propriety of making citizenship a qualification for a narrowly defined class of positions was also recognized, in passing, in Sugarman v. Dougall, 413 U.S., at 647, and in Nyquist v. Mauclet, 432 U.S. 1, 11 (1977).

On the other hand, the Court frequently has invalidated a state provision that denies a resident alien the right to engage in specified occupational activity: Yick Wo v. Hopkins, 118 U.S. 356 (1886) (ordinance applied so as to prevent Chinese subjects from engaging in the laundry business); Truax v. Raich, 239 U.S. 33 (1915) (statute requiring an employer's work force to be composed of not less than 80% "qualified electors or native born-citizens"); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (limitation of commercial fishing licenses to persons not "ineligible to citizenship"); Sugarman v. Dougall, supra, (New York statute relating to permanent positions in the "competitive class" of the state civil service); In re Griffiths, 413 U.S. 717 (1973) (the practice of law); Nelson v. Miranda, 413 U.S. 902 (1973), summarily affirming 351 F. Supp. 735 (Ariz. 1972) (social service worker and

teacher); Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (the practice of civil engineering). See also Nyquist v. Mauclet, supra, (New York statute barring certain resident aliens from state financial assistance for higher education).

Indeed, the Court has held more than once that state classifications based on alienage are "inherently suspect and subject to close judicial scrutiny." Graham v. Richardson, 403 U.S. 365, 372 (1971). See Examining Board v. Flores de Otero, 426 U.S., at 601-602; In re Griffiths, 413 U.S., at 721; Sugarman v. Dougall, 413 U.S., at 642; Nyquist v. Mauclet, 432 U.S., at 7. And "[a]lienage classifications by a State that do not withstand this stringent examination cannot stand." Ibid.

There is thus a line, most recently recognized in Foley v. Connelie, between those employments that a State in its wisdom constitutionally may restrict to United States citizens, on the one hand, and those employments, on the other, that the State may not deny to resident aliens. For me, the present case falls on the Sugarman - Griffiths - Flores de Otero - Mauclet side of that line, rather than on the narrowly isolated Foley side.

We are concerned here with elementary and secondary education in the public schools of New York State. We are not concerned with teaching at the college or graduate levels. It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may

not teach French or, indeed, an Englishwoman may not teach the grammar of the English language. The appellees, to be sure, are resident "aliens" in the technical sense, but there is not a word in the record that either appellee does not have roots in this country or is unqualified in any way, other than the imposed requirement of citizenship, to teach. Both appellee Norwick and appellee Dachinger have been in this country for over 12 years. Each is married to a United States citizen. Each currently meets all the requirements, other than citizenship, that New York has specified for certification as a public school teacher. Tr. of Oral Arg. 4.[4/] Each is willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York.[5/] Each lives in an American community, must obey its laws, and must pay all of the taxes citizens are obligated to pay. Appellees, however,

have hesitated to give up their respective British and Finnish citizenships, just as (lawyer) Fre Le Poole Griffiths, the subject of In re Griffiths, supra, hestiated to renounce her Netherlands citizenship, although married to a citizen of the United States and a resident of Connecticut.

But the Court, to the disadvantage of appellees, crosses the line from Griffiths to Foley by saying, ante, at 6, that the "distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." It then concludes that public school teaching "constitutes a governmental function," ante, at 7, and that public school teachers may be regarded as performing a task that goes "to the heart of representative government." Ibid. The Court speaks of the importance of public schools in the preparation of individuals for participation as

citizens, and in the preservation of the values on which our society rests. (One, of course, can agree with this observation. One may concede, also, that public schools are an "'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground," ante, at 8, and that the inculcation of fundamental values by our public schools is necessary to the maintenance of a democratic political system.) After then observing that teachers play a critical part in all this, the Court holds that New York's citizenship requirement is constitutional because it bears a rational relationship to the State's interest in furthering these educational goals.

I perceive a number of difficulties along the easy road the Court takes to this conclusion:

First, the New York statutory structure itself refutes the argument. Section 3001.3, the very statute at issue here, provides for exceptions with respect to alien teachers "employed pursuant to regulations adopted by the commissioner of education permitting such employment." Section 3001-a provides another exception for persons ineligible for United States citizenship because of over-subscribed quotas. Also, New York is unconcerned with any citizenship qualification for teachers in the private schools of the State, even though the record indicates that about 18% of the pupils at the elementary and secondary levels attend private schools. The education of those pupils seems not to be inculcated with something less than what is desirable for citizenship and what the Court calls an influence "crucial to the continued good health of a democracy." Ante, at 9. The State apparently, under § 3001.3, would not hesitate

to employ an alien teacher while he waits to attain citizenship, even though he may fail ever to attain it. And the stark fact that the State permits some aliens to sit on certain local school boards, N. Y. Educ. Law § 2590-c. 4 (McKinney) (Supp. 1978-1979), reveals how shallow and indistinct is New York's line of demarcation between citizenship and noncitizenship. The Court's attempted rationalization of this fact, ante, at 12, n. 14, hardly extinguishes the influence school board members, including these otherwise "disqualified" resident aliens, possess in school administration, in the selection of faculty, and in the approval of textbooks and instructional materials.

Second, the New York statute is all-inclusive in its disqualifying provisions: "No person shall be employed or authorized to teach in the public schools of the state who is . . . [n]ot a citizen."

It sweeps indiscriminately. It is "neither narrowly confined nor precise in its application," nor limited to the accomplishment of substantial state interests. Sugarman v. Dougall, 413 U.S., at 643. See Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 109-111 (1975).

Third, the New York classification is irrational. Is it better to employ a poor citizen-teacher than an excellent resident alien teacher? Is it to be preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America? The State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently.[6/] That is the way to accomplish the desired result. An artificial citizenship

bar is not a rational way. It is, instead, a stultifying provision. The route to "diverse and conflicting elements" and their being "brought together on a broad but common ground," which the Court so emphasizes, ante, at 8, is hardly to be achieved by disregarding some of the diverse elements that are available, competent, and contributory to the richness of our society and of the education it could provide.

Fourth, it is logically impossible to differentiate between this case concerning teachers and In re Griffiths concerning attorneys. If a resident alien may not constitutionally be barred from taking a state bar examination and thereby becoming qualified to practice law in the courts of a State, how is one to comprehend why a resident alien may constitutionally be barred from teaching in the elementary and secondary levels of a State's public schools? One may speak

proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values. Are the attributes of an attorney any the less? He represents us in our critical courtroom controversies even when citizenship and loyalty may be questioned. He stands as an officer of every court in which he practices. He is responsible for strict adherence to the announced and implied standards of professional conduct, to the requirements of evolving ethical codes, and to honesty and integrity in his professional and personal life. Despite the almost continuous criticism leveled at the legal profession, he, too, is an influence in legislation, in the community, and in the role model figure that the professional person enjoys. The Court specifically

recognized this in In re Griffiths:

> "Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country." 413 U.S., at 729.[7/]

If an attorney has a constitutional right to take a bar examination (and practice law,) despite his being a resident alien, it is impossible for me to see why a resident alien, otherwise completely competent and qualified, as these appellees concededly are, is constitutionally disqualified from teaching in the public schools of the great State of New York. The District Court expressed it well and forcefully when it observed that New York's exclusion "seems repugnant to the very heritage the State is seeking to inculcate." 417 F. Supp. 913, 922 (SDNY 1976).

I respectfully dissent.

1/ One of the appellees in Nyquist v. Mauclet, 432 U.S. 1 (1977), submitted a list of the New York statutes that required citizenship, or a declaration of intent to become a citizen, for no fewer than 37 occupations. Brief for Appellee Mauclet, O.T 1976, No. 76-208, pp. 19-22, nn. 8-44, inclusive. Some of those statutes have been legislatively repealed or modified, or judicially invalidated. Others are still in effect. Among the latter are those relating to the occupations of inspector, certified shorthand reporter, funeral director, masseur, physical therapist, and animal technician.

2/ This particular citizenship requirement had its origin in 1918 N. Y. Laws, ch. 158, effective Apr. 4, 1918.

3/ "To be sure, the course of decisions protecting the employment rights of resident aliens has not been an unswerving one." In re Griffiths, 413 U.S. 717, 720 (1973).

4/ Appellee Norwick is a summa cum laude graduate of a Massachusetts college and received an A average in full-time graduate work in the State University of New York at Albany. She has taught both in this country and in Great Britain.

Appellee Dachinger is a cum laude graduate, with a major in German, of Lehman College, a unit of the City University of New York, and possesses a Master's degree in Early Childhood Education from that institution. She has taught at a day care center in the Bronx.

Each appellee, thus, has received and excelled in educational training the State of New York itself offers.

5/ See In re Griffiths, 413 U.S., at 726, n. 18.

6/ In In re Griffiths the Court significantly has observed:

"Connecticut has wide freedom to gauge on a case-by case basis the fitness of an applicant to practice law. Connecticut can, and does, require appropriate training and familiarity with Connecticut law. Apart from such tests of competence, it requires a new lawyer to take both an 'attorney's oath' to perform his functions faithfully and honestly and a 'commissioner's oath' to 'support the constitution of the United States, and the constitution of the state of Connecticut.' Appellant has indicated her willingness and ability to subscribe to the substance of both oaths, and Connecticut may quite properly conduct a character investigation to insure in any given case 'that an applicant is not one who "swears to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath."' Bond v. Floyd, 385 U.S. 116, 132.' Law Students Research Council v. Wadmond, 401 U.S., at 164. Moreover, once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts. In addition to discipline for unprofessional conduct, the range of post-admission

(footnote 6 cont'd)

sanctions extends from judgments for contempt to criminal prosecutions and disbarment. In sum, the Committee simply has not established that it must exclude all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards." 413 U.S., at 725-727 (footnotes omitted).

7/ In order to keep attorneys on the nongovernmental side of the classification line, the Court continued:

> "Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy." 413 U.S., at 719.

See also Stockton v. Ford, 11 How. 232, 247 (1851); Hickman v. Taylor, 329 U.S. 495, 514-515 (1947) (concurring opinion); Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (concurring opinion); In re Sawyer, 360 U.S. 622, 668 (1959) (dissenting opinion); J. Story, Miscellaneous Writings, Value and Importance of Legal Studies, 503-549 (W. Story ed., 1972); H. Stone, The Public Influence of the Bar, 48 Harv. L. Rev. 1 (1934); W. Brennan, Jr., The Responsibilities of the Legal Profession (1967); A. de Tocqueville, Democracy in America 321-331 (Schocken ed. 1961); J. Rogers, The Lawyer in American Public Life, in Morrison Foundation Lectures 40, 61 (1940).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 7, 1979

Re: 76-808 - Ambach v. Norwick

Dear Harry:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 7, 1979

Re: 76-808 - Ambach v. Norwick

Dear Harry:

Please join me.

Respectfully,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 8, 1979

RE: No. 76-808 Ambach v. Norwick

Dear Harry:

Please join me in your fine dissent.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 13, 1979

Re: 76-808 - Ambach v. Norwich

Dear Lewis:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

P.S. Mr. Justice Powell only:

Talk to Paul

The third to last sentence in note 15 ("Further in applying. . .") seems mistaken to me, and I would feel much more comfortable if it and its citations, were deleted. In short, it seems to me that what causes the constitutional problem in the present case is not the underinclusiveness of the New York law, but its overinclusiveness.

P.S.

7,8,9,12,13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 13 MAR 1979

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-808

Gordon M. Ambach, Individually and as Commissioner of the New York State Department of Education, et al., Appellants, *v.* Susan M. W. Norwick et al.	On Appeal from the United States District Court for the Southern District of New York.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

I

New York Education Law § 3001 (3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship.[1] The Commissioner of

[1] The statute provides:

"No person shall be employed or authorized to teach in the public schools of this state who is:

"3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by

Education is authorized to create exemptions from this prohibition, and has done so with respect to aliens who are not yet eligible for citizenship.[2] Unless a teacher obtains certification, he may not work in a public elementary or secondary school in New York.[3]

Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to seek citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a

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the Commissioner of Education permitting such employment." N. Y. Educ. Law § 3001 (3).

The statute contains an exception for persons who are ineligible for United States citizenship solely because of an oversubscribed quota. *Id.*, § 3001–a. Because this statutory provision is in all respects narrower than the exception provided by regulation, see n. 2, *infra*, as a practical matter it has no effect.

The State does not certify the qualifications of teachers in the private schools, although it does require that such teachers be "competent." N. Y. Educ. Law § 3204 (2) (McKinney 1970). Accordingly, we are not presented with the question of, and express no view as to, the permissibility of a citizenship requirement pertaining to teachers in private schools.

[2] The following regulation governs here:

"*Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons." 8 N. Y. Code of Rules and Regulations § 80.2 (i)

[3] Certification by the Commissioner of Education is not required of teachers at state institutions of higher education and the citizenship restriction accordingly does not apply to them. Brief for Appellants 13 n. *.

teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975.[4] Both applications were denied because of appellees' failure to meet the requirements of § 3001 (3). Norwick then filed this suit seeking to enjoin the enforcement of § 3001 (3), and Dachinger obtained leave to intervene as a plaintiff.

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281. Applying the "close judicial scrutiny" standard of *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971), the court held that § 3001 (3) discriminated against aliens in violation of the Equal Protection Clause. 417 F. Supp. 913 (SDNY 1976). The court believed that the statute was overbroad, because it excluded all resident aliens from all teaching jobs regardless of the subject sought to be taught, the alien's nationality, the nature of the alien's relationship to this country, and the alien's willingness to substitute some other sign of loyalty to this Nation's political values, such as an oath of allegiance. *Id.,* at 921. We noted probable jurisdiction over the State's appeal, 436 U. S. 902 (1978), and now reverse.

II

A

The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years. State regulation of the employment of aliens long has been subject to constitutional

[4] At the time of her application Norwick had not yet met the postgraduate educational requirements for a permanent certificate and accordingly applied only for a temporary certificate, which also is governed by § 3001 (3). She since has obtained the necessary graduate degree for full certification. Dachinger previously had obtained a temporary certificate, which had lapsed at the time of her 1975 application. The record does not indicate whether Dachinger previously had declared an intent to obtain citizenship or had obtained the temporary certificate because of some applicable exception to the citizenship requirement.

constraints. In *Yick Wo* v. *Hopkins,* 118 U. S. 356 (1886), the Court struck down an ordinance which was applied to prevent aliens from running laundries, and in *Truax* v. *Raich,* 239 U. S. 33 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's "right to work for a living in the common occupations of the community . . . ." *Id.,* at 41. At the same time, however, the Court also has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment. At the time *Truax* was decided, the governing doctrine permitted States to exclude aliens from various activities when the restriction pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State, . . ." *Id.,* at 39. Hence, as part of a larger authority to forbid aliens from owning land, *Frick* v. *Webb,* 263 U. S. 326 (1923); *Webb* v. *O'Brien,* 263 U. S. 313 (1923); *Porterfield* v. *Webb,* 263 U. S. 225 (1923); *Terrace* v. *Thompson,* 263 U. S. 197 (1923); *Blythe* v. *Hinkley,* 180 U. S. 333 (1901); *Hauenstein* v. *Lynham,* 100 U. S. 483 (1880), harvesting wildlife, *Patsone* v. *Pennsylvania,* 232 U. S. 138 (1914); *McCready* v. *Virginia,* 94 U. S. 391 (1877), or maintaining an inherently dangerous enterprise, *Clarke* v. *Deckebach,* 274 U. S. 392 (1927), States permissibly could exclude aliens from working on public construction projects, *Crane* v. *New York,* 239 U. S. 195 (1915), and, it appears, from engaging in any form of public employment at all, see *Truax,* at 40.

Over time, the Court's decisions gradually have restricted the activities from which States are free to exclude aliens. The first sign that the Court would question the constitutionality of discrimination agianst aliens even in areas affected with a "public interest" appeared in *Oyama* v. *California,* 332 U. S. 633 (1948). The Court there held that statutory presumptions designed to discourage evasion of California's ban

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> "Such power inheres in the State by virtue of its obligation, already noted above, 'to preserve the basic conception of a political community.' . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly

> in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Id.*, at 647 (citation omitted).

The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. *Id.*, at 648. See also *Nyquist* v. *Mauclet*, *supra*, at 11; *Perkins* v. *Smith*, 370 F. Supp. 134 (Md. 1974), aff'd, 426 U. S. 913 (1976).

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The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. The Constitution itself refers to the distinction no less than 11 times, see *Sugarman* v. *Dougall*, *supra*, at 651–652 (REHNQUIST, J., dissenting), indicating that the status of citizenship was meant to have significance in the structure of our government. The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. See *Foley* v. *Connelie*, *supra*, at 295. The form of this association is important: an oath of allegiance or similar ceremony cannot substitute for

the unequivocal legal bond citizenship represents. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.[5]

B

In determining whether, for purposes of equal protection analysis, teaching in public schools constitutes a governmental function, we look to the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role. See *id.*, at 297. Each of these considerations supports the conclusion that public school teachers may be regarded as performing a task "that go[es] to the heart of representative government." *Sugarman* v. *Dougall*, *supra*, at 647.[6]

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[5] That the significance of citizenship has constitutional dimensions also has been recognized by several of our decisions. In *Trop* v. *Dulles*, 356 U. S. 86 (1958), a plurality of the Court held that the expatriation of an American citizen constituted cruel and unusual punishment for the crime of desertion in time of war. In *Afroyim* v. *Rusk*, 387 U. S. 253 (1967), the Court held that the Constitution forbade Congress from depriving a person of his citizenship against his will for any reason.

[6] The dissenting opinion of MR. JUSTICE BLACKMUN, in reaching an opposite conclusion, appears to apply a different analysis from that employed in our prior decisions. Rather than consider whether public school teachers perform a significant government function, the inquiry mandated by *Foley* v. *Connelie*, 435 U. S. 291 (1978), and *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), the dissent focuses instead on the general societal importance of primary and secondary school teachers, both public and private. Thus on the one hand it depreciates the importance of New York's citizenship requirement because it is not applied to private school teachers, and on the other hand it argues that the role teachers perform in our society is no more significant than that filled by attorneys. This misses the point of *Foley* and *Sugarman*. New York's citizenship requirement is limited to a governmental function because it applies only to teachers employed by and acting as agents of the State. The Connecticut statute held unconstitutional in *In re Griffiths*, 413 U. S. 717 (1973), by contrast, applied to all attorneys, most of whom do not work for the

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." *Foley*, at 297. The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954).

See also *Keyes* v. *School Dist. No. 1*, 413 U. S. 189, 246 (1973) (POWELL, J., concurring); *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972); *id.*, at 238–239 (WHITE, J., concurring); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring); *Adler* v. *Board of Education*, 342 U. S. 485, 493 (1952); *McCollum* v. *Board of*

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government. The exclusion of alien from access to the bar implicated the right to pursue a chosen occupation, not access to public employment. Cf. *Nyquist* v. *Mauclet*, 432 U. S. 1, 15–16, n. * (1977) (POWELL, J., dissenting). The distinction between a private occupation and a government function was noted expressly in *Griffiths*:

"Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers." 413 U. S., at 729.

Education, 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925); *Meyer* v. *Nebraska,* 262 U. S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts,* 207 U. S. 79 (1907).[7] Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. See, *e. g.,* J. Dewey, Democracy and Education 26 (1929); N. Edwards & H. Richey, The School in the American Social Order 623–624 (1963). These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. See R. Dawson & K. Prewitt, Political Socialization 146–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 114, 158–171, 217–220 (1967); V. O. Key, Public Opinion and American Democracy 323–343 (1961).[8]

Within the public school system, teachers play a critical

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[7] As *San Antonio Ind. School Dist.* v. *Rodriguez, supra,* recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education is not guaranteed by the Constitution. *Id.,* at 30–35.

[8] The curricular requirements of New York's public school system reflect some of the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, . . ." N. Y. Educ. L. § 801 (1) (McKinney 1970). Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. *Id.,* § 802. In addition, required courses include classes in civics, United States and New York history, and principles of American government. *Id.,* § 3204 (3) (a) (1), (2).

Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.[9] This influence is crucial to the continued good health of a democracy.[10]

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[9] Although the findings of scholars who have written on the subject are not conclusive, they generally reinforce the commonsense judgment, and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political. See *e. g.*, R. Dawson & K. Prewitt, Political Socialization 158–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 162–163, 217–218 (1967). Cf. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 99–104 (1975).

[10] Appellees contend that restriction of an alien's freedom to teach in public schools is contrary to principles of diversity of thought and academic freedom embodied in the First Amendment. See also Note, *supra*, n. 8, at 106–109. We think the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government.

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system.[11] Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects.[12] More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bears a rational relationship to a legitimate state interest. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976).

Section 3001 (3) does not inhibit appellees from expressing freely their political or social views or from associating with whomever they please. Cf. *Givhan* v. *Western Line Consol. School Dist.*, — U. S. —, — (1979); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274 (1977); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). Nor are appellees discouraged from joining with others to advance particular political ends. Cf. *Shelton* v. *Tucker*, 364 U. S. 479 (1957). The only asserted liberty of appellees withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection.

[11] At the primary school level, for which both appellees sought certification, teachers are responsible for all of the basic curriculum.

[12] In New York, for example, all certified teachers, including those in the secondary schools, are required to be available for up to five hours of teaching a week in subjects outside their specialty. 8 N. Y. Code of Rules & Regulations § 80.2 (c).

III

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether § 3001 (3) bears a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[13] Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty.[14] They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001 (3) furthers that judgment.[15]

Reversed.

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[13] See n. 2, *infra*.

[14] As our cases have emphasized, resident aliens pay taxes, serve in the armed forces, and have made significant contributions to our country in private and public endeavors. See *In re Griffiths*, 413 U. S. 717, 722 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634, 645 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971). No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state and local governments, see *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), may determine eligibility for the key position in discharging that function on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens. We note in this connection that regulations promulgated pursuant to § 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 N. Y. Code of Rules & Regulations § 80.2 (i) (1). The State informs us, however, that the authority conferred by this regulation has not been exercised. Brief for Appellant 7 n. *.

[15] Appellees argue that the State cannot rationally exclude aliens from

teaching positions and yet permit them to vote for and sit on certain local school boards. We note, first, that the State's legislature has not expressly endorsed this policy. Rather, appellants as an administrative matter have interpreted the statute governing New York City's unique community school boards, N. Y. Educ. Law § 2590–c (McKinney Supp. 1978–1979), to permit aliens who are the parents of public school students to participate in these boards. See App. 27, 29. Further, in applying the rational basis standard we have observed that "mere underinclusiveness" is not fatal to the validity of a law under the Equal Protection Clause. *Nixon* v. *Administrator of General Services*, 433 U. S. 425, 471 n. 33 (1977); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 215 (1975); cf. *Geduldig* v. *Aiello*, 417 U. S. 484, 495 (1974). We also may assume, without having to decide, that there is a rational basis for a distinction between teachers and board members based on their respective responsibilities. Although possessing substantial responsibility for the administration of the schools, board members teach no classes, and rarely if ever are known or identified by the students.

13

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: _____

Recirculated: 15 MAR 1979

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-808

Gordon M. Ambach, Individually and as Commissioner of the New York State Department of Education, et al., Appellants, *v.* Susan M. W. Norwick et al.

On Appeal from the United States District Court for the Southern District of New York.

[February —, 1979]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a State, consistently with the Equal Protection Clause of the Fourteenth Amendment, may refuse to employ as elementary and secondary school teachers aliens who are eligible for United States citizenship but who refuse to seek naturalization.

I

New York Education Law § 3001 (3) forbids certification as a public school teacher of any person who is not a citizen of the United States, unless that person has manifested an intention to apply for citizenship.[1] The Commissioner of

[1] The statute provides:

"No person shall be employed or authorized to teach in the public schools of this state who is:

"3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by

Education is authorized to create exemptions from this prohibition, and has done so with respect to aliens who are not yet eligible for citizenship.[2] Unless a teacher obtains certification, he may not work in a public elementary or secondary school in New York.[3]

Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in this country since 1965 and is married to a United States citizen. Appellee Dachinger is a Finnish subject who came to this country in 1966 and also is married to a United States citizen. Both Norwick and Dachinger currently meet all of the educational requirements New York has set for certification as a public school teacher, but they consistently have refused to seek citizenship in spite of their eligibility to do so. Norwick applied in 1973 for a

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the Commissioner of Education permitting such employment." N. Y. Educ. Law § 3001 (3).

The statute contains an exception for persons who are ineligible for United States citizenship solely because of an oversubscribed quota. *Id.*, § 3001-a. Because this statutory provision is in all respects narrower than the exception provided by regulation, see n. 2, *infra*, as a practical matter it has no effect.

The State does not certify the qualifications of teachers in the private schools, although it does require that such teachers be "competent." N. Y. Educ. Law § 3204 (2) (McKinney 1970). Accordingly, we are not presented with the question of, and express no view as to, the permissibility of a citizenship requirement pertaining to teachers in private schools.

[2] The following regulation governs here:

"*Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons." 8 N. Y. Code of Rules and Regulations § 80.2 (i)

[3] Certification by the Commissioner of Education is not required of teachers at state institutions of higher education and the citizenship restriction accordingly does not apply to them. Brief for Appellants 13 n. *.

teaching certificate covering nursery school through sixth grade, and Dachinger sought a certificate covering the same grades in 1975.[4] Both applications were denied because of appellees' failure to meet the requirements of § 3001 (3). Norwick then filed this suit seeking to enjoin the enforcement of § 3001 (3), and Dachinger obtained leave to intervene as a plaintiff.

A three-judge District Court was convened pursuant to 28 U. S. C. § 2281. Applying the "close judicial scrutiny" standard of *Graham* v. *Richardson,* 403 U. S. 365, 372 (1971), the court held that § 3001 (3) discriminated against aliens in violation of the Equal Protection Clause. 417 F. Supp. 913 (SDNY 1976). The court believed that the statute was overbroad, because it excluded all resident aliens from all teaching jobs regardless of the subject sought to be taught, the alien's nationality, the nature of the alien's relationship to this country, and the alien's willingness to substitute some other sign of loyalty to this Nation's political values, such as an oath of allegiance. *Id.,* at 921. We noted probable jurisdiction over the State's appeal, 436 U. S. 902 (1978), and now reverse.

II

A

The decisions of this Court regarding the permissibility of statutory classifications involving aliens have not formed an unwavering line over the years. State regulation of the employment of aliens long has been subject to constitutional

[4] At the time of her application Norwick had not yet met the postgraduate educational requirements for a permanent certificate and accordingly applied only for a temporary certificate, which also is governed by § 3001 (3). She since has obtained the necessary graduate degree for full certification. Dachinger previously had obtained a temporary certificate, which had lapsed at the time of her 1975 application. The record does not indicate whether Dachinger previously had declared an intent to obtain citizenship or had obtained the temporary certificate because of some applicable exception to the citizenship requirement.

constraints. In *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886), the Court struck down an ordinance which was applied to prevent aliens from running laundries, and in *Truax* v. *Raich*, 239 U. S. 33 (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's "right to work for a living in the common occupations of the community . . . ." *Id.*, at 41. At the same time, however, the Court also has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment. At the time *Truax* was decided, the governing doctrine permitted States to exclude aliens from various activities when the restriction pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State. . . ." *Id.*, at 39. Hence, as part of a larger authority to forbid aliens from owning land, *Frick* v. *Webb*, 263 U. S. 326 (1923); *Webb* v. *O'Brien*, 263 U. S. 313 (1923); *Porterfield* v. *Webb*, 263 U. S. 225 (1923); *Terrace* v. *Thompson*, 263 U. S. 197 (1923); *Blythe* v. *Hinkley*, 180 U. S. 333 (1901); *Hauenstein* v. *Lynham*, 100 U. S. 483 (1880), harvesting wildlife, *Patsone* v. *Pennsylvania*, 232 U. S. 138 (1914); *McCready* v. *Virginia*, 94 U. S. 391 (1877), or maintaining an inherently dangerous enterprise, *Clarke* v. *Deckebach*, 274 U. S. 392 (1927), States permissibly could exclude aliens from working on public construction projects, *Crane* v. *New York*, 239 U. S. 195 (1915), and, it appears, from engaging in any form of public employment at all, see *Truax*, at 40.

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[5] That the significance of citizenship has constitutional dimensions also has been recognized by several of our decisions. In *Trop* v. *Dulles*, 356 U. S. 86 (1958), a plurality of the Court held that the expatriation of an American citizen constituted cruel and unusual punishment for the crime of desertion in time of war. In *Afroyim* v. *Rusk*, 387 U. S. 253 (1967), the Court held that the Constitution forbade Congress from depriving a person of his citizenship against his will for any reason.

[6] The dissenting opinion of MR. JUSTICE BLACKMUN, in reaching an opposite conclusion, appears to apply a different analysis from that employed in our prior decisions. Rather than consider whether public school teachers perform a significant government function, the inquiry mandated by *Foley* v. *Connelie*, 435 U. S. 291 (1978), and *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), the dissent focuses instead on the general societal importance of primary and secondary school teachers both public and private. Thus on the one hand it depreciates the importance of New York's citizenship requirement because it is not applied to private school teachers, and on the other hand it argues that the role teachers perform in our society is no more significant than that filled by attorneys. This misses the point of *Foley* and *Sugarman*. New York's citizenship requirement is limited to a governmental function because it applies only to teachers employed by and acting as agents of the State. The Connecticut statute held unconstitutional in *In re Griffiths*, 413 U. S. 717 (1973), by contrast, applied to all attorneys, most of whom do not work for the

Public education, like the police function, "fulfills a most fundamental obligation of government to its constituency." *Foley*, at 297. The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions:

> "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954).

See also *Keyes* v. *School Dist. No. 1*, 413 U. S. 189, 246 (1973) (POWELL, J., concurring); *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U. S. 1, 29–30 (1973); *Wisconsin* v. *Yoder*, 406 U. S. 205, 213 (1972); *id.*, at 238–239 (WHITE, J., concurring); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 230 (1963) (BRENNAN, J., concurring); *Adler* v. *Board of Education*, 342 U. S. 485, 493 (1952); *McCollum* v. *Board of*

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government. The exclusion of aliens from access to the bar implicated the right to pursue a chosen occupation, not access to public employment. Cf. *Nyquist* v. *Mauclet*, 432 U. S. 1, 15–16, n. * (1977) (POWELL, J., dissenting). The distinction between a private occupation and a government function was noted expressly in *Griffiths*:

"Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country. Yet, they are not officials of government by virtue of being lawyers." 413 U. S., at 729.

Education, 333 U. S. 203, 212 (1948) (Frankfurter, J., concurring); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Interstate Consolidated Street R. Co.* v. *Massachusetts*, 207 U. S. 79 (1907).[7] Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. See, *e. g.*, J. Dewey, Democracy and Education 26 (1929); N. Edwards & H. Richey, The School in the American Social Order 623–624 (1963). These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. See R. Dawson & K. Prewitt, Political Socialization 146–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 114, 158–171, 217–220 (1967); V. O. Key, Public Opinion and American Democracy 323–343 (1961).[8]

Within the public school system, teachers play a critical

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[7] As *San Antonio Ind. School Dist.* v. *Rodriguez*, *supra*, recognized, there is no inconsistency between our recognition of the vital significance of public education and our holding that access to education is not guaranteed by the Constitution. *Id.*, at 30–35.

[8] The curricular requirements of New York's public school system reflect some of the ways a public school system promotes the development of the understanding that is prerequisite to intelligent participation in the democratic process. The schools are required to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, . . ." N. Y. Educ. L. § 801 (1) (McKinney 1970). Flag and other patriotic exercises also are prescribed, as loyalty is a characteristic of citizenship essential to the preservation of a country. *Id.*, § 802. In addition, required courses include classes in civics, United States and New York history, and principles of American government. *Id.*, § 3204 (3)(a)(1), (2).

Although private schools also are bound by most of these requirements, the State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses.

part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.[9] This influence is crucial to the continued good health of a democracy.[10]

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[9] Although the findings of scholars who have written on the subject are not conclusive, they generally reinforce the commonsense judgment, and the experience of most of us, that a teacher exerts considerable influence over the development of fundamental social attitudes in students, including those attitudes which in the broadest sense of the term may be viewed as political. See *e. g.*, R. Dawson & K. Prewitt, Political Socialization 158–167 (1969); R. Hess & J. Torney, The Development of Political Attitudes in Children 162–163, 217–218 (1967). Cf. Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L. J. 90, 99–104 (1975).

[10] Appellees contend that restriction of an alien's freedom to teach in public schools is contrary to principles of diversity of thought and academic freedom embodied in the First Amendment. See also Note, *supra*, n. 8, at 106–109. We think the attempt to draw an analogy between choice of citizenship and political expression or freedom of association is wide of the mark, as the argument would bar any effort by the State to promote particular values and attitudes toward government.

Furthermore, it is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system.[11] Teachers, regardless of their specialty, may be called upon to teach other subjects, including those expressly dedicated to political and social subjects.[12] More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. Certainly a State also may take account of a teacher's function as an example for students, which exists independently of particular classroom subjects. In light of the foregoing considerations, we think it clear that public school teachers come well within the "governmental function" principle recognized in *Sugarman* and *Foley*. Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bears a rational relationship to a legitimate state interest. See *Massachusetts Board of Retirement* v. *Murgia*, 427 U. S. 307, 314 (1976).

Section 3001 (3) does not inhibit appellees from expressing freely their political or social views or from associating with whomever they please. Cf. *Givhan* v. *Western Line Consol. School Dist*, — U. S. —, — (1979); *Mt. Healthy City School Dist.* v. *Doyle*, 429 U. S. 274 (1977); *Pickering* v. *Board of Education*, 391 U. S. 563 (1968). Nor are appellees discouraged from joining with others to advance particular political ends. Cf. *Shelton* v. *Tucker*, 364 U. S. 479 (1957). The only asserted liberty of appellees withheld by the New York statute is the opportunity to teach in the State's schools so long as they elect not to become citizens of this country. This is not a liberty that is accorded constitutional protection.

[11] At the primary school level, for which both appellees sought certification, teachers are responsible for all of the basic curriculum.

[12] In New York, for example, all certified teachers, including those in the secondary schools, are required to be available for up to five hours of teaching a week in subjects outside their specialty. 8 N. Y. Code of Rules & Regulations § 80.2 (c).

III

As the legitimacy of the State's interest in furthering the educational goals outlined above is undoubted, it remains only to consider whether § 3001 (3) bears a rational relationship to this interest. The restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship.[13] Appellees, and aliens similarly situated, in effect have chosen to classify themselves. They prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty.[14] They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country. The people of New York, acting through their elected representatives, have made a judgment that citizenship should be a qualification for teaching the young of the State in the public schools, and § 3001 (3) furthers that judgment.[15]

Reversed.

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[13] See n. 2, *infra*.

[14] As our cases have emphasized, resident aliens pay taxes, serve in the armed forces, and have made significant contributions to our country in private and public endeavors. See *In re Griffiths*, 413 U. S. 717, 722 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634, 645 (1973); *Graham* v. *Richardson*, 403 U. S. 365, 376 (1971). No doubt many of them, and we do not exclude appellees, would make excellent public school teachers. But the legislature, having in mind the importance of education to state and local governments, see *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954), may determine eligibility for the key position in discharging that function on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens. We note in this connection that regulations promulgated pursuant to § 3001 (3) do provide for situations where a particular alien's special qualifications as a teacher outweigh the policy primarily served by the statute. See 8 N. Y. Code of Rules & Regulations § 80.2 (i)(1). The State informs us, however, that the authority conferred by this regulation has not been exercised. Brief for Appellant 7 n. *.

[15] Appellees argue that the State cannot rationally exclude aliens from

teaching positions and yet permit them to vote for and sit on certain local school boards. We note, first, that the State's legislature has not expressly endorsed this policy. Rather, appellants as an administrative matter have interpreted the statute governing New York City's unique community school boards, N. Y. Educ. Law § 2590–c (McKinney Supp. 1978–1979), to permit aliens who are the parents of public school students to participate in these boards. See App. 27, 29. We also may assume, without having to decide, that there is a rational basis for a distinction between teachers and board members based on their respective responsibilities. Although possessing substantial responsibility for the administration of the schools, board members teach no classes, and rarely if ever are known or identified by the students.

omission

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1979

Re: 76-808 - Ambach v. Norwick

Dear Lewis:

I join.

Regards,

Mr. Justice Powell

Copies to the Conference

2 copies to Mr Lund 3/14/79

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
						1/22/79		
Join L F P 3/22/79	Join HAB 3/8/79	Join L F P 3/13/79	Join L F P 2/17/79	await dissent 2/22/79	will dissent 2/21/79	1st draft 2/16/79	Join L F P 2/20/79	await dissent 2/23/79
				Join HAB 3/7/79	Typed draft 3/7/79	2nd draft 2/26/79 3rd draft		Join HAB 3/7/79
					2d draft 3/9/79	3/13/79 4th draft 3/15/79		
				76-808 Ambach v. Norwick				

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

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HENRY PUTZEL, jr.
Reporter of Decisions.

SUPREME COURT OF THE UNITED STATE

Syllabus

AMBACH, COMMISSIONER, NEW YORK STATE DEPARTMENT OF EDUCATION, ET AL. *v.* NORWICK ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF NEW YORK

No. 76-808. Argued January 10, 1979—Decided April —, 1979

A New York statute forbidding permanent certification as a public school teacher of any person who is not a United States citizen unless that person has manifested an intention to apply for citizenship, *held* not to violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 3–12.

(a) As a general principle some state functions are so bound up with the operation of the State as a governmental entity as to permit exclusion from those functions of all persons who have not become part of the process of self-government. Accordingly, a State is required to justify its exclusion of aliens from such governmental positions only "by a showing of some rational relationship between the interest sought to be protected and the limiting classification." *Foley* v. *Connelie*, 435 U. S. 291, 296. Pp. 5–6.

(b) This rule for governmental functions, which is an exception to the stricter general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State, and the references to such distinction in the Constitution itself indicate that the status of citizenship was meant to have significance in the structure of our government. It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens. Pp. 6–7.

(c) Taking into consideration the role of public education and the degree of responsibility and discretion teachers possess in fulfilling that role, it is clear that public school teachers come well within the "govern-

Syllabus

mental function" principle recognized in *Sugarman* v. *Dougall*, 413 U. S. 634, and *Foley* v. *Connelie*, *supra*, and, accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public school bear a rational relationship to a legitimate state interest. Pp. 7–11.

(d) Here, the statute in question does bear a rational relationship to the State's interest in furthering its educational goals, especially with respect to regarding all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught. P. 12.

417 F. Supp. 913, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined.

T

lfp/ss 4/16/79 76-808 Ambach v. Norwick

This case presents the question whether New York may impose a citizenship requirement upon its public school teachers. A three-judge district court in the Southern District of New York held that this requirement, excluding resident aliens, violated the Equal Protection Clause of the Fourteenth Amendment.

Although the exclusion of aliens from fields of private employment generally serves no legitimate state interest, the Constitution and our decisions make clear that the States properly may limit participation of aliens at least in certain governmental functions.

Only last Term we upheld New York's citizenship requirement with respect to police officers, because of the important role of the police function in the exercise of governmental authority. For essentially the same reasons, we think teaching in the public schools also constitutes a governmental function that may be confined to citizens. Teachers, both through the instruction they give and the example they set, shape the basic attitudes of children toward our democratic form of government, and the political process of this country and the obligations of American citizenship.

A state rationally may decide

Ambach

A State rationally may decide that only those persons who have made an unequivocal, legal commitment to our form of government through the tie of citizenship should be entrusted with this important public responsibility. Accordingly, we reverse the decision of the court below.

We also note that the resident aliens who brought this suit could have qualified to teach under the New York law by applying for United States citizenship. They were eligible and free to do this, but preferred to retain their citizenship allegiance to other countries.

Mr. Justice Blackmun has filed a dissenting opinion, in which Mr. Justice Brennan, Mr. Justice Marshall and Mr. Justice Stevens have joined.

Richmond Times Dispatch, May 3, 1979

76-808

Aliens as Teachers

By one of its paper-thin divisions, the U. S. Supreme Court ruled 5-to-4 recently that a state may refuse to employ as a public school teacher an alien who is eligible for United States citizenship but who refuses to apply for it.

The majority opinion was written by Justice Lewis F. Powell Jr., former chairman of both the Richmond School Board and the Virginia State Board of Education. The decision is of interest in Virginia because Board of Education regulations state that an applicant for certification as a school teacher must be a citizen.

The four dissenters — Justices Harry A. Blackmun, William J. Brennan Jr., Thurgood Marshall and John Paul Stevens — described as "irrational" the New York law at issue in the case.

"Is it better to employ a poor citizen-teacher than an excellent resident alien teacher?" they asked. "Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America?"

But Justice Powell emphasized — rightly, we think — that a teacher's influence extends beyond the academic subject matter.

"Within the public school system," he wrote, "teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society.... A teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy."

The New York law, as Justice Powell pointed out, applies only to aliens who manifest no intention of becoming U. S. citizens. Such people, he said, "prefer to retain citizenship in a foreign country with the obligations it entails of primary duty and loyalty."

The majority opinion is a reasonable one. It does not, of course, say to the states that they must employ only citizens as public school teachers. It says, rather, that if a state itself wants to impose such a restriction, there is nothing in the U.S. Constitution to forbid it.

In Virginia, the Board of Education's citizenship regulation apparently has relatively little practical force as it is now being administered. From what we have been able to learn, education officials have been under the impression that the requirement might not withstand a court test, and for that and other reasons the State Department of Education has been almost automatically granting one-year certificates, on application of local school superintendents, to aliens otherwise qualified. A state statute permits such waivers from board regulations.

We do not necessarily suggest any basic change in the department's practices in regard to this matter, but department officials might want to take another look at those practices in light of the recent court ruling. Many waivers are unquestionably justified, such as those given in connection with teacher-exchange programs. But rather than automatically granting a superintendent's request in every case, the department might want to consider whether it is always wise to certify an alien who has lived in this country for years but whose interest in the United States is not sufficient to impel him or her to give up foreign citizenship and become a naturalized American.