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Constitutional Law - Fourteenth Amendment - Equal Protection - Aliens' Rights - Governmental Function Doctrine

Gwendolyn M. Robosson

Recent Decisions

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION—ALIENS' RIGHTS—GOVERNMENTAL FUNCTION DOCTRINE—The Supreme Court of the United States has held that a state may exclude aliens who have not declared an intent to become citizens from teaching in public schools.

Ambach v. Norwick, 441 U.S. 68 (1979).

Susan Norwick and Tarja Dachinger are resident aliens of the state of New York.[1] Pursuant to section 3001(3) of the New York Education Law,[2] both parties applied for certification to teach in the New York public schools.[3] Section 3001(3) limits the certification of public school teachers to citizens of the United States and to those aliens who have manifested an intention to apply for citizenship. Both applications were denied because neither alien had manifested the requisite intent to apply for citizenship. Norwick then filed suit in federal district court seeking to enjoin the enforcement of section 3001(3), and Dachinger subsequently obtained leave to intervene.[4] A three-judge district

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1. Ambach v. Norwick, 441 U.S. 68 (1979). Appellee Norwick was born in Scotland and is a subject of Great Britain. She has resided in the United States since 1965, and is married to a United States citizen. *Id.* at 71. She received a Bachelor of Arts degree *summa cum laude* from North Adams State College in Massachusetts and received an "A" average in full-time graduate work at the State University of New York at Albany. *Id.* at 85 n.4 (Blackmun, J., dissenting). Appellee Dachinger, a citizen of Finland, has resided in the United States since 1966 and is married to a United States citizen. *Id.* at 71. She obtained a Bachelor of Arts degree *cum laude* at Lehman College in New York. *Id.* at 85 n.4 (Blackmun, J., dissenting).

2. N.Y. EDUC. LAW § 3001(3) (McKinney 1970) provides:

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

Although both appellees had fulfilled New York's educational requirements for permanent certification, they had refused to apply for United States citizenship. 441 U.S. at 71.

3. Both appellees sought certification to teach nursery school through sixth grade. 441 U.S. at 71.

4. *Id.*

court,[5] applying a strict scrutiny test,[6] held that section 3001(3) discriminated against aliens in violation of the fourteenth amendment's equal protection clause.[7] The Supreme Court noted probable jurisdiction[8] and, relying upon *Sugarman v. Dougall*,[9] held that a citizenship requirement for public school teachers bore a rational relationship to a legitimate state interest.[10] Justice Powell, speaking for the majority,[11] outlined the development of constitutional constraints upon state attempts to regulate the employment of aliens. He admitted that the Court's decisions had waivered over the years. The majority noted that while the Court has struck down laws which infringed upon the alien's right to work in the common occupations of the community,[12] the Court has also given the states greater latitude to exclude aliens from public employment.[13] Thus, at the time *Truax v. Raich*[14] was

5. The three-judge district court was convened pursuant to 28 U.S.C. § 2281 (1970) (repealed 1976), and 28 U.S.C. § 2284 (1970) (amended 1976).

6. Norwick v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). The strict scrutiny standard of review is employed when the state regulation impinges upon a fundamental right or creates an inherently suspect classification. The use of strict scrutiny raises a presumption of invalidity, placing a heavy burden of justification upon the state. Under strict scrutiny, the state interest said to justify the discrimination must be constitutionally legitimate and substantial, and the means adopted to achieve the goal must be precisely drawn. *See In re* Griffiths, 413 U.S. 717, 721-22 (1973); McLaughlin v. Florida, 379 U.S. 184, 196 (1964); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

7. Norwick v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). The district court concluded that the statute was overbroad because it excluded all non-applicant aliens from every teaching position in the public schools without regard to nationality, the subject to be taught, the grade level, or the alien's willingness to take a loyalty oath. *Id.* at 921.

8. 436 U.S. 902 (1978).

9. 413 U.S. 634 (1973). In *Sugarman*, the Court struck down on equal protection grounds a New York civil service law providing that only citizens could hold permanent positions in the state's competitive civil service. The *Sugarman* Court implied in dictum that a state's legitimate interest in establishing its own form of government and preserving the basic conception of its political community would justify the application of a rational basis standard of review to some statutes with alienage-based classifications. *Id.* at 647-48.

10. 441 U.S. at 80-81.

11. *Id.* at 68. Justice Powell delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, White, and Rehnquist joined.

12. *Id.* at 72. *See* Truax v. Raich, 239 U.S. 33 (1915) (alien's right to work for a living in the common occupations of the community deemed to be the type of personal freedom and opportunity the fourteenth amendment is designed to secure); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (city ordinance preventing Chinese subjects from operating laundry violates fourteenth amendment).

13. 441 U.S. at 72.

14. 239 U.S. 33 (1915). *See* note 12 *supra*.

decided, a state was free to exclude aliens from activities within the public domain or that involved common resources of the people of the state. As part of its larger authority to forbid aliens from owning land, a state was authorized to exclude aliens from activities normally associated with property ownership.[15] Eventually the activities from which a state could permissibly exclude aliens narrowed[16] until the Court, in *Graham v. Richardson*,[17] declared that classifications based on alienage were "inherently suspect and subject to close judicial scrutiny."[18] Using the strict scrutiny rationale, the Court subsequently invalidated state laws which excluded aliens from entering a state's classified civil service,[19] practicing law,[20] working as a civil engineer,[21] and receiving state educational benefits.[22]

Although he acknowledged a trend away from the public interest doctrine of *Truax*, Justice Powell maintained that the Court had not abandoned the principle that aliens could be excluded from those state functions affecting the operation of the state as a governmental entity.[23] In his view, the *Sugarman* Court had reaffirmed this principle by recognizing that the states could require citizenship as a qualification for certain offices. The exclusion of aliens from these functions does not warrant close judicial scrutiny. Instead, the state need only show a rational relationship between the classification and the state in-

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15. 441 U.S. at 72-73. *See, e.g.*, Frick v. Webb, 263 U.S. 326 (1923) (state law prohibiting direct or indirect ownership of land within state border by aliens held not violative of fourteenth amendment equal protection clause); Webb v. O'Brien, 263 U.S. 313 (1923) (state has power to deny aliens permission to own, lease, use, or have the benefit of agricultural lands within its borders); Crane v. New York, 239 U.S. 195 (1915) (state statute forbidding aliens to contract to labor upon public works does not violate fourteenth amendment); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (state statute prohibiting aliens from killing wildlife except in defense of person or property does not violate the equal protection clause of fourteenth amendment); Hauenstein v. Lynham, 100 U.S. 483 (1880) (state has authority to give aliens only such rights touching real property within its territory as it may see fit to concede).

16. 441 U.S. at 73. *See* Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (state statute limiting the issuance of commercial fishing licenses to persons eligible for United States citizenship violates equal protection clause); Oyama v. California, 332 U.S. 633 (1948) (state law forbidding aliens ineligible for United States citizenship from acquiring, owning, leasing, or transferring real property violates equal protection clause when enforced against alien holding property as guardian for his citizen child).

17. 403 U.S. 365 (1971) (state welfare laws which condition receipt of benefits upon citizenship and durational residency requirements violate equal protection clause).

18. *Id.* at 371-72.

19. Sugarman v. Dougall, 413 U.S. 634 (1973).

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

21. Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976).

22. Nyquist v. Mauclet, 432 U.S. 1 (1977).

23. 441 U.S. at 73-74.

terest sought to be protected.[24] According to the majority, the governmental function exception to alienage classifications rested upon fundamental constitutional principles, since the status of citizenship creates a legal bond with the polity and with the democratic republic which exercises the powers of governance.[25]

Justice Powell then focused on whether teaching in public schools constituted a governmental function subject only to the rational basis review. The majority looked to the degree of responsibility and discretion possessed by teachers within the educational system. Noting that teachers are the only employees of the school system in direct, day-to-day contact with students, the Court concluded that teachers play a critical role in developing students' attitudes toward government and understanding of the role of citizens in society.[26] In fulfilling this task, teachers are vested with wide discretion over presentation of course material. This discretion is significant because teachers may be required to teach courses directly related to political and social subjects even though such courses are not their specialty.[27] Moreover, the majority reasoned that teachers serve as role models for students, exerting a subtle but important influence over the perceptions and values of students. This influence was said to enable a teacher to shape students' attitudes toward government, the political process, and the social responsibilities of citizenship.[28] Furthermore, the state could legitimately expect that all teachers, not just those directly teaching courses in government, history, and civics, had an obligation to promote civic virtue.[29] Because of the importance of the teacher's role in public education, the majority concluded that public school teachers perform a task going to the heart of representative government.[30] Since teaching in public schools came within the governmental function principle of *Sugarman v. Dougall*[31] and *Foley v. Connelie*,[32] the Court stated that the citizenship requirement of section 3001(3) need only bear a rational relationship to New York's legitimate interest in furthering its educational goals.[33]

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24. *Id.* at 74 (citing Foley v. Connelie, 435 U.S. 291, 296 (1978)).
25. 441 U.S. at 75.
26. *Id.* at 78-79.
27. *Id.* at 80.
28. *Id.* at 79.
29. *Id.* at 80.
30. *Id. But see* text accompanying notes 62-63 *infra*.
31. 413 U.S. 634 (1973). *See* note 9 *supra*.
32. 435 U.S. 291 (1978). In *Foley*, the Court held that New York could exclude aliens from its police force. The Court applied the governmental function rule because the police fulfill a fundamental obligation of government to its constituency and are cloaked with substantial discretionary powers. *Id.* at 296-97.
33. 441 U.S. at 80.

Applying the rational basis test, the Court found that New York's statutory scheme furthers the state's interest in education because it bars from teaching only those aliens who have indicated their unwillingness to become citizens. Thus, New York did not exceed the range of permissible regulation, since the state is permitted to determine eligibility for teaching positions on the assumption that people who have not refused citizenship are generally better qualified than those who have chosen to remain aliens.[34] Because the appellees, and aliens similarly situated, had chosen to exclude themselves from teaching positions by refusing to apply for United States citizenship, the Court found no equal protection violation.[35]

Justice Blackmun, writing for the dissent,[36] began his analysis by noting that section 3001(3) was one of many statutes which New York had passed in the hysteria of World War I. He pointed out that in the 1978 Term, the Court had upheld New York's statutory requirement that policemen be citizens in *Foley v. Connelie*.[37] However, the dissent emphasized that New York's restriction in *Foley* was upheld because policemen were deemed to be important officers who participated directly in the execution of broad public policy.[38] In the dissenters' view, *Foley* was a limited exception to the rule that state attempts to deny employment opportunities to resident aliens are subject to strict judicial scrutiny.[39] Justice Blackmun opined that *Ambach* fell squarely within the general rule that alienage-based classifications are subject to strict scrutiny.[40] He labeled it a constitutional absurdity to say, as the majority in effect had, that a Frenchman could not teach French in the elementary or secondary schools of New York. He noted that the appellees were aliens only in the technical sense of the word, since both had roots in this country[41] and were willing to subscribe to a

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34. *Id.* at 81 n.14.

35. *Id.* at 80-81. Justice Powell stated that the "[a]ppellees, and aliens similarly situated, in effect have chosen to classify themselves. . . . They have rejected the open invitation extended to qualify for eligibility to teach by applying for citizenship in this country." *Id.*

36. *Id.* at 81 (Blackmun, J., dissenting). Justices Brennan, Marshall, and Stevens joined in the dissent.

37. 435 U.S. 291 (1978). *See* note 32 *supra*.

38. 441 U.S. at 83 (Blackmun, J., dissenting).

39. *Id.* at 84 (Blackmun, J., dissenting). *See* notes 19-21 and accompanying text *supra*.

40. 441 U.S. at 84 (Blackmun, J., dissenting) (citing Graham v. Richardson, 403 U.S. 365, 371-72 (1971)). *See also* Nyquist v. Mauclet, 432 U.S. 1 (1977); Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976); *In re* Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973).

41. 441 U.S. at 84 (Blackmun, J., dissenting). The dissent noted that the appellees have lived in the United States for over twelve years, are married to United States citizens, and are obligated to pay taxes. *Id.* at 84-85 (Blackmun, J., dissenting).

loyalty oath. More importantly, the record was devoid of any evidence that either appellee was unqualified in any way. To the dissent, the majority's rationale that teaching in public schools went to the heart of representative government could not justify the restrictions placed upon aliens in New York. The dissent perceived four areas of difficulty with the reasoning behind the conclusions of the majority.

Initially, Justice Blackmun pointed out that New York's statutory scheme was so riddled with exceptions that it cast doubt on the legitimacy of the purported state interest in furthering educational goals by excluding alien teachers from public schools.[42] Justice Blackmun noted that the education law permitted aliens to teach in public schools in certain circumstances,[43] that aliens could teach in private schools without qualification,[44] and that aliens could be elected to local school boards.[45] This demonstrated that New York had drawn a shallow and indistinct line of demarcation between citizens and aliens.[46] The dissenters' second objection to the majority's conclusion was that section 3001(3) was not narrowly confined nor precise in its application. Instead, the statute operated to exclude all aliens from any teaching positions in the public schools.[47] Third, Justice Blackmun postulated that the classification was an irrational method to choose teachers, since the cultural heritage of some alien teachers would make them better qualified than teachers who were citizens.[48] Finally, the dissent expressed the belief that *Ambach* could not be distinguished from *In*

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42. *Id.* at 86-87 (Blackmun, J., dissenting).

43. *See* N.Y. EDUC. LAW § 3001(3) (McKinney 1970), reproduced at note 2 *supra*. Section 3001(3) provides an exception for alien teachers who are employed pursuant to regulations adopted by New York's Commissioner of Education. The appellants asserted that the Commissioner's power under § 3001(3) is limited to issuing temporary certificates which enable the employment of non-applicant aliens for a limited period only. *See* Brief for Appellants at 8. The language of § 3001(3), however, contains no limitation on the Commissioner's authority to employ non-applicant aliens. Moreover, there is no evidence in the legislative history of § 3001(3) indicating an intention to impose restrictions on the Commissioner's discretion. *See* Brief for Appellees at 47.

44. The dissent noted that eighteen percent of New York's elementary and secondary school children attend private schools. 441 U.S. at 86 (Blackmun, J., dissenting). Private school teachers are not required to obtain state certification. *See* N.Y. EDUC. LAW §§ 3001(2), 3204(2) (McKinney 1970 & Supp. 1979).

45. *See* N.Y. EDUC. LAW § 2590-c(3) to c(4) (McKinney Supp. 1979), which provides that parents of school children are eligible for membership on community school boards. This section has been construed by the New York City Board of Elections and by the New York City Board of Education to require state citizenship but not federal citizenship. *See* Brief for Appellees at 48-49.

46. 441 U.S. at 86 (Blackmun, J., dissenting).

47. *Id.* at 87 (Blackmun, J., dissenting).

48. *Id.* at 87-88 (Blackmun, J., dissenting).

re Griffiths,[49] where the Court had upheld the right of an alien attorney to take the bar exam and practice law. Justice Blackmun reasoned that an attorney played as great a role as a teacher does in communicating society's values, yet the attorney's right to do so is protected while the alien teacher's right is not.[50]

Ambach v. Norwick represents the second time in three years that the Court has upheld an alienage-based classification under a rational review standard. In both *Ambach* and the 1978 decision in *Foley v. Connelie*,[51] the Court justified its selection of a rational basis standard by invoking the governmental function doctrine. This doctrine, first promulgated in dictum in *Sugarman v. Dougall*,[52] is an exception to the mandatory application of close judicial scrutiny to all classifications based on alienage.[53] Recognition of a state's legitimate interest in preserving the basic conception of its political community led the *Sugarman* Court to declare that state legislation which precludes aliens from holding state elective or important nonelective executive, legislative, or judicial positions need only be justified by a rational relationship between the interest sought to be protected and the limiting classification.[54] Prior to *Ambach*, the decision in *Foley* marked the only instance where the Court resorted to the governmental function doctrine to uphold the constitutionality of a statutory scheme restricting the employment of aliens. In *Foley*, the Court upheld the validity of a state statute which excluded aliens from the state police force.[55] Under the *Foley* rationale, whether a classification based on alienage is subjected to strict scrutiny or rational review depends upon the role the individual assumes by virtue of his employment.[56] The

49. 413 U.S. 717 (1973) (state court rule limiting the practice of law to citizens violates equal protection clause).

50. 441 U.S. at 88-89 (Blackmun, J., dissenting).

51. 435 U.S. 291 (1978). *See* note 32 *supra*.

52. 413 U.S. 634 (1973). *See* note 9 *supra*.

53. *See* text accompanying notes 16-18 *supra*.

54. 413 U.S. at 647-48. In *Sugarman*, the Court indicated that a state could, "in an appropriately defined class of positions, require citizenship as a qualification for office." *Id.* at 647. The express language of the exception reads:

> "[E]ach state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen" . . . and this power and responsibility of the State applies, not only to the qualification 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. (quoting Boyd v. Thayer, 143 U.S. 135, 161 (1892)).

55. 435 U.S. 291 (1978).

56. *Id.* at 296. According to *Foley*, the rational review standard may be applied to an alienage-based classification only after "examin[ing] each position in question to determine

Foley decision comports with the definition of governmental function announced in *Sugarman* because policemen do hold important nonelective executive positions and are charged with the executive duty of enforcing the law.[57] According to *Foley*, the purpose of the governmental function doctrine is to enable a state to exclude aliens from the process of governing.[58]

In *Ambach*, the Court expanded the governmental function doctrine by discarding the requirement that the position in question must relate directly to the formulation, execution, or review of public policy.[59] According to *Foley*, the governmental function doctrine is based on the premise that only citizens may formulate and execute public policy.[60] The statutory scheme at issue in *Foley* was upheld because of the

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whether it involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." *Id. See* Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671, 678 (1978), where the author refers to policemen and those persons falling within the governmental function doctrine as "key government figures."

57. In order to properly consummate the purpose of the police function, society has endowed policemen with authority to execute warrants, resort to lawful force, investigate suspect conduct, make arrests, apprehend suspected criminals, and take action when criminal activity is observed. 435 U.S. at 294-96. The discretionary powers vested in policemen include, under limited circumstances, the power of search, seizure and arrest without a formal warrant, the invasion of privacy of individuals in public places, stopping vehicles on public highways, and forcibly entering a dwelling or building in execution of a warrant.

58. *Id.* at 297-99. The language employed by the *Foley* Court is illustrative of the purpose of the governmental function doctrine:

> 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.*
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> . . . .
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> In short, it would be as anomalous to conclude that citizens may be subjected to the broad discretionary powers of noncitizen police officers as it would be to say that judicial officers and jurors *with the power to judge citizens can be aliens.*

Id. (emphasis added). *See* 24 N.Y.L. SCH. L. REV. 790 (1979).

59. Significantly, the *Ambach* Court avoided using the explicit language of the governmental function exception as it was first promulgated in Sugarman v. Dougall, 413 U.S. 634 (1973). *See* note 54 *supra*. Instead, the Court looked to the employer's role in society, and to the nature of the discretion its employees possessed. 441 U.S. at 75. According to the *Ambach* majority, the inquiry mandated by *Foley* and *Sugarman* is "whether public school teachers perform a significant government function." 441 U.S. at 76 n.6.

60. 435 U.S. at 295-96. Support for the governmental function doctrine may also be found in the text of the United States Constitution, which clearly indicates that citizenship is a legitimate requirement for persons holding high office. The plain language of the Constitution imposes a citizenship requirement for the federal offices of President, U.S. CONST. art. II, § 1, cl. 5; Senator, *id.* art. I, § 3, cl. 3; and Representative, *id.* art. I, § 2, cl. 2.

distinction drawn between a police officer vested with broad discretionary powers performing an executive function, and a private person engaged in routine public employment or other "common occupations of the community."[61] The inquiry directed by *Foley* is whether the position in question involves discretionary decisionmaking or execution of policy which substantially affects members of the political community. The *Ambach* Court avoided this line of inquiry and instead emphasized a teacher's role within the classroom. Justice Powell found that because teachers exercise discretion in the presentation of course material and perform a task said to go to the heart of representative government, they fall within the scope of the governmental function doctrine.[62] The majority failed to show how teachers participate in the governing process, or how the discretion they enjoy permits them to exercise a governing or determining influence over public policy. According to *Ambach*, all that a state need prove in order to sustain a limitation of employment based upon alienage is that the position encompasses some discretion and has as its purpose the discharge of a fundamental duty of the state. In *Ambach*, the Court accepted the state's argument that education—indeed, teaching in a certain way—is a fundamental state duty.[63] If the state has such a duty, then obviously it has a legitimate interest in protecting school children from those who might teach civics in a manner which the state finds unflattering.[64]

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61. 435 U.S. at 298. The *Ambach* Court rejected the appellees' contention that teaching is a "common occupation of the community," even though teaching is the third largest occupation within New York. *See* Brief for Appellees at 32.

62. *See* text accompanying notes 27 & 30 *supra*.

63. *See* Brief for Appellants at 20.

64. The state's interest in regulating the content of information a teacher disseminates to students is subject to first and fourteenth amendment considerations. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (state statute forbidding under penalty, the teaching of a foreign language in any private, parochial or public school, to any child who had not passed the eighth grade, invades the liberty guaranteed a teacher by the fourteenth amendment and exceeds the power of the state). A teacher's right to make statements outside the classroom, which address matters of public concern, is also protected by the first and fourteenth amendments. However, this right is balanced against the state's interest in promoting the efficiency of its public school system. *See* Pickering v. Board of Educ., 391 U.S. 563 (1968) (teacher who published letter in local newspaper criticizing school board's prior handling of proposals to raise revenues for schools was entitled to same protection as member of general public where letter contained statements then the subject of public debate and letter did not interfere with teacher's classroom performance or the school's operation). *See also* Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1069-70 (1968) (teacher's right to engage in nonpartisan advocacy of social or political reform should be protected absent a showing that such activity substantially affects his classroom performance). The state does, however, have the right to screen teachers and employees of the public school system to determine whether they will maintain the integrity of the schools as a part of ordered society. *See* Adler v. Board of

However, Justice Powell failed to explain how he concluded that this sort of education is a fundamental state duty.[65] By upholding the validity of section 3001(3), the Court legitimizes the state's interest not merely in providing education, but in controlling the process of political socialization in the schools. The Court sustained as rational the state's assumption that aliens who choose to retain foreign citizenship will not instill in students the proper attitudes toward the state, the political process, and the social responsibilities which citizenship entails.[66] Therefore, the majority of the Court now believes that for purposes of preserving and furthering the aims of government, as opposed to the process of governing, it is permissible to draw a distinction between aliens who choose to retain foreign citizenship and those aliens who declare an intent to become United States citizens.

To support the validity of the statutory distinction, Justice Powell focused on the difference between citizens and aliens, and noted that citizenship is meant to have special significance, particularly when governmental entities are exercising the functions of government.[67] However, section 3001(3) is less than faithful to the principle that citizenship is of such special significance that aliens can be justifiably excluded from performing governmental functions. The statutory scheme at issue in *Ambach* actually permits aliens to receive state certification to teach provided they declare their intent to become citizens.[68] The classification does not exclude all aliens, only those who choose not to declare the necessary intent. Because aliens are included in the class eligible for certification, the statutory scheme actually undermines the state's purported interest in controlling the process of political socialization, since a mere declaration of intent, without more, is not likely to impart knowledge of, or loyalty to, the political mores and civic virtues

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Educ., 342 U.S. 485 (1952) (state law which renders a member of an organization advocating the otherthrow of the government by *force, violence, or unlawful means* ineligible for employment in public schools does not deny right of free speech and assembly). It appears that the state's interest in curtailing a teacher's first amendment rights will arise when the teacher's pronouncements or affiliations substantially impair his classroom performance or threaten the operation of the school system.

65. The Court has recently ruled that a citizen's interest in education is not fundamental, as it is protected neither explicitly nor implicitly by the Federal Constitution. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Under New York law, however, the legislature has a duty to provide for the maintenance and support of a public school system. *See* N.Y. CONST. art. XI, § 1. The majority in *Ambach* did not look to New York law but appears to have taken the state's word that education is a fundamental state duty.

66. 441 U.S. at 80, 81 n.14. *See generally* Note, *Aliens' Right to Teach: Political Socialization and the Public Schools*, 85 YALE L.J. 90 (1975).

67. 441 U.S. at 75.

68. *See* N.Y. EDUC. LAW § 3001(3) (McKinney 1970), reproduced at note 2 *supra*.

of the community. The majority's view that an alien's intent to become a citizen suffices to transform an otherwise unqualified alien teacher into a proper role model for students[69] is questionable, since the declaration of intent can be revoked.[70] Although Justice Powell permits the state to assume that aliens who choose to become citizens will develop in students the values necessary for the preservation of the state, while those who retain foreign citizenship will not, he failed to establish how an alien who is eligible for certification under section 3001(3) acquires the characteristics, thought of as inherent in citizenship,[71] which ensure that teaching will be conducted in a manner consistent with the state's educational goals.

The *Ambach* Court also thought it significant that section 3001(3) permits aliens to determine their own eligibility for permanent teaching certificates by manifesting an intent to become United States citizens.[72] Yet this factor has never been determinative when an alien's rights under the equal protection clause have been at issue.[73] Section 3001(3) is similar to the statutory scheme invalidated by the Court in *Nyquist v. Mauclet*.[74] The statute in *Nyquist* conditioned the receipt of higher education assistance funds upon a declaration of intent to become a United States citizen.[75] According to Justice Powell's dissent in *Nyquist*, placing aliens who declare an intent to become United States citizens in the same class as citizens enables aliens to determine

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69. *See* text accompanying note 34 *supra*.

70. *See* 8 U.S.C. § 1445 (1976).

71. 441 U.S. at 75.

72. *Id.* at 80-81.

73. Since the Court began safeguarding aliens' rights under the equal protection clause, most of the challenged statutory schemes employed per se classifications. *See, e.g.*, Foley v. Connelie, 435 U.S. 291 (1978); Clarke v. Deckebach, 274 U.S. 392 (1927). In Nyquist v. Mauclet, 432 U.S. 1 (1977), the challenged statute enabled aliens who had declared an intent to become citizens to receive state benefits. Nevertheless, the Court invalidated the statute under a strict scrutiny analysis. *Id.* at 12.

74. 432 U.S. 1 (1977).

75. N.Y. EDUC. LAW § 661(3) (McKinney Supp. 1979), limits eligibility for general awards, academic performance awards and student loans for higher education as follows:

> 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 his parole authority pertaining to the admission of aliens to the United States.

Section 661(3) was invalidated under strict judicial scrutiny yet it contained a statutory scheme similar to § 3001(3). The statute in *Nyquist*, like the statute in *Ambach*, conditioned state "benefits" upon a declaration of intent to become a United States citizen. *See* N.Y. EDUC. LAW § 3001(3) (McKinney 1970), reproduced at note 2 *supra*.

their own status and does not create a per se classification.[76] To Justice Powell, the reasons for applying strict scrutiny are absent under this type of statutory scheme.[77] However, the majority in *Nyquist* disagreed, holding that the presence of an ameliorating factor such as the ability to declare an intent to become a United States citizen and thereby alter one's status was irrelevant in determining whether the statutory scheme should be subject to strict scrutiny.[78] In *Ambach*, Justice Powell failed to cite *Nyquist* or to explain why the equal protection analysis utilized by the Court varied between these two approximating statutes. Apparently, the *Ambach* Court has concluded that no per se classification is created when a statute treats citizens and those who intend to become citizens on an equal basis.

Although the *Ambach* majority stated that the rational basis standard of review was invoked because teachers fall within the governmental function doctrine, the expansion of this doctrine in *Ambach* demonstrates the Court's reluctance to invalidate all alienage-based classifications where public employment is involved. The majority did not explicitly adopt the proposition that all statutes which allow aliens to classify themselves should be subject to a rational basis review. Yet the decision suggests that the status of aliens as a suspect classification is vulnerable. The future importance of *Ambach* lies not in the express holding that teachers fall within the governmental function doctrine, but in the Court's expressed willingness to expand this doctrine and thereby dispense with strict judicial scrutiny.

Gwendolyn M. Robosson

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76. 432 U.S. at 15 (Powell, J., dissenting). Aliens were traditionally afforded protection as a suspect classification because alienage was a status that could not be changed for a period of five years. This stigma was used repeatedly to subject aliens to substantial discrimination. *See* Graham v. Richardson, 403 U.S. 365 (1971). *Accord*, Note, *Residence Requirements After Shapiro v. Thompson*, 70 COLUM. L. REV. 134 (1970).

77. 432 U.S. at 15 (Powell, J., dissenting). Justice Powell further reasoned that the states have a substantial interest in encouraging allegiance to the United States on the part of aliens who have come to live within their borders. *Id.* at 16 (Powell, J., dissenting).

78. 432 U.S. 1 (1977). In *Nyquist*, the Court noted that the statute was directed at aliens and only aliens were harmed by it. Even though the statute was not an absolute bar, it effectively discriminated against aliens as a class. *Id.* at 8-10.