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Good memo.

Note Bott[illegible]

11th Amend. issue will [illegible]

3 J/Ct invalidated N.Y. statute making education financing assistance (scholarships, loans) available only to citizens or aliens who intend to become citizens.

But D.C. denied damages vs state on 11th Amend.

D.C. erred (probably) in voiding statute as it allows aliens to qualify for the aid simply by applying for citizenship.

The 11th Amend issue (75-1809) may possibly be affected by M+ H[illegible]

PRELIMINARY MEMORANDUM

October 15, 1976 Conference
List 1, Sheet 1

No. 75-1809 — 11th Amend issue

RABINOVITCH, Student

v.

NYQUIST, Comm'r of Educ.

Appeal from 3-JUDGE DC (Van Graafeiland C.J., Curtin, E.D. NY; Judd, W.D. NY)

Federal/Civil — Timely

No. 76-208 Note — This is the Const. E/P issue - Note

NYQUIST

v.

MAUCLET & RABINOVITCH

Same — Same — Timely*

I would note both cases. If, as seems likely, you reverse the DC's holding of constitutional violation (76-208), there will be no need to reach the 11th amendment issue (75-1809).

1. SUMMARY: Is a state statute unconstitutional because it makes

* Mauclet and Rabinovitch commenced separate actions in the W.D. NY and E.D. NY, respectively. The cases were heard together by a single three judge court, and a single decision was rendered. However, separate judgments were

citizenship or intent to acquire citizenship a condition for receiving educational financial assistance? (No. 76-208). If so, did the DC err by holding that a money judgment against the New York State Higher Education Services Corporation (NYSHESC) was barred by the Eleventh Amendment? (No. 75-1809).

2. FACTS AND HOLDING BELOW: Mauclet and Rabinovitch are resident aliens. They were denied educational financial assistance solely because they failed to meet the requirements of New York Education Law §661(3) (McKinney's Supp. 1975), which provides that an applicant must either be a U.S. citizen, or be an applicant for citizenship, or if ineligible for citizenship must submit a statement of intent to seek citizenship as soon as qualified. They commenced separate actions in the Eastern and Western Districts of New York. Mauclet (W. D. NY) sought only injunctive and declaratory relief against enforcement of the statute. Rabinovitch (E. D. NY) additionally sought damages for awards denied in prior years on account of the statute.

The cases were consolidated before a single 3-J DC. Citing Graham v. Richardson, 403 U.S. 365 (1971), the DC held that the classification here in question was based on alienage and hence was "inherently suspect and subject

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* Continued
rendered: as to Mauclet on Feb. 11, 1976 in the W. D. NY, and as to Rabinovitch in the E. D. NY on March 29, 1976. An appeal was filed in the W. D. NY on March 12, 1976, and in the E. D. NY on May 26, 1976. No action was taken as to either case until July 19, 1976 when appellants sought an extension of time to docket their appeal to this Court. Appellee Mauclet argues that by then the time for appeal in his action had run, and hence the appeal is untimely. The Jurisdictional Statement makes no reference to this problem, simply referring to the March 29th judgment as the judgment below. This judgment (reproduced Juris Stement at 19a) in fact bears the caption of both the E. D. NY and W. D. NY, and bears the signature of all three judges. My guess would be that this judgment superseded the earlier one filed in the W. D. NY. In any case, the question of time is not jurisdictional, and at least as to Rabinovitch there is no question but that the appeal is timely.

to close judicial scrutiny." It then concluded that the defendants had failed to meet their heavy burden of justifying the statute, and that the statute was therefore unconstitutional. The DC did not pass on plaintiffs' claim that §661(3) violated the supremacy clause.

The DC enjoined enforcement of the statute ordering the state to process plaintiffs' pending financial aid applications. This fully satisfied Mauclet's claim for relief. The DC, however, denied Rabinovitch's claim for monetary relief, holding such relief barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974).

No. 75-1809 is Rabinovitch's appeal from that portion of the DC judgment denying him money damages. No. 76-208 is the state's[1/] appeal from the order enjoining the statute.

3. CONTENTIONS: No. 75-1809 -- (a) NYESHESC is an entity separate from the state of NY, and hence the DC erred in denying appt money damages; (b) 42 USC §1981 and/or the Fourteenth Amendment expressly authorize suits for money damages against the states.

No. 76-208 -- The DC erred in employing a strict scrutiny standard in assessing the constitutionality of §661(3).

4. DISCUSSION: No. 76-208 -- The thrust of the state's argument is that the classification here in question does not separate aliens on the one hand and citizens on the other, but rather it separates certain types of aliens -- those not

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1/ The term "state" is used loosely to describe Ewald Nyquist, Commissioner of Education, the University of New York, NYSHESC, and a host of other named appellants. Whether these parties are in fact the state is, of course, a question challenged by Ravinovitch in No. 75-1809.

intending to establish citizenship -- from another class of people consisting of citizens, as well as of aliens who intend to become citizens. They argue that "[o]nce aliens are combined with citizens, as they are under NYEL §661(3), they are not a 'discrete and insular minority' . . . and no basis exists for heightened judicial solicitude." Juris Statement at 8. Appts cite in support Matthews v. Diaz, No. 73-1046, 44 U.S.L.W. 4748 (U.S. June 1, 1976) where the Court last term upheld that portion of the Medicare Act restricting certain benefits to citizens and to permanent resident aliens who have lived in the US for five or more years. The Court held, "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence. . . . [C]itizens and those who are most like citizens qualify. Those who are less like citizens do not." Id. at 4753.

Whatever support appts derive from the above is, however, undercut by that portion of the Diaz opinion which distinguishes Graham v. Richardson by underscoring the special powers of the federal gov't with respect to aliens.[2/] In fact, Graham v. Richardson's holding that state statutes classifying persons on the basis of alienage are subject to strict judicial scrutiny was reaffirmed last term in Examining Board of Engineers v. de Otero, No. 74-1267, 44 U.S.L.W. 4890, 4899 (U.S. June 17, 1976).

2/ "Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are non-citizens as far as the State's interest in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent jusitification, whereas a comparable classification by the Federal Government is a routine and normally legitimate part of its business."

44 U.S.L.W. 4754 (footnote omitted).

This case can, however, be distinguished from the Graham line of cases in two important respects. First, the state here does not impose upon an individual disabilities on the basis of an externally imposed classification over which he has no control; everyone can choose which side of the statutory line he falls on, and literally everyone can qualify for financial aid by completing either a citizenship application or a statement of intention to become a citizen. Compare, Examining Board of Engineers v. de Otero, supra (Puerto Rico statute permitted only US citizens to practice privately as civil engineers); In re Griffith, 412 U.S. 717 (1973) (membership in state bar limited to citizens); Sugarma v. Dougall, 413 U.S. 634 (1973) (participation in state's competitive civil service limited to citizens); Graham v. Richardson, supra (welfare benefits denied to aliens who have not resided in the state a minimum number of years); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1958) (state statute denied fishing licenses to persons "ineligible to citizenship"). The statutes struck down in these cases saddled certain individuals with disadvantages on the basis of characteristics which they could not change. Such discrimination, like discrimination on the basis of race, involves the manifest unfairness of punishing someone for something over which he has no control. The matter, it seems, is substantially different where, as here, each applicant for financial aid could, if he chose, meet the criteria of the statute.

The second factor distinguishing this case from those cited above is the interest of the state. This is to assure that those who obtain a free education at state expense remain in the state, or at least in the United States, to practice their new skills. This interest is rationally more defensible than e.g. the discrimination among welfare recipients considered in Graham v. Richardson,

see note 2/ supra.[3] While the line drawn is not a perfect one,[4] it does seem to ~~rationally~~ further the state's objective. It stands to reason that individuals who are citizens, or who are committed to the idea of becoming citizens, are more likely to remain in this country than individuals whose ties to their country of origin are so strong that they choose not to sever them.[5] Moreover, the benefit here denied, educational financial assistance, does not fall within that fundamental category involving the ability to earn a living which has been the object of special solicitude by the Court. See de Otero, supra, 44 U.S.L.W. at 4900.

3/ That the Court will closely examine the type of state interest involved in testing the validity of a classification based on alienage is made clear, e.g. in Matthews v. Diaz, No. 73-1046, 44 U.S.L.W. 4748, 4754 n. 24 (U.S. June 1, 1976):

> We have left open the question whether a State may prohibit aliens from holding elective or important non-elective positions or whether a State may, in some circumstances, consider the alien status of an applicant or employee in making an individualized employment decision. See Sugarman v. Dougall, 413 U.S. 634, 646-649. In re Griffith, 413 U.S. 717, 728-729 and n. 21.

4/ Mauclet, for example, has resided in NY since 1969, is married to an American citizen and is the father of an American citizen. Rabinovitch has resided in NY since 1964.

5/ It appears that both appellees' reason for refusing to apply for American citizenship is reluctance to give up their current citizenship -- French for Mauclet and Canadian for Rabinovitch.

The interplay of these factors -- the element of individual choice as a basis of the classification, the fact that a substantial and legitimate state interest is involved, and the fact that the deprivation is not a fundamental one -- presents a question sufficiently distinguishable from prior decisions so as to merit plenary consideration by the Court. I would therefore note probable jurisdiction as to No. 76-208.[6/]

No. 75-1809: In Fitzpatrick v. Bitzer, No. 75-251, 44 U.S.L.W. 5120 (U.S. June 29, 1976), the Court held that congress may abrogate the state's immunity under the Eleventh Amendment through specific legislation. Appellant Rabinovitch would extend that holding to this case by arguing that 42 U.S.C. §1981 and/or the Fourteenth Amendment constitute implicit congressional authorization for a damage remedy and that "[t]herefore . . . the federal courts should be free to award the traditional remedy of damages against state in equal protection cases where, as here, such relief is essential to address the injury suffered and to deter future violations of the Amendment."

Appellees claimed in the DC that §661(3) also violated the supremacy use by interfering with the congressional scheme for immigration and uralization. Because the DC resolved the equal protection issue in favor ppellees it did not rule on this contention. Appellees renew this argu- nt in their motion to affirm quoting DeCanas v. Bica, No. 74-882, 44 . L.W. 4235 (U.S. Feb. 25, 1976) for the proposition that "state ulation not congressionally sanctioned that discriminates against aliens ully admitted to the country is impermissible if it imposes additional lens not contemplated by Congress."

This would extend Fitzpatrick far indeed, blowing a substantial hole into the Eleventh Amendment.

Petr's other contention is that a money judgment against NYSHESC, an independent, state created educational corporation funded by the state, is not a judgment against the state for purposes of the Eleventh Amendment. The court will probably shed some light on this subject in Mt. Healthy School Bd. v. Doyle, No. 75-1278. I would, therefore, hold this appeal for Mt. Healthy. If jurisdiction is noted in No. 76-208, this case should also be held for that.

There are motions to affirm.

10/4/76
SJG

Kozinski

op in juris
statements

Note

PRELIMINARY MEMORANDUM

October 15, 1976 Conference
List 1, Sheet 1

No. 76-208

NYQUIST

v.

MAUCLET & RABINOVITCH

Appeal from 3-JUDGE DC (Van Graafeiland C.J., Curtin, E.D. NY; Judd, W.D. NY)

Federal/Civil

Timely

See Preliminary Memorandum October 15, 1976 Conference, List 1, Sheet 1, No. 75-1809, RABINOVITCH, Student v. NYQUIST, Comm'r of Educ.

OCT 1 5 1976

Court USDC, W. D., N.Y.

Argued ....., 19...

Submitted ....., 19...

Voted on ....., 19...

Assigned ....., 19...

Announced ....., 19...

No. 76-20
(Vide 75-1809

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.
Appellants

vs.

JEAN-MARIE MAUCLET

8/11/76 - Appeal

This is the E/P case in which 3 J/Ct invalidated N.Y. statute excluding aliens from scholarships unless they declare intent to become citizens.

Related for John (If case is not noted, I'll note)

	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.				✓					Relist				
Marshall, J.							✓						
White, J.							✓						
Stewart, J.							✓						
Brennan, J.				✓									
Burger, Ch. J.							✓						

OCT 15 1976

Court USDC, E.D. New York ....
Argued ...., 19...
Submitted ...., 19...

Voted on ...., 19...
Assigned ...., 19...
Announced ...., 19...

No. 75-1809

ALAN RABINOVITCH, Appellant

vs.

EWALD B. NYQUIST, ETC., ET AL.

6/14/76 - Appeal

There are four to note in 76-208 - I think two cases should be treated alike.

Relisted for John & for LFP

I still prefer to note both cases. 76-208 is a "must" for me. This case (75-1809) involves the award issue (damages) & was not a hold)

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION			NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
....													
Stevens, J.							no juris						
Rehnquist, J.							✓ or hold						
Powell, J.				✓ or hold									
Blackmun, J.							✓ or hold						
Marshall, J.							✓		"		"		
White, J.							✓		"		"		
Stewart, J.							✓						
Brennan, J.				✓									
Burger, Ch. J.							✓		"	"			

OCT 29 1976

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 75-1809
(Vide 76-208)

RABINOVITCH

vs.

NYQUIST

RELIST for Justice Stevens - Also motion to dismiss or affirm

Held for 76-208

Held for 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.	✓						✓		(Dismiss also should)				
White, J.	✓						✓		(Dismiss should be changed to Hold)				
Stewart, J.							✓						
Brennan, J.	✓	✓		✓									
Burger, Ch. J.							✓						

OCT 2 9 1976

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 76-208
(Vide 75-1809

NYQUIST

vs.

MAUCLET

RELIST for Justice Stevens - Also motion to dismiss or affirm
Also motion to affirm

Noted

	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.							✓						

76-208 NYQUIST v. MAUCLET Argued 3/22/77

3 J/Ct in N.Y. voided N.Y. law that excluded from state scholarship & loan program resident aliens unless they apply for Am. citizenship.

Legislative purpose: "to provide leadership --- for future generations" (In preamble to 1961 Act setting up program - ~~#~~ p 12 State's Br.)

Reasonable to assume that citizens are more likely to remain & provide this leadership than "permanent aliens" who are unwilling to become citizens

Troublesome Q is whether this exclusion can be distinguished from our "alienage" cases that have involved making a living: Griffiths, Sugarman, Richardson.

Gordon (asst AG)

On "loan" issue, state's interest is greater because of ease with which aliens can avoid ~~re~~ repayment by leaving country.

Tuition grants to aliens could encourage influx of aliens. Fed Gov't can exclude aliens but N.Y. can't.

Alien can't vote, hold office, serve on jury. Citizenship is a criteria for various acts of citizenship.

Marshall asked ~~is that~~ why aliens are not excluded from attending state universities if they may be excluded from scholarship program. (No real answer).

White asked whether tuition is required of non-residents — I think Gordon ~~answered~~ said "yes."

Gordon said scholarship program is limited to citizens & to residents of N.Y.

Gordon (N.Y.)

J Stewart noted that this differs from Griffith & Sugarman because there is larger - not denying opportunity to earn money.

Davidson (Appellee)

~~Eligibility~~ Entitlement to the Tuition Assistance Program depends only on need of one is admitted to a ~~the~~ N.Y. college - public or private.

The Regency scholarships are awarded on competetive basis.

Greenberg (Appellee)

Not "larger" because aliens also pay taxes.

3/22/77

Supplemental Memo

No. 76-208, Nyquist v. Mauclet

On the question of standing in this case, I do not think either appellee has standing to challenge the loan provision, since neither applied for a loan under that provision and neither may be qualified for a loan in other respects than alienage. This seems to be an article III problem, since neither can demonstrate injury in fact.

But the standing question is in my view completely inconsequential in this case. It deserves no more than a footnote. Whatever the court decides with respect to the grant provsions will be dispositive with respect to the loan provisions. Justice Rehnquist's comments at argument notwithstanding, the considerations are identical.

CA

3/22/77

Bobtail Bench Memo

No. 76-208, Nyquist v. Mauclet

This seems to me to be a difficult case to analyze and to decide. The question is whether it violates equal protection to deny higher educational scholarship assistance to aliens who prefer not to become citizens. I am inclined to think that there is an equal protection violation, and that the DC should be affirmed.

I would not affirm, however, on the ground that discrimination against aliens as a class is involved, requiring strict judicial scrutiny. The reason ~~why~~ alienage is a suspect classification is that alienage is a status that requires a number of years to escape, or in some cases that is inescapable. A classification based on alienage is in essence a classification based on past national allegiance, an attribute that an individual cannot readily discard. That is why aliens can be characterized as a "discrete and insular minority."

But aliens not barred who merely apply

Here, the classification is based on present national affinity, and the analysis should therefore begin with the question whether affinity to a nation other than the United States is a fundamental right. I would be inclined to say that it is. The freedom to associate protected by the First Amendment does not stop at our national borders. This is not to say that the interests of the federal or state governments may not be far greater in regulating international association than internal association. It is only to say that the individual interest in retaining affinity to another country

weighs as much, on that side of the First Amendment scales, as the interest in retaining affininty to the Democratic Party, or to the Teamsters, or to the NAACP.

The implications of this view are very different for the states than for the federal government. The powers of the federal government in the field of immigration and naturalization are such that courts will not test its regulations implicating fundamental rights of aliens "by balancing its justification against . . . First Amendment interests . . . " Fiallo v. Bell, slip at 8, quoting Kleindienst v. Mandel, 408 U.S., at 769-770. But whatever power the states have in this area is merely supplemental and I would suppose that a state's regulation or burdening of an alien's rights of association or affinity would have to be justified by a compelling interest -- just as if it were discriminating against aliens as a class. On this basis strict scrutiny would be appropriate and the DC judgment should be affirmed.

There are two state interests involved in this case. First, the state has an interest in restricting educational benefits to persons who intend to use their enhanced educations within the state for the state's benefit -- an interest, if you will, in avoiding a "brain drain". That interest is not rationally served by the requirement of affinity to the United States. The state concedes that the disadvantaged class is the class of "permanent" resident aliens: there is no reason to believe that persons in that class are more likely to leave New York than either citizens of the United States or aliens who plan to become citizens.

3/24/77

Supplemental Memo

76-208, Nyquist v. Mauclet

The most pertinent cases recognizing that Communist Party affiliation is protected by the First Amendment are: United States v. Robel, 389 U.S. 258 (1967)(Congress cannot constitutionally bar members of the Communist Party from employment in private defense establishments important to national security); Keyishian v. Board of Regents, 385 U.S. 589 (1967)(New York cannot constitutionally bar members of the Communist Party from public employment); Elfbrandt v. Russell, 384 U.S. 11 (1966)(Arizona cannot constitutionally require state employees to swear that they are not members of an organization which has as one of its purposes the violent overthrow of the government); Wieman v. Updegraff, 344 U.S. 183 (1952)(Oklahoma cannot require state employees to state that they are not members of any organization that the US Attorney General has classified as a communist front or subversive organization).*

Charlie

* Cf. Cole v. Richardson, 405 U.S. 676 (1972)(Massachusetts may constitutionally require state employees to swear that they will uphold and defend the state and federal constitutions and that they will "oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method").

The second state interest is the interest in residing in New York encouraging aliens to become citizens of the United States and therefore of New York State. I believe this is a legitimate state interest. The states are part of a national union and have a traditional and important interest in encouraging respect for and allegiance to that union. The interest is similar to the interest that justifies state laws making it criminal to desecrate the national flag. Cf. Spence v. Washington, 418 U.S. 405 (1974)(leaving open the validity of this state interest). But I doubt that the interest in encouraging citizenship can justify the classification at issue in this case. The same interest was rejected in both Graham v. Richardson and Sugarman v. Dougall, both of which involved efforts by states to provide state benefits (welfare and jobs) only to citizens. Although this case involves a more finely tuned effort to encourage citizenship, the result of the fine tuning is to confront directly the associational interest described above. Since Congress -- the primary regulator in the field, has declined to discourage permanant resident alien status on the part of persons who qualify for that condition, the state's interest cannot be viewed as compelling.

If you reject the view that associational interests are at stake, I think you could reverse the DC on the ground that encouraging citizenship is an important state interest rationally furthered by this classification. The best

argument to the contrary would be a preemption argument: Congress has seen fit to treat permanent resident aliens in the same manner as it treats citizens, see, e.g. Mathews v. Diaz, 426 U.S., at 80, and the states cannot discourage what Congress has seen fit to encourage. I think you could come out either way if strict scrutiny is not required.

C.A.

76-208 NYQUIST v. MAUCLET Affirm 6-3 Conf. 3/25/77

The Chief Justice Reverse

Graham is different. Quest. is whether to extend it.

Classification is not aliens vs non-aliens as law is spun to aliens

This doesn't involve livelihood; rather the state here

Social Security taxes were in Graham — which are paid by aliens.

Mr. Justice Brennan Affirm

Graham, Griffiths ~~Sugarman~~ etc control.

Mr. Justice Stewart Affirm (tentative)

Citizenship ~~is~~ is glorified by 13th, 14th & 15th Amends.

Can distinguish employment cases, but Richardson v Graham is hard to distinguish.

Would like to find way to distinguish.

Mr. Justice White Affirm

Can distinguish Graham.

N.Y.'s interest is substantial.

Can't believe Court forbids N.Y. to afford this assistance to citizens.

Fed gov't could certainly exclude this category.

Byron would like to believe all of this - but can't distinguish Graham

Mr. Justice Marshall Affirm

Mr. Justice Blackmun Affirm

Graham not necessarily controlling.

State has less power than Fed govt.

Aliens are suspect class. Thus strict scrutiny applies.

Mr. Justice Powell Reverse (tentative)

Aliens here are not a "suspect" class

N.Y. interest here is substantial - more so than in other "alien" cases.

First Amend. cases trouble me more than prior alien cases.

We should not push the alien line of cases to denying choice of a state to further an interest as legitimate as this.

Mr. Justice Rehnquist Reverse

All a person here has to do is declare an intent. Then distinguishes prior case. Nothing one could do in Graham's situation to qualify.

Mr. Justice Stevens Affirm

"Tough case. We discriminate - in a way - against aliens who do become citizens. They regard this as an honor.

But prior alien cases control, altho John agrees that what Bill & I say should be law.

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: 5/19/77

Recirculated: _____

Received
5/24

Await dissent. Not at next.

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, *v.* Jean-Marie Mauclet et al.

On Appeal from the United States District Court for the Western and Eastern Districts of New York.

[May —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

New York, by statute, bars certain *resident* aliens from state financial assistance for higher education. New York Educ. Law § 661 (3) (McKinney Supp. 1976). This litigation presents a constitutional challenge to that statute.

I

New York provides assistance, primarily in three forms, to students pursuing higher education. The first type is the Regents college scholarship. These are awarded to high school graduates on the basis of performance in a competitive examination. §§ 605 (1) and 670. Currently, in the usual case, a recipient is entitled to $250 annually for four years of study without regard to need. §§ 670 (2) and (3)(b).[1] The second and chief form of aid is the tuition assistance award. These are noncompetitive; they are available to both graduate

[1] There also are other special competitive awards: Regents professional education in nursing scholarships, N. Y. Educ. Law §§ 605 (2) and 671 (McKinney Supp. 1976); Regents professional education in medicine or dentistry scholarships, §§ 605 (3) and 672; Regents physician shortage scholarships, §§ 605 (4) and 673; Regents war veteran scholarships, §§ 605 (5) and 674; and Regents Cornell University scholarships, § 605 (6).

and undergraduate students "enrolled in approved programs and who demonstrate the ability to complete such courses." §§ 604 (1) and 667 (1). The amount of the award depends on both tuition and income. The ceiling on assistance was $600, although it has been increased for undergraduates to $1,500. §§ 667 (3) and (4). The third form of assistance is the student loan. §§ 680–684. The loan is guaranteed by the State; a borrower meeting certain income restrictions is entitled to favorable interest rates and generally to an interest-free grace period of at least nine months after he completes or terminates his course of study. *Id.*, §§ 680, 682 (2) and (3).[2]

There are several general restrictions on eligibility for participation in any of these programs. § 661.[3] The instant dispute concerns § 661 (3). That subsection provides:

> "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship, or (d) must be an individual of a class of refugees paroled by the attorney general of the United States under

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[2] The loan program is largely subsidized by the Federal Government. See 20 U. S. C. §§ 1071 to 1087–2. (In fiscal 1976 the federal expenditure for New York's loan program was $67,208,000 and the State contribution was $9,466,000. Brief for Appellants 8 n. ——, and 17 n. ——.) Although it appears that federal administrators have not lodged objections to the State's practice of disqualifying certain resident aliens, see App. 82, the federal standards would make eligible for assistance an alien student who "is in the United States for other than a temporary purpose and intends to become a permanent resident thereof." 45 CFR § 177.1 (a) (1976).

[3] Among these, and not the subject of challenge here, is a modest durational residency requirement. § 661 (5). See *Vlandis* v. *Kline*, 412 U. S. 441 (1973); *Starns* v. *Malkerson*, 401 U. S. 985 (1971), aff'g 326 F. Supp. 234 (Minn. 1970).

his parole authority pertaining to the admission of aliens to the United States." [4]

The statute obviously serves to bar from the assistance programs the participation of all aliens who do not satisfy its terms. Since many aliens, such as those here on student visas, may be precluded by federal law from establishing a permanent residence in this country, see, *e. g.*, 8 U. S. C. § 1101 (a)(15)(F)(i); 22 CFR § 41.45 (1976), the bar of § 661 (3) is of practical significance only to resident aliens. The Court has observed of this affected group: "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces and contribute in myraid other ways to our society." *In re Griffiths*, 413 U. S. 717, 722 (1973).

II

Appellee Jean-Marie Mauclet is a citizen of France and has lived in New York since April 1969. He has been a permanent resident of the United States since November of that year. He is married to a United States citizen and has a child by that marriage. The child is also a United States citizen. App. 49. Mauclet by affidavit stated: "Although I am presently qualified to apply for citizenship and intend to reside permanently in the United States, I do not wish to relinquish my French citizenship at this time." [5] *Id.*, at 50. He applied for a tuition assistance award to aid in meeting the expenses of his graduate studies at the State University of New York at Buffalo. Because of his refusal to apply for United States

[4] Section 661 (3) replaced former § 602 (2) of the State's Education Law, in effect at the times appellees' complaints were filed. 1974 N. Y. Laws c. 942. Clause (d) was added after the commencement of the suits. 1975 N. Y. Laws c. 663, § 1. Since clause (d) serves to make a class of aliens eligible for aid without regard to citizenship or intent to apply for citizenship, its inclusion serves to undermine the State's arguments as to the purposes served by the first three clauses. See n. 13, *infra*.

[5] In order to become a United States citizen, Mauclet would be required to renounce his French citizenship. 8 U. S. C. § 1448 (a).

citizenship, his application was not processed. *Id.*, at 49–50.

Appellee Alan Rabinovitch is a citizen of Canada. He was admitted to this country in 1964 at the age of nine as a permanent resident alien. He is unmarried and, since his admission, has lived in New York with his parents and a younger sister, all of whom are Canadian citizens. He registered with Selective Service on his 18th birthday. He graduated in 1973 from the New York public school system. *Id.*, at 68, 71. As a result of a commendable performance on the competitive Regents Qualifying Examinations, Rabinovitch was informed that he was qualified for, and entitled to, a Regents college scholarship and tuition assistance. He later was advised, however, that the offer of the scholarship was withdrawn since he intended to retain his Canadian citizenship. *Id.*, at 69, 25. Rabinovitch entered Brooklyn College without financial aid from the State. He states that he "does not intend to become a naturalized American, but . . . does intend to continue to reside in New York." *Id.*, at 65.

Mauclet and Rabinovitch each brought suit in United States District Court (Mauclet in the Western District of New York and Rabinovitch in the Eastern District), alleging that the citizenship bar of § 661 (3) was unconstitutional. The same three-judge court was convened for each of the cases. Subsequently, it was ordered that the cases be heard together. App. 45. After cross motions for summary judgment, the District Court in a unanimous opinion ruled in appellees' favor. It held that § 661 (3) violated the Equal Protection Clause of the Fourteenth Amendment in that the citizenship requirement served to discriminate unconstitutionally against resident aliens.[6] 406 F. Supp. 1233 (WDNY and EDNY

[6] Other courts also have held that discrimination against resident aliens in the distribution of educational assistance is impermissible. See, *e. g.*, *Chapman* v. *Gerard*, 456 F. 2d 577 (CA3 1972); *Jagnandan* v. *Giles*, 379 F. Supp. 1178 (ND Miss. 1974), appealed on damages and aff'd, 538 F. 2d 1166 (CA5 1976), cert. pending, No. 76–832.

1976). Its enforcement was enjoined in separate judgments. App. 103, 106.

Appellants—the various individuals and corporate entities responsible for administering the State's educational assistance programs—challenge this determination.[7] We noted probable jurisdiction. 429 U. S. —— (1976).

III

The Court has ruled that classifications by a State that are 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. 572, 601–602 (1976); *In re Griffiths,* 413 U. S., at 721; *Sugarman* v. *Dougall,* 413 U. S. 634, 642 (1973). In under-

[7] Appellants also argue that the District Court should not have reached the question of the applicability of § 661 (3) to the loan program because appellee Rabinovitch, who alone challenged this aspect of the assistance program, had not been denied a loan. Hence, appellants assert, he lacks standing. Early in the litigation, however, Rabinovitch submitted an unrebutted affidavit to the effect that he believed that he "may require student loans to help cover the cost of" his education and that he was "barred from receiving a student loan simply because of [his] status as an alien." App. 71. Indeed, appellants conceded in the District Court that any application from Rabinovitch for a loan would be refused because of § 661 (3). 406 F. Supp., at 1235. It is clear, therefore, that Art. III adverseness existed between the parties and that the dispute is a concrete one. The only obstacle to standing, under the circumstances, would arise from prudential considerations. And we see no reason to postpone resolution of the dispute. Rabinovitch has been denied others form of aid and little is to be served by requiring him now to go through the formality of submitting an application for a loan, in light of the certainty of its denial. See *Arlington Heights* v. *Metropolitan Housing Corp.*, —— U. S. ——, —— (1977) (Slip op. 11). Until oral argument, appellants suggested no reason why the loan program should differ from the other forms of assistance. Tr. of Oral Arg. 7. In the absence of a more timely suggestion supporting a distinction among the forms of aid, we think that nothing is to be gained by adjudicating the validity of § 661 (3) with regard to only two of the three primary assistance programs. After all, the single statutory proscription applies with equal force to all the programs.

taking this 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." *Examining Board* v. *Flores de Otero*, 426 U. S., at 605. See *In re Griffiths*, 413 U. S., at 721–722. Alienage classifications by a State that do not withstand this stringent examination can not stand.[8]

Appellants claim that § 661 (3) should not be subjected to such strict scrutiny because it does not impose a classification based on alienage.[9] Aliens who have applied for citizenship, or, if not qualified for it, who have filed a statement of intent to apply as soon as they are eligible, are allowed to

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[8] In *Mathews* v. *Diaz*, 426 U. S. 67 (1976), the Court applied relaxed scrutiny in upholding the validity of a federal statute that conditioned an alien's eligibility for participation in a federal medical insurance program on the satisfaction of a durational residency requirement, but imposed no similar burden on citizens. The appellants can draw no solace from the case, however, because the Court was at pains to emphasize that Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States. *Id.*, at 84–87. See *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 100–101 (1976); *De Canas* v. *Bica*, 424 U. S. 351, 358 n. 6 (1976).

It is perhaps worthy of note that the Medicare program, under consideration in *Diaz*, granted a permanent resident alien eligibility when he had resided in the United States for five years. Five years' residence is also the generally required period under federal law before an alien *may* seek to be naturalized. 8 U. S. C. § 1427 (a). Yet, ironically, this is precisely the point that, in New York, a resident *must* petition for naturalization or, irrespective of declared intent, he loses his eligibility for higher education assistance.

[9] Appellants also seem to assert that strict scrutiny should not be applied because aid to education does not deny an alien "access to the necessities of life." Brief for Appellants 21. The Court noted in *Graham* v. *Richardson*, 403 U. S., at 376, however, that classifications based on alienage "are inherently suspect and are therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired."

participate in the assistance programs. Hence, it is said, the statute distinguishes "only within the 'heterogeneous' class of aliens" and "does not distinguish between citizens and aliens *vel non.*" Brief for Appellants 20.[10] Only statutory classifications of the latter type, appellants assert, warrant strict scrutiny.

Graham v. *Richardson, supra,* undermines appellants' position. In that case, the Court considered an Arizona statute that imposed a durational residency requirement for welfare benefits on aliens but not on citizens. Like the New York statute challenged here, the Arizona statute served to discriminate only within the class of aliens: aliens who met the durational residency requirement were entitled to welfare benefits. The Court nonetheless subjected the statute to strict scrutiny and held it unconstitutional. The important points are that § 661 (3) is directed at aliens and that only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.[11] Cf. *Mathews* v. *Lucas,* 427 U. S. 495, 504–505, n. 11 (1976);[12] *Weber v. Aetna Casualty & Surety Co.,* 406 U. S. 164, 169, 172 (1972).

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[10] The District Court dealt abruptly with appellants' contention:

"This argument defies logic. Those aliens who apply, or agree to apply when eligible, for citizenship are relinquishing their alien status. Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage." 406 F. Supp., at 1235.

[11] The element of voluntariness in a resident alien's retention of disfavored status is a recognized element in several of the Court's decisions and yet has not reduced the intensity of the scrutiny. See *In re Griffiths,* 413 U. S., at 718 n. 1 (1973) (the alien was eligible for naturalization but had not filed a declaration of intention and had "no present intention of doing so"); *Sugarman* v. *Dougall,* 413 U. S., at 650, 657 (REHNQUIST, J., dissenting).

[12] The footnote reads in part:

"That the statutory classifications challenged here discriminate among illegitimate children does not mean, of course, that they are not also

Appellants also assert that there are adequate justifications for § 661 (3). First, the section is said to offer an incentive for aliens to become naturalized. Second, the restriction on assistance to only those who are or will become eligible to vote is tailored to the purpose of the assistance program, namely, the enhancement of the educational level of the electorate. Brief for Appellants 22–25. Both justifications are claimed to be related to New York's interest in the preservation of its "political community." See *Sugarman* v. *Dougall*, 413 U. S., at 642–643, 647–649; *Dunn* v. *Blumstein*, 405 U. S. 330, 344 (1972).

The first purpose offered by the appellants, directed to what they describe as some "degree of national affinity," Brief for Appellants 18, however, is not a permissible one for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere. U. S. Const. Art. I, § 8, cl. 4. See *Mathews* v. *Diaz*, 426 U. S., at 84–85; *Graham* v. *Richardson*, 403 U. S., at 376–380; *Takahashi* v. *Fish Comm'n*, 334 U. S. 410, 419 (1948). But even if we accept, *arguendo*, the validity of the proffered justifications, we find them inadequate to support the ban.[13]

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properly described as discriminating between legitimate and illegitimate children."

[13] In support of the justifications offered for § 661 (3), appellants refer to a statement of purpose in legislation adopted in 1961 that substantially amended the State's aid programs. 1961 N. Y. Laws c. 389, § 1. But the statement speaks only in general terms of encouraging education so as "to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations," § 1 (a), and of developing fully a "reservoir of talent and future leadership," § 1 (c)—purposes that would be served by extending aid to resident aliens as well as to citizens—and hardly supports appellants in clear and unambiguous terms. Moreover, the statutory discrimination against aliens with regard to certain Regents scholarships dates from long before. 1920 N. Y. Laws c. 502, § 1. And the very 1961 legislation on which appellants rely abolished the statutory disqualification of aliens in favor of an adminis-

In *Sugarman* v. *Dougall*, 413 U. S., at 642, the Court recognized that the 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'" might justify some consideration of alienage. But as *Sugarman* makes quite clear, the Court had in mind a State's historical and constitutional powers to define the qualifications of voters,[14] or of "elective or important nonelective" officials "who participate directly in the formulation, execution, or review of broad public policy." *Id.*, at 647. See *id.*, at 648. *In re Griffiths*, *supra*, decided the same day, reflects the narrowness of the exception. In that case, despite a recognition of the vital public and political role of attorneys, the Court found invalid a state court rule limiting the practice of law to citizens. 413 U. S., at 729.

Certainly, the justifications for § 661 (3) offered by appellants sweep far beyond the confines of the exception defined in *Sugarman*. If the encouragement of naturalization through these programs were seen as adequate, then every discrimination against aliens could be similarly justified. The exception would swallow the rule. *Sugarman* clearly does not tolerate that result. Nor does the claimed interest in educating the electorate provide a justification; although such education is a laudable objective, it hardly would be frustrated by including resident aliens, as well as citizens, in the State's assistance programs.[15]

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trative rule. 1961 N. Y. Laws c. 391, §§ 2 and 18. See also §§ 7, 14, and 19. In fact, it appears that the state administrators of the aid programs did not find the purposes in the 1961 legislation that appellants urge, since between 1961 and 1969, when the precursor of § 661 (3) was adopted, resident aliens were allowed to receive tuition assistance awards. Brief for Appellants 15.

[14] See also *Perkins* v. *Smith*, 370 F. Supp. 134 (Md. 1974), aff'd, 426 U. S. 913 (1976).

[15] Although the record does not reveal the number of aliens who are disqualified by § 661 (3), there is a suggestion that the number may be

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

CHAMBERS OF
JUSTICE WM J. BRENNAN, JR.

May 20, 1977

RE: No. 76-208 Nyquist v. Mauclet, et al.

Dear Harry:

I agree.

Sincerely,

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 20, 1977

Re: No. 76-208 - Nyquist v. Mauclet

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 23, 1977

Re: No. 76-208 Nyquist v. Mauclet

Dear Harry:

In due course, I propose to circulate a dissent, demonstrating (although, I fear, without euclidean precision) that the result you reach in this case does not necessarily follow from Graham, Sugarman, and Griffiths.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 24, 1977

Re: No. 76-208, Nyquist v. Mauclet

Dear Harry,

I shall await Bill Rehnquist's dissent.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

May 25, 1977

No. 76-208 Nyquist v. Mauclet

Dear Harry:

As indicated at Conference, I think the State of New York should win this one. Accordingly, I will await Bill Rehnquist's dissent.

I must say, however, that our precedents - including my opinion In re Griffiths - certainly justify an opinion as you have written it. But the state interest here is, I think, perceptively greater than in our prior cases.

I am simply not yet at rest.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

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

From: The Chief Justice

Dated: MAY 31 1977

No. 76-208 - Nyquist v. Mauclet

MR. CHIEF JUSTICE BURGER, dissenting:

I [illegible] r. Justice Rehnquist's dissenting opinion, but [illegible] ficant diff [illegible] ring alien prior [illegible] d statute [illegible] certain occupati[illegible] pairing their ability to earn a [illegible]g., Examining Board of Engineers v. [illegible]o, 426 U.S. 572 (1976) (Puerto Rico statute permitted only U.S. citizens to practice as private civil engineers); In re Griffith, 412 U.S. 717 (1973) (membership in State Bar limited to citizens); Sugarman v. Dougall, 413 U.S. 634 (1973) (participation in State's competitive civil service limited to citizens); Takahashi v. Fish and Game Comm'n., 334 U.S. 410 (1958) (State statute denied fishing license to persons "ineligible to citizenship");

Charlie - The C J's opinion makes some good points. What do you think of it?

Truax v. Raich, 239 U.S. 33 (1915) (State constitution required employers to hire "not less than eighty (80) percent qualified electors or native-born citizens of the United States"); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (city ordinance discriminatorily enforced against aliens so as to prevent Chinese subjects, but not United States citizens, from operating laundries within the city). The only other case striking down a classification on the basis of alienage, Graham v. Richardson, 403 U.S. 365 (1971), involved the denial of welfare benefits to aliens, while similarly situated citizens were given such benefits to sustain life. The Court has noted elsewhere the crucial role which such benefits play in providing the poor with "means to obtain essential food, clothing, housing, and medical care." Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (footnote omitted).

In this case the State is not seeking to deprive aliens of the essential means of economic survival. Rather, pursuant to its broad power to regulate its education system, the State has chosen to provide some types of individuals -- those it considers most likely to provide a long-range return to the local and national community -- certain added benefits to facilitate participation in its system of higher education. The State is certainly not preventing aliens

from obtaining an education; it is agreed that appellees may attend New York colleges and universities on an equal footing with citizens. However, beyond that, the State has provided certain economic incentives to its citizens in order to induce them to pursue higher studies, which in the long run can be a benefit to the State. The State has not deemed such incentives as necessary or proper as to those aliens who are unwilling to declare their commitment to the State in which they reside by stating their intent to acquire citizenship.

In my view, the States ~~must be given~~ broad latitude in carrying out such programs. Where fundamental personal interests are not at stake, the State must be free to exercise its largesse in any reasonable manner. New York, like most other states, does not have unlimited funds to provide its residents with higher education services; it is equally clear that the State has every interest in assuring that those to whom it gives special help in obtaining an education remain within the State to practice their special skills. The line drawn by the State is not a perfect one -- and few lines can be -- but it does provide a rational means to further the State's legitimate objectives. There is no State interest served by giving its resources to subjects or citizens of other countries who have been given permanent resident status to secure graduate education. Resident individuals who are

citizens, or who declare themselves committed to the idea of becoming American citizens, are more likely to remain in the State of New York after their graduation than are aliens whose ties to their ~~place~~ country of origin are so strong that they decline to sever them.

I thus conclude that the State of New York has not acted impermissibly in refusing to dispense its limited tax revenues to give assistance to aliens who by clear implication reject the opportunity to become citizens of the United States. Beyond the specific case, I am concerned that we not obliterate all the distinctions between citizens and aliens, and thus depreciate the value of citizenship.

If a state desires -- and has the means -- nothing in the United States Constitution prevents it from giving graduate school scholarships to aliens, even to those who reject United States citizenships. But nothing heretofore found in the Constitution compels a state to apply its finite resources to graduate school education of aliens who have demonstrated no permanent attachment to the United States and who refuse to apply for citizenship. It is true we are literally a "nation of immigrants," but not a nation of aliens.

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

CHAMBERS OF
THE CHIEF JUSTICE

May 31, 1977

Re: 76-208 - Nyquist v. Mauclet

MEMORANDUM TO THE CONFERENCE:

I am giving thought to circulating a dissent along the lines of the attached typed draft. Alternatively, I will likely join Bill's dissent.

Regards,

LFB

6/3/77

JUN 3 1977
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TO FILE

No. 76-208 Nyquist v. Mauclet

MR. JUSTICE POWELL, dissenting.

I am persuaded, for the reasons set forth in Mr. Justice Rehnquist's dissent, that New York's scheme of financial assistance in higher education does not discriminate against a suspect class. The line New York has drawn in this case is not between aliens and citizens, but between aliens who prefer to retain foreign citizenship and all others.

> "The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."
> San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Our prior cases dealing with discrimination against all aliens as a class, In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973), and against sub-classes of aliens without regard to ability or willingness to acquire

citizenship, Graham v. Richardson, 403 U.S. 365 (1971), do not justify the application of strict judicial scrutiny to the legislative scheme before us today. */

I also agree with Mr. Justice Rehnquist that the line New York has drawn in extending scholarship assistance in higher education is a rational one. I see no basis for the Court's statement that offering incentives to resident alien scholars to become naturalized "is not a permissible [purpose] for a State." Ante, at 8. In my view, the States have a substantial interest in encouraging allegiance to the United States on the part of all persons, including resident aliens, who have come to live within their borders. As the New York legislature declared in enacting a predecessor to the present financial assistance scheme:

> "The future progress of the state and nation and the general welfare of the people depend upon the individual development of the maximum number of citizens to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations." 1961 N. Y. Laws, c. 389, § 1(a).

As long as its program neither discriminates "on the basis of alienage," Graham v. Richardson, supra, at 372, nor conflicts with Federal immigration and naturalization policy, it is my view that New York legitimately may reserve its scholarship assistance to citizens, and to those resident aliens who declare their intention to become citizens, of both the Nation and the State.

FOOTNOTES

*/ The Court's reliance on the personal status of the appellant in In re Griffiths is misplaced. Our observation that Griffiths herself was eligible for citizenship but did not intend to apply, 413 U.S., at 718 n. 1, was hardly more than a factual "aside." The challenge in that case was to a Connecticut Rule of Court that flatly required an applicant for admission to the bar to be a citizen of the United States. Neither eligibility for naturalization nor intent to apply was relevant under the legislative scheme. There was no question that Griffiths had standing to challenge a classification against all aliens, just as Mauclet and Rabinovitch unquestionably have standing to challenge the classification before us today. Yet because the scheme in In re Griffiths "totally excluded aliens from the practice of law", 413 U.S., at 719, we had no occasion in that case to consider whether a more narrowly tailored rule would be permissible. Had we done so, we would have confronted the additional question, not presented here, whether the exclusion improperly burdened the right to follow a chosen occupation. Cf. Takahashi v. Fish and Game Comm'n., 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915).

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 3, 1977

76-208, Nyquist v. Mauclet

Dear Lewis,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 4, 1977

No. 76-208 - Nyquist v. Mauclet

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to Conference

Ames
x 245

2nd

~~1st PRINTED~~ DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, *v.* Jean-Marie Mauclet et al.

On Appeal from the United States District Court for the Western and Eastern Districts of New York.

[June —, 1977]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

I am persuaded, for the reasons set forth in MR. JUSTICE REHNQUIST's dissent, that New York's scheme of financial assistance in higher education does not discriminate against a suspect class. The line New York has drawn in this case is not between aliens and citizens, but between aliens who prefer to retain foreign citizenship and all others.

> "The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).

Our prior cases dealing with discrimination against all aliens as a class, *In re Griffiths*, 413 U. S. 717 (1973); *Sugarman* v. *Dougall*, 413 U. S. 634 (1973), and against sub-classes of aliens without regard to ability or willingness to acquire citizenship, *Graham* v. *Richardson*, 403 U. S. 365 (1971), do not justify the application of strict judicial scrutiny to the legislative scheme before us today.*

* The Court's reliance on the personal status of the appellant in *In re*

I also agree with MR. JUSTICE REHNQUIST that the line New York has drawn in extending scholarship assistance in higher education is a rational one. I see no basis for the Court's statement that offering incentives to resident alien scholars to become naturalized "is not a permissible [purpose] for a State." *Ante,* at 8. In my view, the States have at substantial interest in encouraging allegiance to the United States on the part of all persons, including resident aliens, who have come to live within their borders. As the New York Legislature declared in enacting a predecessor to the present financial assistance scheme:

> "The future progress of the state and nation and the general welfare of the people depend upon the individual development of the maximum number of citizens to provide the broad range of leadership, inventive genius, and source of economic and cultural growth for oncoming generations." 1961 N. Y. Laws, c. 389, § 1 (a).

As long as its program neither discriminates "on the basis of alienage," *Graham* v. *Richardson, supra,* at 372, nor conflicts with federal immigration and naturalization policy, it is my view that New York legitimately may reserve its scholarship assistance to citizens of both the Nation and State.

Griffiths is misplaced. Our observation that Griffiths herself was eligible for citizenship but did not intend to apply, 413 U. S., at 718 n. 1, was hardly more than a factual "aside." The challenge in that case was to a Connecticut Rule of Court that flatly required an applicant for admission to the bar to be a citizen of the United States. Neither eligibility for naturalization nor intent to apply was relevant under the ~~legislative~~ scheme. There was no question that Griffiths had standing to challenge a classification against all aliens, just as Mauclet and Rabinovitch unquestionably have standing to challenge the classification before us today. Yet because the scheme in *In re Griffiths* "totally excluded aliens from the practice of law", 413 U. S. at 719, we had no occasion in that case to consider whether a more narrowly tailored rule would be permissible. Had we done so, we would have confronted the additional question, not presented here, whether the exclusion improperly burdened the right to follow a chosen occupation. Cf. *Takahashi* v. *Fish and Game Comm'n,* 334 U. S. 410 (1948); *Truax* v. *Raich,* 239 U. S. 33 (1915).

p 1

JUN 7 1977

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SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, *v.* Jean-Marie Mauclet et al. | On Appeal from the United States District Court for the Western and Eastern Districts of New York.

[June —, 1977]

THE CHIEF JUSTICE and MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

I am persuaded, for the reasons set forth in MR. JUSTICE REHNQUIST's dissent that New York's scheme of financial assistance in higher education does not discriminate against a suspect class. The line New York has drawn in this case is not between aliens and citizens, but between aliens who prefer to retain foreign citizenship and all others.

> "The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).

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*The Court's reliance on the personal status of the appellant in *In re*

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76–208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, *v.* Jean-Marie Mauclet et al.

On Appeal from the United States District Court for the Western and Eastern Districts of New York.

[June —, 1977]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART joins, dissenting.

I am persuaded, for the reasons set forth in MR. JUSTICE REHNQUIST's dissent that New York's scheme of financial assistance in higher education does not discriminate against a suspect class. The line New York has drawn in this case is not between aliens and citizens, but between aliens who prefer to retain foreign citizenship and all others.

> "The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).

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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.
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dissent. going thought to typed dropt 5/31/77	I agree HAB 5/20/77	await dissent 5/24/77	Join HAB 6/4/77	join HAB 5/20/77	1st draft 5/19/77 2nd dropt	~~Join HAB~~ 5 ~~[illegible]~~	will dissent 5/23/77	Join HAB 5/20/77
1st typed dropt 6/8/77		Join LFP 6/3/77			5/26/77 3rd dropt 6/7/77	await dissent 5/25/77 dissent	1st dropt 5/25/77	
1st dropt 6/9/77					4th dropt 6/10/77	typed dropt 6/3/77		
						2nd dropt 6/7/77 3rd dropt 6/8/77		

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