NOTES

CONSTITUTIONAL LAW—EQUAL PROTECTION—DISCRIMINATION AGAINST ALIENS EMPLOYED AS PUBLIC SCHOOL TEACHERS NOT PROSCRIBED BY THE FOURTEENTH AMENDMENT—*Ambach v. Norwick*, 441 U.S. 68 (1979).

In 1973, Susan Norwick applied for a temporary teaching certificate that would have enabled her to teach nursery school through sixth grade in the New York City school system.[1] She met all of the qualifications for an educator at the applicable levels,[2] but was not an American citizen and did not intend to apply for naturalization.[3] Section 3001 of the New York Education Law mandates that teachers in the public school system of the state of New York either be citizens of the United States[4] or make proper application to become citizens.[5] Ms. Norwick, having done neither of the above,[6] was denied her teaching certificate.[7]

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[1] Ambach v. Norwick, 441 U.S. 68, 71 (1979). Intervenor-plaintiff Tarja U.K. Dachinger made a similar application in 1975. *Id.*

[2] Norwick v. Nyquist, 417 F. Supp. 913, 914 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). Appellee Norwick is a graduate of North Adams State College in Massachusetts, where she earned a B.A. degree summa cum laude. Currently a full time graduate student in Developmental Reading at the State University of New York at Albany, she has compiled a perfect "A" average. *Id.* Intervenor Dachinger received a B.A. degree cum laude in German from Lehman College in New York. She has also received a Master's degree in Early Childhood Education. Ambach v. Norwick, 441 U.S. 68, 85. Appellees Norwick and Dachinger have taught at various educational facilities in the United States and abroad. Norwick v. Nyquist, 417 F. Supp. 913, 914. At the time of their application for their respective teaching certificates, neither had satisfied the prerequisites for a permanent certificate. They now meet such requirements. *Id.* However, the district court found that plaintiffs' nonsatisfaction of these prescribed criteria was not a factor in the final disposition of their application. *Id.* at 914–15.

[3] Norwick v. Nyquist, 417 F. Supp. 913, 914 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). Appellee Norwick was born in Dundee, Scotland and is married to a United States citizen. *Id.* A British subject, she has maintained resident alien status by residing in this country since 1965. *Id.* Intervenor Dachinger, born in Turku, Finland, has not renounced her Finnish citizenship, though she also is married to an American citizen and has lived in the United States since 1966. *Id.*

[4] N.Y. EDUC. LAW § 3001 (McKinney 1978).

[5] *Id.* Section 3001 of the New York Education Law provides in pertinent part:

> No person shall be employed or authorized to teach in the public schools of the state who is: . . . 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen.

Id. §§ 3001, 3001(3).

The applicable legislation does, however, provide two exceptions to an otherwise indiscriminate ban. Section 3001-a of the New York Education Law provides for the temporary granting of a teaching certificate for any resident alien who has applied for citizenship but was

On June 27, 1974, Norwick filed suit in the Federal District Court for the Southern District of New York.[8] She contended that a cause of action existed under the Civil Rights Act of 1871, 42 U.S.C. § 1983, because the New York statute denied her equal protection of the laws.[9] Ruling on the plaintiff's motion for summary judgment, a three judge panel[10] declared section 3001(3) violative of the four-

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denied due to oversubscription of naturalization quotas. *Id.* § 3001-a. The second relevant enactment, title 8, section 80.2(i) of the New York Code of Rules and Regulations allows non-citizens to teach when they "possess skills or competencies not readily available among teachers holding citizenship" or are "unable to declare an intention of becoming a citizen for valid statutory reasons." 8 N.Y. CODE OF RULES AND REGS § 80.2(i) (1970).

The Supreme Court, in special recognition of section 80.2(i)(1), noted that "a particular alien's special qualifications as a teacher outweigh the policy primarily served by [§ 3001(3)]." Ambach v. Norwick, 441 U.S. 68, 81 n.14 (1979).

[6] Ambach v. Norwick, 441 U.S. 68, 71 (1979). Appellees Norwick and Dachinger maintained permanent resident alien status. Norwick v. Nyquist, 417 F. Supp. 913, 914–15 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). To be so characterized, one must hold an immigrant visa and have "been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." 8 U.S.C. § 1101(a)(20) (1970).

Appellees' classification as resident aliens removed any obstacle a candidate for naturalization may have encountered because of quota restrictions imposed by the Immigration Service. Were Norwick and Dachinger seeking citizenship status only to be frustrated by the aforementioned quotas, they could have utilized the relief afforded by section 3001-a. *See* note 5 *supra*. However, as appellees did not pursue such avenues, the Supreme Court characterized their inactivity as a "reject[ion of an] open invitation extended to qualify for eligibility to teach." Ambach v. Norwick, 441 U.S. 68, 81 (1979).

[7] Norwick v. Nyquist, 417 F. Supp. 913, 914–15 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). Intervenor Dachinger was also denied on this basis. *Id.*

[8] Norwick v. Nyquist, 417 F. Supp. 913 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). Original defendant Ewald Nyquist, as Commissioner of the New York State Department of Education, was responsible "for the implementation and enforcement of the statutes and regulations challenged" in the litigation initiated by Norwick. Norwick v. Nyquist, 417 F. Supp. 913, 915 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). He was sued both individually and in his official capacity. *Id.* In the interim between the adjudication of the district court and the United States Supreme Court, Nyquist was succeeded by Gordon Ambach as Commissioner of Education.

[9] Norwick v. Nyquist, 417 F. Supp. 913, 915 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1970).

To achieve use of the federal courts, Norwick invoked the "jurisdictional counterpart" of section 1983, 28 U.S.C. § 1343. Norwick v. Nyquist, 417 F. Supp. 913, 915 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). Intervention on the part of Tarja U.K. Dachinger was permitted with the consent of the appellants. *Id.*

[10] Norwick v. Nyquist, 417 F. Supp. 913, 915 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979). The three judge district court was impaneled pursuant to 28

teenth amendment, and enjoined its further enforcement.[11] Appeal was taken to the United States Supreme Court and, on May 15, 1978, probable jurisdiction was noted.[12]

The Supreme Court, in *Ambach v. Norwick*,[13] in a five-to-four decision,[14] reversed the district court.[15] It determined that the equal protection clause of the fourteenth amendment did not prohibit states from discriminating against aliens in the employment of public school teachers.[16] The Court, limiting its focus to one issue, found the educators' role so imbued with the qualities inherent in representative government that citizenship restrictions were constitutionally permissible.[17] Justice Blackmun, writing for the dissent, argued that section 3001(3) was violative of the fourteenth amendment,[18] an irrational means to a questionable end,[19] and logically inconsistent with recent Supreme Court rulings.[20]

Ambach v. Norwick is the latest link in a chain of Supreme Court decisions concerning alien rights that has been forged over the last century. In the 1886 decision of *Yick Wo v. Hopkins*,[21] the Supreme Court first applied the equal protection analysis to persons other than citizens.[22] In *Yick Wo*, the City of San Francisco, riding the tide of anti-Chinese sentiment prevalent throughout the West in

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U.S.C. § 2281. This statute provides for a tripartite judicial hearing whenever an interlocutory or permanent injunction is sought against the enforcement, operation or execution of a state statute, and it is alleged that such law is in contravention of the federal constitution. 28 U.S.C. § 2281 (1970), *repealed by* Act of Aug. 12, 1976 Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119. Section 2281 was repealed on August 12, 1976, but a specific proviso of the repealer continued the statute's applicability to actions commenced before the effective date of the repeal. Act of Aug. 12, 1976, Pub. L. No. 94-381, § 2, 90 Stat. 1119. The trial court made its determination on July 20, 1976. Norwick v. Nyquist, 417 F. Supp. 913, 913 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979).

To date, there is no new legislation which compels the empanelment of a three judge tribunal when injunctions, temporary or permanent, are sought on the basis of a statute's alleged unconstitutionality.

[11] Norwick v. Nyquist, 417 F. Supp. 913, 922 (S.D.N.Y. 1976), *rev'd sub nom.* Ambach v. Norwick, 441 U.S. 68 (1979).

[12] Nyquist v. Norwick, 438 U.S. 902 (1978).

[13] 441 U.S. 68 (1979).

[14] *Id.* at 69. The majority was composed of Chief Justice Burger, and Justices Rehnquist, Stewart, Powell, and White. Justices Blackmun, Brennan, Marshall, and Stevens joined in dissent.

[15] *Id.* at 81.

[16] *Id.* at 80–81.

[17] *Id.* at 81 & n.4.

[18] *Id.* at 90 (Blackmun, J., dissenting).

[19] *Id.* at 87.

[20] *Id.* at 88–89.

[21] 118 U.S. 356 (1886).

[22] *Id.* at 369.

the 1870s,[23] passed municipal ordinances requiring laundry proprietors within city limits to obtain the consent to operate from the governing board of supervisors.[24] Convicted of violating this ordinance,[25] the plaintiff in error contended that he had been unjustly discriminated against.[26] Justice Matthews, writing for a unanimous court, determined that because the statute had a disproportionate impact upon resident aliens, without sufficient justification,[27] the ordinance contravened the fourteenth amendment.

Yick Wo prohibited the states from discriminating against aliens as a class. However, there soon arose a faction within the Court which argued that the states were infused with the power to exclude aliens from various pursuits, so long as the restriction actually pertained to "the regulation or distribution of the public domain, or . . . the common property or resources of the people of the State."[28]

In *Truax v. Raich*,[29] the Court on authority of the fourteenth amendment, overturned an Arizona statute which limited employers to hiring only a maximum percentage of aliens.[30] The eight justice

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[23] The need for massive amounts of cheap labor to work on the transcontinental railroad, and a lack of manpower generally, caused a vast influx of Asians into the United States during the 1860s and 1870s. *See generally* E. SABIN, BUILDING THE PACIFIC RAILROAD (1919). The completion of the transcontinental railroad in 1869, however, displaced many thousands of workers, and caused a major economic upheaval throughout the West. *See generally* O. LEWIS, THE BIG FOUR (1937).

[24] 118 U.S. at 357–58. The ordinances vested the governing board with total discretion, *id.* at 366, and were not applicable to laundries built of brick or stone composition. *Id.* at 357. Attempts to circumvent the restrictions imposed upon wood-frame laundries were effectively frustrated by requiring all those desirous of utilizing scaffolding (essential to the construction of brick or stone edifices) to secure a permit from the board of supervisors prior to use. *See id.* at 357–58. Testimony on the trial level revealed that of the approximately 320 laundries within the city and county of San Francisco, about 240 were owned and operated by subjects of China. *Id.* at 359. Of the total, 310, or about ninety six percent, were constructed of wood. *Id.*

[25] *Id.* at 359.

[26] *Id.* at 361. The defendant conceded that over 200 of the Chinese petitioners were denied permission to continue their businesses, while virtually all other requests were granted. *Id.* at 319.

[27] *Id.* at 373–74. The Court could not discover any justification for the obvious discrimination worked against the orientals, commenting: "the conclusion cannot be resisted, that no reason for [the discrimination] exists except hostility to the race and nationality to which the petitioners belong." *Id.* at 374. *See also* United States v. Wong Kim Ark, 169 U.S. 649, 695 (1898); Wong Wing v. United States, 163 U.S. 228, 242 (1896); *In re* Quong Woo (Laundry Ordinance Case), 13 F. 229 (1882).

[28] Truax v. Raich, 239 U.S. 33, 39 (1915). *See also* notes 33–38 *infra* and accompanying text. The Court equated a state's right to control areas in the public interest by discrimination against its own resident aliens with the state's acknowledged right to discriminate against other states' citizens. Truax v. Raich, 239 U.S. 33, 39–40 (1915).

[29] 239 U.S. 33 (1915).

[30] *Id.* at 35. Arizona enacted legislation requiring employers of more than five persons at any one time, to hire no less than eighty percent "qualified electors or native-born citizens of

majority reasoned that the equal protection clause allowed persons the right to live in any state. This freedom carried with it "the right to work for a living in the common occupations of the community."[31] The Court limited this pronouncement by recognizing that areas imbued with a "public interest" could merit discriminatory treatment.[32] The *Truax* decision was the major articulation of the "public interest" doctrine which, in a series of cases, was the vehicle for restrictions upon aliens' access to various sectors and activities.

In *Blythe v. Hinkley*,[33] the Court ruled that states possessed the power to discriminate against aliens in the application of probate laws absent treaties to the contrary.[34] Later, a line of interrelated cases[35] found the "public interest" inherent in the ownership of argricultural properties sufficient to justify discriminatory practices.[36] The operation of a pool hall and its propensity to be "harmful and vicious"[37]

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the United States or some subdivision thereof." *Id.* Penalties amounted to a fine of not less than one hundred dollars and imprisonment for not less than thirty days. *Id.* Submitting to the pressures of possible corporal and economic sanctions, defendant Truax released the plaintiff Raich, a native of Austria, from his employ as a cook in defendant's kitchen. *Id.* at 36. Raich thereafter instituted suit against both Truax and the Attorney General of Arizona, positing that the statute contravened the plaintiff's fourteenth amendment rights. Raich v. Truax, 219 F. 273, 275 (D. Ariz.), *aff'd*, 239 U.S. 33 (1915). The district court granted injunctive relief in favor of Raich, and the state appealed. 239 U.S. at 37.

[31] 239 U.S. at 43. The Court considered the preclusion of employment oportunities for resident aliens to be adverse to "the very essence of . . . personal freedom and opportunity" that the fourteenth amendment was designed to secure. *Id.* at 41.

[32] *Id.* at 40.

[33] 180 U.S. 333 (1901).

[34] *Id.* at 341–42. *See also* Hauenstein v. Lynham, 100 U.S. 483 (1879). In *Hauenstein*, it was noted that each state has the liberty to "give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede." Hauenstein v. Lynham, 100 U.S. 483, 484 (1879). However, the Constitution makes properly executed treaties superior to state law. U.S. CONST., Art. VI, Cl. 2. Thus, a state's ability to restrict alien rights was compromised by any treaty which construed the rights of the affected parties differently. *See* Hauenstein v. Lynham, 100 U.S. 483, 488 (1879).

[35] Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Terrace v. Thompson, 263 U.S. 197 (1923).

[36] *See, e.g.*, Terrace v. Thompson, 263 U.S. 197, 220–21 (1923). The *Terrace* Court determined that a state's interest in controlling the transfer of agricultural lands was a "matter . . . of highest importance [which] affect[ed] the safety and power of the State itself." *Id.* at 221. The Court found discriminatory practices defensible because of the " 'possibility that every foot of land within the state might pass to the ownership or possession of non-citizens.' " *Id.* at 220–21 (quoting Terrace v. Thompson, 274 F. 841, 849 (W.D. Wash. 1929)). Such a possibility was later characterized as "statistically absurd." Oyama v. California, 332 U.S. 633, 667 (1948) (Murphy, J., concurring).

[37] Clarke v. Deckebach, 274 U.S. 392, 397 (1927).

merited the expressed prejudices permitted in *Clarke v. Deckebach*.[38] The harvesting of tidal shellfish[39] and the hunting of wild game and fowl[40] also merited differential treatment of aliens. Indeed, public employment itself was classified as "within the public interest" and thus permitted the exclusion of aliens.[41]

The excesses wreaked upon resident aliens during World War II[42] provoked the first restriction of state power to discriminate on the basis of alienage[43] within public interest areas. In *Oyama v. California*,[44] the Supreme Court granted relief to a Japanese immigrant's American born minor son who had been denied ownership of

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[38] 274 U.S. 392 (1927). The Court found that the Cincinnati City Council gave reasonable considerations to the view that aliens' associations, experiences and activities disqualified them from pursuing an occupation of dangerous tendency. *Id.* The Court found the plaintiff in error's invocation of Asakura v. City of Seattle, 265 U.S. 332 (1924), to be without merit. Clarke v. Deckebach, 274 U.S. 396. *Asakura* declared a Seattle municipal ordinance, which prohibited aliens from operating pawn shops, unconstitutional. Asakura v. City of Seattle, 265 U.S. 332, 342 (1924). However, the *Clarke* Court cited the existence of a treaty with Japan which allowed Nipponese immigrants to operate wholesale and retail shops unfettered. The Court distinguished that treaty from the Treaty of 1815 with Great Britain, which protected commerce only among nations, and found only the Treaty of 1815 applicable to Clarke due to his English heritage. Clarke v. Deckebach, 274 U.S. 395–97.

[39] McCready v. Virginia, 94 U.S. 391 (1876). The relevant Virginia statute permitted only citizens of Virginia the right to harvest oysters from the riparian waters of the state. *Id.* at 394. The Court considered the state's proprietary interest in these mollusks to be comparable to the interest it possessed in the agricultural lands of the state. *Id.* at 396. This decision has been subsequently limited in scope. *See* Toomer v. Witsell, 334 U.S. 385, 408–09 (1948); Manchester v. Massachusetts, 139 U.S. 240, 265 (1891).

[40] Patsone v. Pennsylvania, 232 U.S. 138 (1914). Justice Holmes opined that the Commonwealth of Pennsylvania was within its sovereign power to exclude resident aliens from the use and enjoyment of wild game. *Id.* at 145–46. Considering the several treaties with foreign lands which supercede state law, the Court deferred questions of whether the harvest of wild game unduly burdened the conduct of commerce protected by the various treaties. *Id.* at 145.

[41] *See, e.g.*, Crane v. New York, 239 U.S. 195 (1915); Truax v. Raich, 239 U.S. 33 (1915). In Heim v. McCall, 239 U.S. 175 (1915), a New York City statute explicitly proscribed the employment of aliens on public works projects. The Court upheld the legislation, claiming "it belongs to the State, as guardian of its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." Heim v. McCall, 239 U.S. 175, 191 (1915) (quoting Atkin v. Kansas, 191 U.S. 207, 222–23 (1903)).

[42] *See, e.g., Ex parte* Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). In *Korematsu*, the Court upheld the federal government's right to evacuate thousands of Japanese with and without citizenship, from the coastal areas of California, and to confine them to relocation camps inland. Korematsu v. United States, 323 U.S. 214, 219 (1944). The government's interest in the national security was determined to constitute sufficient justification for his confinement. *Id.* at 223. *But see Ex parte* Endo, 323 U.S. 283, 302 (1944) (war power constitutionality incapable of detaining loyal Japanese-American citizens).

[43] Oyama v. California, 332 U.S. 633 (1948).

[44] *Id.*

certain agricultural lands because his father had paid the consideration and held the property as guardian.[45] This type of transaction was presumed to be a fraud under the California Alien Land Law,[46] which forbade the ownership of farm lands by aliens ineligible to attain citizenship.[47] The Supreme Court, however, in a five-to-four decision, found the treatment given citizen offspring of ineligible aliens radically different from that conferred upon children of native-born Americans or other eligible aliens.[48] This variance of procedure was without "the compelling justification which would be needed to sustain [such] discrimination."[49]

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[45] *Id.* at 636–39. The plaintiff's father, Kajiro Oyama, was ineligible for naturalization because he was a Japanese citizen. *Id.* at 635. At the time of the ownership denial, Japanese were among the very few ethnic groups not permitted to apply for citizenship. *Id.* at 635 n.3. The children of ineligible immigrants, who were born in this country, however, were not prohibited the right of land ownership. *See* Estate of Tetsubumiyano, 188 Cal. 645, 649, 206 P. 995, 998 (1922).

[46] CAL. GEN. LAWS ANN., act 261 (Deering 1944 & Supp. 1945). The statute created a presumption that any conveyance of land in which an ineligible alien paid the consideration was an attempt to "prevent, evade or avoid" escheat. *Id.* § 9(a). *See* notes 47–48 *infra* and accompanying text.

[47] 332 U.S. at 635. *See also* note 45 *supra* and accompanying text. The overall constitutional validity of the statute, not reconsidered in *Oyama*, 332 U.S. at 646–47, had grown out of the Court's holdings in a series of 1923 cases: Frick v. Webb, 263 U.S. 326 (1923); Webb v. O'Brien, 263 U.S. 313 (1923); Porterfield v. Webb, 263 U.S. 225 (1923). All upheld California's ability to deny certain aliens the right to own, transfer and convey agricultural properties. *See* notes 33–34 *supra* and accompanying text.

[48] 332 U.S. at 640. The statutory presumption of fraudulent intent was contrary to the usual presumption in similar circumstances. *See id.* at 642. Typically, a parent's payment of consideration for a land purchase and the securement of title in trust for his progeny gave rise to the presumption that a gift was intended. *See id.* at 641. Upon those who attacked the validity of such transfer, would fall the burden of proving that no bona fide gift was contemplated. *Id.* at 641.

Despite the presumptive burdens placed upon children of ineligible aliens, the California supreme court discovered no violated constitutional rights. This finding was premised on the fact that the lands under scrutiny escheated to the state at the time of initial acquisition by the ineligible alien, without ever vesting in the name of an American citizen. People v. Oyama, 29 Cal. 2d 164, 167, 173 P.2d 794, 796 (1946), *rev'd sub nom.* Oyama v. California, 332 U.S. 633 (1948).

In Cockrill v. California, 268 U.S. 258 (1925), a Japanese immigrant claimed to have contracted with a citizen third party for the purchase of land to be held in trust for the alien's children. The alien was to pay the consideration while the citizen held the property. *Id.* at 261. However, the Court upheld the statutory presumption of non-gift because the presumption of fraudulent intent applied to any recipient of the property, regardless of citizenship. *Id.* The *Oyama* Court, however, did not find *Cockrill* controlling, because it did not consider the rights of the citizen children. 332 U.S. at 645–46 n.27.

[49] 332 U.S. at 640. The Court found the only basis for the discrimination against Oyama as an American citizen was "that his father was Japanese, and not American, Russian, Chinese, or English." *Id.* at 644. Justice Murphy, in his concurrence, believed the law "was spawned of the great anti-Oriental virus which . . . infected [California]," and was founded in racial, economic and social antagonism. *Id.* at 651, 662 (Murphy, J., concurring).

While the *Oyama* Court refused to fully address alien rights, it had greatly restricted state power to utilize alienage as a vehicle to control use and transfer of land.[50] In *Takahashi v. Fish & Game Commission*,[51] the Supreme Court took this restriction one step further, and eliminated California's ability to deny, on the basis of alienage, the commercial exploitation of wildlife resources.[52] Without an explicit pronouncement, it rejected previous case law, and discovered no "special public interest" inherent in migratory ocean fish.[53] Also rejected was the argument that a state could employ alienage discrimination in the preservation of its interests because Congress also discriminated against aliens in the classification of immigrants by ethnic origin.[54] On this point, the Court found the congressional apportionments, made pursuant to an efficient regulation of immigration and naturalization, totally distinguishable from the disparaging treatment given aliens engaged in the harvesting of marine wildlife.[55] Moreover, the "tenuousness" of California's legal assertions highlighted the need for "narrow limits" to be imposed on

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[50] *Id.* at 647.

[51] 334 U.S. 410 (1948).

[52] *Id.* at 421. Plaintiff Takahashi had fished the coastal waters of California under license from 1915 to 1942. *Id.* at 413. In 1942, he was removed from the state pursuant to military order. *Id. See* note 46 *supra*. Upon his return in 1945, he was denied a commercial license pursuant to section 990 of the California Fish and Game Code. 334 U.S. at 413. Application for a writ of mandamus brought no permanent relief. Takahashi v. Fish & Game Comm'n, 30 Cal. 2d 719, 185 P.2d 805 (1947), *rev'd*, 334 U.S. 410 (1948). The United States Supreme Court thereafter granted Takahashi a writ of certiorari. Takahashi v. Fish & Game Comm'n, 333 U.S. 853 (1947).

While the petitioner was denied a commercial license, a 1947 amendment to the California Fish and Game Code allowed "any person, not a citizen of the United States" to receive a hunting or sport fishing license. 334 U.S. at 413–14 n.3 (quoting CAL. FISH & GAME CODE §§ 427, 428 (Deering 1945)).

[53] 334 U.S. at 421. The special interest that California claimed in coastal marine life had its origins in Patsone v. Pennsylvania, 232 U.S. 138 (1914), and McCready v. Virginia, 94 U.S. 391 (1876). *See* notes 39–40 *supra*. Such property rights waned through a series of subsequent cases. In Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928), it was determined that Louisiana lacked the power to dictate the handling and shipping of shrimp allegedly owned by the sovereign. *Id.* at 13. In Toomer v. Witsell, 334 U.S. 385 (1948), South Carolina was denied the right to discriminate against citizens of other states (including alien state citizens) in the assessment of license fees for commercial fishing vessels utilizing South Carolina riparian waters. *Id.* at 396–99. The Court, in Missouri v. Holland, 252 U.S. 416 (1920), concluded that a state claim to ownership of migratory wildlife was tenuous at best. *Id.* at 434. *But see* Geer v. Connecticut, 161 U.S. 519 (1896).

[54] 334 U.S. at 418.

[55] *Id.* at 419. In Hines v. Davidowitz, 312 U.S. 51 (1941), the Court addressed the issue of state law coexistence with federal law in the area of alien control. It determined that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Id.* at 66–67.

"the power of a state to apply its laws exclusively to its alien inhabitants."[56]

The judicial disfavor for alienage discrimination perhaps reached its pinnacle in *Graham v. Richardson*.[57] In a unanimous voice, the Supreme Court declared alienage classifications "inherently suspect"[58] and required the demonstration of a compelling state interest to justify a discriminatory scheme.[59] In *Graham*, an indigent Arizona resident alien was denied welfare benefits merely because she did not meet the fifteen-year national residency requirement.[60] The Court determined that the state's alleged interest in the distribution of its tax revenues was not of sufficient import to warrant this "invidious form of unequal treatment."[61] Utilizing the thoughts originally propounded in *Takahashi*,[62] the Court again found alienage discrimination of this type completely inapposite to superior congressional authority to control aliens' entrance into and residence in the country.[63]

[56] 334 U.S. at 420. The Court recognized that the fourteenth amendment "embod[ied] a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privilege with all citizens under non-discriminatory laws." *Id.* California's occupational prohibition was held to be inconsistent with this philosophy. *Id.*

[57] 403 U.S. 365 (1971).

[58] *Id.* at 376. The Court characterized aliens as a "discrete and insular" minority for which "heightened judicial solicitude" was necessary. *Id.* at 372 (quoting United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938)).

[59] 403 U.S. at 376. For a discussion of the equal protection clause and the various burdens of proof that apply, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 517–34 (1st ed. 1978).

[60] 403 U.S. at 367. Appellee Richardson was a Mexican citizen who immigrated to Arizona in 1956. *Id.* Having instituted suit in 1969, she became qualified for benefits in 1971, the time of the Court's decision. *See id.* This did not moot Richardson's individual claim for benefits during the period 1969-1971, as well as the claims of the class of persons similarly situated. *See id.* at 367 n.2.

[61] *Id.* at 374. At the outset, the Court noted that the special public interest doctrine had its foundation in the belief that privileges, rather than rights, could be allocated on the basis of citizenship. *Id. See* People v. Crane, 214 N.Y. 154, 164, 108 N.E. 427, 430, *aff'd sub nom.* Crane v. New York, 239 U.S. 195 (1915). However, such a "right-privilege" distinction had been rejected in a series of Supreme Court decisions. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 633 (1968) (state's fiscal integrity not constitutionally attainable through series of invidious classifications); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (right-privilege distinction for unemployment benefits rejected).

[62] *See* notes 56–59 *supra* and accompanying text.

[63] 403 U.S. at 372–73. In *Graham*, the Court concluded that the federal government has " 'broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.' " *Id.* at 377 (quoting Takahashi v. Fish & Game Comm'n, 334 U.S. at 419). In accordance with this authority, Congress determined that all indigents or other potential public charges be refused entry to this country. 8 U.S.C. § 1182(A)(8), (15) (1970). Once having entered, however, all aliens are statutorily entitled to receive equal treatment under the law. 42 U.S.C. § 1981 (1974). From congressional action, it was inferred by the Court that discriminatory treatment worked against subsequently impoverished resident aliens contradicted federal government mandate. 403 U.S. at 378.

Sugarman v. Dougall[64] concerned a New York statute which prohibited aliens from holding positions in the "competitive class" of civil servants employed by the state.[65] *Sugarman* constituted an affirmation of the *Graham* philosophies, but with an important difference. The Court, heeding the *Graham* pronouncement, declared the statute unconstitutional[66] because it was both over- and under-inclusive in its scope, and incapable of withstanding close judicial scrutiny.[67] The *Sugarman* Court also commented on the types of alienage restrictions which could satisfy the equal protection demands of the fourteenth amendment.[68] In particular, it suggested that various positions, instilled with the essence of "representative government," might embody characteristics and qualities worthy of citizenship requirements.[69]

In *In re Griffiths*,[70] decided on the same day as *Sugarman*, the Supreme Court determined that the attributes of representative government did not sufficiently pervade the practice of law to allow discriminatory restrictions.[71] The Court reasoned that there was no ra-

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[64] 413 U.S. 634 (1973).

[65] *Id.* at 635. The classified civil service in the State of New York was composed of four groups of which only the competitive class had an alienage restriction imposed upon it by New York Civil Service Law, section 53(1). *Id.* at 639. Notably, the Court mentioned the existence of an unclassified service to which no restriction operates. It "include[d] among others, all elective offices, offices filled by legislative appointment, employees of the legislature, various offices filled by the Governor, and *teachers*." *Id.* at 640 (emphasis added). However, certain other statutory schemes affected the various positions in the unclassified service, and subjected them to citizenship requirements. *Id. See, e.g.*, N.Y. CONST. art. III, § 7 (members of legislature); N.Y. CONST. art. IV, § 2 (the Governor and Lieutenant-Governor); N.Y. PUB. OFFICERS LAW § 3 (McKinney Cum. Supp. 1979) (non-elective civil officers); N.Y. EDUC. LAW § 3001(3) (McKinney 1970) (public school teachers). For a discussion of other alien employment restrictions, see Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COL. L. REV. 1012, 1021–23 (1957).

[66] 413 U.S. at 646.

[67] *Id.* at 642. Declaring the statutory scheme to be "neither narrowly confined nor precise in its application," the Court noted that the statute proscribed alien employment in both menial and high level positions. *Id.*

[68] *Id.* at 647. The Court cited, *inter alia*, the state's constitutional power to insist upon citizenship status as a prerequisite to tenure in public office. *Id.* Jurors, also may be so limited. *See* Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), *aff'd without opinion*, 426 U.S. 913 (1976).

[69] 413 U.S. at 647. In the preservation of its basic political community, a state may prescribe citizenship prerequisites for:

> persons holding state elective or important non-elective 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.

[70] 413 U.S. 717 (1973).

[71] *Id.* at 724. Griffiths, a citizen of the Netherlands, had successfully completed law school, but was prohibited from taking the Connecticut state bar exam because of her alien status. *Id.*

tional relationship between the prohibition of alien membership in the Connecticut bar and the state's proper interest in the character and general fitness requisite for an attorney and counselor-at-law.[72] The potentiality that some resident aliens were "unsuited to the practice" did not constitute sufficient reason for a total ban.[73] Addressing the *Sugarman* exceptions, the Court rejected the state's argument that a lawyer, characterized as an "officer of the Court," was "so close to the core of the political process as to make him a formulator of government[al] policy."[74]

The prohibition of alienage discrimination in a professional employment context was further buttressed in *Examining Board of Engineers v. Flores de Otero*.[75] The *Flores de Otero* Court struck down a Puerto Rico statute that discriminated against aliens in the issuance of engineering licenses.[76] To continue such disparaging treatment in one occupation, the Court rationalized, would have allowed "any State to bar the employment of aliens in any or all lawful occupations."[77]

In what has proved to be its last affirmation[78] of alien rights, the Supreme Court in *Nyquist v. Mauclet*,[79] held that New York State lacked sufficient justification in its concern for the enhanced educa-

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at 718. Having to renounce her Dutch citizenship in order to be naturalized, she declared no intent to become a United States citizen. *Id.* at 717; *see* 8 U.S.C. § 1448(a) (1970).

[72] 413 U.S. at 723 (quoting Law Students Research Council v. Wadmond, 401 U.S. 154, 159 (1971)). Connecticut, however, argued that the special role of the lawyer in society was the justification for the disparaged treatment. *Id.*

[73] *Id.* at 725. The *Griffiths* Court suggested a case-by-case determination of applicant fitness to practice law. *Id.*

[74] *Id.* at 729. While the Court did acknowledge a lawyer's role as an "officer of the court," *id.* at 728, it noted that such persons are engaged in private employment and exercise no real governmental power. *Id.* at 728–29.

[75] 426 U.S. 572 (1976).

[76] P.R. LAWS ANN. tit. 20, § 689 (1974).

[77] 426 U.S. at 606–07. In satisfaction of the fourteenth amendment equal protection mandates, Puerto Rico offered three justifications for the ban it instituted on alien employment in private engineering practice: control of the vast influx of Spanish speaking foreign nationals into Puerto Rico; elevation of the low standard of living in the Commonwealth; and achievement of financial accountability for defective and deficient engineering, within a 10-year period, in personal and property damage due to building collapse or failure. *Id.* at 605.

The first asserted rationale was determined to be in contravention of the federal government power to control and regulate immigration. *Id.* The second justification ran afoul of the principle cited in Truax v. Raich, 239 U.S. at 35. *See* notes 29–31 *supra* and accompanying text. The third reason failed, "bearing no particular or rational relationship to skill, competence or financial responsibility." 426 U.S. at 606.

[78] At this writing, no Supreme Court decision subsequent to *Nyquist* has expanded alien rights or struck down state legislation in restraint of non-citizens.

[79] 432 U.S. 1 (1977).

tion of the electorate, to refuse alien state citizens equal access to scholarship funds and other educational financial assistance.[80] Moreover, the *Mauclet* Court decided that a state could not utilize financial aid programs as an inducement for aliens to seek citizenship status.[81]

In the first application of the "representative government" exception carved out in *Sugarman*,[82] state troopers were considered synonymous with those "important non-elective . . . officers who participate directly in the . . . execution . . . of broad public policy."[83] The Supreme Court in *Foley v. Connelie*,[84] ruled that an alien may be constitutionally prohibited from employment as a police officer because such a position is "clothed with authority to exercise an almost infinite variety of discretionary powers."[85] Chief Justice Burger, writing the majority opinion, considered the police a pervasive presence in our society,[86] and one of the basic components of representative government.[87]

In his dissent, Justice Marshall, questioned the majority's heavy reliance on the police arrest power.[88] He reasoned that such power could not be sufficient justification for alienage restrictions when any person, citizen *vel non*, has statutory authority to make arrests and searches incident thereto.[89]

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[80] *Id.* at 11. While such a concern was considered a "laudable objective," it would not have been stymied by the inclusion of resident aliens in scholarship programs, *id.*, particularly in light of the small number of persons disqualified by virtue of their alien status. *See* Brief for Appellee at 9 n.4, Nyquist v. Mauclet, 432 U.S. 1 (1977).

[81] 432 U.S. at 10.

[82] 413 U.S. at 647–49.

[83] Foley v. Connelie, 435 U.S. 291 (1978). The Court also characterized state policemen as not within the category of persons employed in "routine public employment or other 'common occupations of the community.'" *Id.* at 298.

[84] 435 U.S. 291 (1978).

[85] *Id.* at 297. The *Foley* Court considered police capable of affecting "the most sensitive areas of daily life." *Id.* However, Justice Stevens noted in his dissent that neither the police, nor the military, have policy-making powers; rather both execute the decisions and policies developed by the citizenry. *Id.* at 310 (Stevens, J., dissenting).

[86] *Id.* at 297. The *Foley* Court emphasized the serious implications of the exercise of the police arrest power. *Id.* Because most arrests are devoid of judicial authority, police officers must exercise a "high degree of judgment and discretion," raising the attendant risks of abuse and detrimental effect on private individuals. *Id.* at 298.

[87] *Id.* at 297.

[88] *Id.* at 304–06.

[89] *Id.* at 306. Justice Stevens' dissent further highlighted the similarity between citizen police and an alien constabulary, *id.* at 308, citing the alien's alleged penchant for disloyalty as the sole distinction. Justice Stevens argued that if the Court held such a disloyalty theorem insufficient justification for state restriction of the practice of law, *see In re* Griffiths, 413 U.S. at 717, such a theory should also be insufficient justification for the restriction of applicants to the police force. 438 U.S. at 312.

The *Ambach* Court had only one real issue before it: did the fourteenth amendment limit a state's ability to exclude aliens from public employment as elementary and secondary school teachers?[90] Justice Powell, delivering the opinion of the five justice majority, determined that under the equal protection clause the states did possess such powers.[91]

The Court's first consideration was to ascertain the true character and nature of the publicly employed school teacher. Underlying this investigation was the Court's recognition of the continued viability of the *Sugarman* representative government exception in a form metamorphosized from its simple public interest doctrine origins in *Truax v. Raich*.[92] Where a particular public employment satisfied the *Sugarman* exception, a strict scrutiny approach would be discarded in favor of a mere rational basis inquiry.[93]

The governmental function exception was viewed by the *Ambach* Court as an embodiment of the philosophical distinctions between "citizen" and "alien" inherent in the federal constitution.[94] Citizenship connoted an essential communion of thought with the entity exercising governmental powers.[95] This association was believed to be of such quality that no mere oath of allegiance or pledge of service could adequately substitute.[96]

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[90] 441 U.S. at 69.

[91] *Id.* at 82.

[92] *Id.* at 73. In *Truax v. Raich*, the court inferred that persons engaged in public work or affecting some public interest could be subjected to citizenship requirements. 239 U.S. at 39–40. In *Sugarman v. Dougall*, it was recognized that "in an appropriately defined class of positions, [a state could] require citizenship as a qualification for office." 413 U.S. at 647.

The *Ambach* Court characterized public positions which fell within the *Truax-Sugarman* exception as those "bound up with the operation of the State as a governmental entity." 441 U.S. at 73–74. The dissent seriously questioned whether the teaching profession fit such a description. *See id.* at 88–90 (Blackmun, J., dissenting).

[93] 441 U.S. at 73. *See also* Perkins v. Smith, 370 F. Supp. 134, 136 (D. Md. 1974), *aff'd without opinion*, 426 U.S. 913 (1976). In *Sugarman*, the Court declared that its scrutiny would not be so intense where the issues concerned were clearly within the state's power. 413 U.S. at 648. In *Foley*, it was considered "inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.' " 435 U.S. at 295 (quoting Nyquist v. Mauclet, 432 U.S. at 14 (Burger, C.J., dissenting)).

[94] 441 U.S. at 74–75. The Court considered the differences between citizen and alien as fundamental to the concept of government. *Id.* at 75. Notably, the Constitution itself highlights the distinction eleven times. *Id.*

[95] *Id.* It was recognized in *Sugarman* that the state had a right "to preserve the basic conception of a political community," 413 U.S. at 647, by the exclusion of "aliens from participation in . . . democratic political institutions." *Id.* at 648.

[96] 441 U.S. at 75. *But see In re* Griffiths, 413 U.S. at 725–27.

Public school educators were deemed to fall within the government function exception because of the responsibility and discretion they possessed while fulfilling one of the " 'most fundamental obligation[s] of government to its constituency.' "[97] Citing a score of cases as precedent, the *Ambach* Court posited that teachers were integral to the proper development of a student's conceptions of society and government.[98] No quantum of standardization or subject specialization could minimize a teacher's pervasive influence on impressionable students;[99] even the example conveyed by teachers outside the classroom was thought to have significant effect. Section 3001(3) was perceived to bear a rational relationship to the interest it avowedly served, because barred from educational employ were only those persons who "demonstrated their unwillingness to obtain United States citizenship."[100]

In his dissent, Justice Blackmun objected to the majority's enforcement of provincial legislation which had its genesis in the reactionary days of World War I.[101] Seeing a clear division of thought in past alien-rights decisions, he argued that the case fell on the *Sugarman-Griffith-Flores de Otero-Mauclet* side in favor of alien rights, rather than on the negative *Foley* side.[102] The dissent noted the inconsistency between the majority's argument for a general bar to alien educational employment, and the four exceptions to the general bar provided by the statutory scheme.[103] Moreover, the fact that these same excluded aliens could by statute sit on the local school boards which control the schools and their employees,[104] in

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[97] 441 U.S. at 76 (quoting Foley v. Connelie, 435 U.S. at 297).

[98] *Id.* at 77. *See, e.g.*, Keyes v. School Dist. No. 1, 413 U.S. 189, 246 (1973); Wisconsin v. Yoder, 406 U.S. 205–13 (1972); School Dist. v. Schempp, 374 U.S. 203, 230 (1963).

[99] 441 U.S. at 78–79. The Court determined that the inherent and ingrained cultural, social, and political orientation of non-naturalized teachers would defy any attempts to factor out undesirable qualities that would filter through to the students. *Id.*

[100] *Id.* at 80.

[101] *Id.* at 82 (Blackmun, J., dissenting). Justice Blackmun's dissent echoed the impassioned opinions of Justice Murphy who spoke out against the alienage discrimination perpetrated upon the Japanese during World War II. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 233–42 (1944); Hirabayashi v. United States, 320 U.S. 81, 109–14 (1943).

[102] 441 U.S. at 84 (Blackmun, J., dissenting).

[103] *Id.* at 86–87 (Blackmun, J., dissenting). The exceptions noted by the dissent included: (1) section 3001(3) which provides for alien employment pursuant to regulations adopted by the Commissioner of Education; (2) section 3001-a which excludes aliens from the employment ban who are affected by oversubscribed immigration quotas; (3) all private schools who educate over 18% of all New York elementary and secondary school children; (4) section 3001-a which allows aliens declaring an intent, albeit unfulfilled, to become American citizens. *Id.* at 86. Interestingly, such persons need only take an oath of allegience to continue employment. *See* N.Y. EDUC. LAW § 3001-a (McKinney 1979).

[104] N.Y. EDUC. LAW § 2590-c (McKinney 1979).

Justice Blackmun's opinion, further narrowed the alleged schism between citizen and alien.[105]

The dissent also characterized section 3001(3) as irrational in that the totality of the educational process emphasized by the majority could hardly be served by excluding some of the diverse facets of our society.[106] Finally, Justice Blackmun could discover no discernible difference between the lawyer in *Griffiths* and the teacher in the case at bar, to warrant differential treatment.[107]

The *Ambach* majority placed an inordinate value on the role of public school teachers in the operation of representative government. More importantly, the Court overlooked the real position of the elementary and secondary educator in our society, which could be characterized as among the more "common occupations" of our day,[108] falling within the protections posited by *Truax v. Raich* and its progeny.[109]

The *Ambach* holding appears inconsistent with the views offered in *In re Griffiths*.[110] The *Ambach* majority asserted that a state may constitutionally presume that all persons who chose not to pursue United States citizenship, irrespective of their origin, academic field of interest, strength of ties to the United States, or willingness to take an oath of allegiance, are unfit to teach in the elementary or secondary public schools.[111] In *Griffiths*, however, a similar argument was

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[105] *Id.* at 86–87 (Blackmun, J., dissenting).

[106] *Id.* at 87–88. In Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), Justice Powell pronounced sentiments similar to Justice Blackmun's *Ambach* entreaties and recognized the advantages inherent in neighborhood schools composed of groups ethnically homogenous. 413 U.S. 189, 245–46. The prohibition in the instant case against the employ of teachers closely identified with these groups would seemingly be inconsistent with the Court's past perceptions of local schools.

[107] 441 U.S. at 88–89 (Blackmun, J., dissenting). Seeing the lawyer in *Griffiths* as a paradigm for youth, Justice Blackmun could discover no reason for differentiated treatment of teachers on the basis of the model influence they offer pupils. *Id.* at 89 (Blackmun, J., dissenting) (quoting *In re* Griffiths, 413 U.S. at 729). Moreover, he inferred that the oath of allegiance believed satisfactory in *Griffiths* to obviate the need for discrimination, would serve equally well in the case at bar. *See id.* at 87–88 n.7 (Blackmun, J., dissenting).

[108] Truax v. Raich, 239 U.S. at 39. The teaching profession constitutes the third largest occupation in New York, trailing only secretaries and sales personnel. Brief for Appellee at 35–36, Ambach v. Norwick, 441 U.S. 68 (1979) (citing N.Y. State Dep't of Labor, Div. of Research and Statistics, Bureau of Labor Market Information of Pub. Workers) [hereinafter cited as Brief for Appellee]. Educators form the largest block of persons employed by the state. *Id.*

[109] Truax v. Raich, 239 U.S. at 35.

[110] 413 U.S. at 717. *See* notes 71–74 *supra* and accompanying text.

[111] 441 U.S. at 75, 80. The presumption of unfitness does not statutorily operate where the alien declares an intent to obtain American citizenship. N.Y. EDUC. LAW § 3001-a (McKinney 1979). On the district court level, the state argued that an alien "[b]y obtaining declarant status

labeled "unconvincing" and without "justification for a wholesale ban."[112]

A more appropriate approach by New York would have been the pursuit of a less onerous alternative that would have served the desired goals while avoiding invidious discrimination.[113] Numbered among such substitutes are oaths of allegience and diligence, which the appellees in *Ambach* were willing and ready to take.[114] Character investigations would "insure that an applicant is not one who 'swears to an oath pro forma while declaring or manifesting his disagreement with or indifference to the oath.' "[115] "Continued scrutiny" could also insure compliance.[116] In conjunction with such evaluation, subject specialization could further minimize any possible threat to the state's interest in a proper educational environment.[117] The nexus between citizenship as an outward manifestation of loyalty and loyalty itself is tenuous. Where citizen students need not participate in pledges of allegiance to the flag,[118] and where avowed communists cannot be stopped from teaching,[119] it appears inconsistent to deny positions of employment as public school teachers to non-

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[and timely completing the naturalization process], . . . has provided objective evidence that he in fact believes in the American heritage which he in turn is obliged to transmit to his students." Norwick v. Nyquist, 417 F. Supp. at 919. It was argued by the appellees that section 3001(3) swept too broadly and excluded aliens whose land of origin possessed "political and cultural systems almost indistinguishable" from that of the United States. Brief for Appellee, *supra* note 108, at 72. Moreover, to reject aliens of such countries, would be tantamount to rejection of citizens. *Id.*

[112] 413 U.S. at 725. *See also* Norwick v. Nyquist, 417 F. Supp. at 921.

[113] *See* Norwick v. Nyquist, 417 F. Supp. at 920–21. The pursuit of less onerous alternatives is in recognition of the fact that " '[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools.' " *Id.* at 920 (quoting Shelton v. Tucker, 364 U.S. 479, 488 (1965)). However, "the means the State employs must be precisely drawn in light of the acknowledged purpose." Sugarman v. Dougall, 413 U.S. at 653. *See also* Shelton v. Tucker, 364 U.S. 479, 488 (1965).

[114] Ambach v. Norwick, 441 U.S. at 85. It is interesting to note, that while native-born Americans, many of whom take this country's political institutions for granted are allowed public employment, appellees, who demonstrate a higher degree of respect for American ideals by affirmatively swearing to uphold the Constitution, are denied.

[115] *In re* Griffiths, 413 U.S. at 726.

[116] *Id.* at 726–27. Sanctions against inappropriate conduct, on a case-by-case basis, would ensure that the proper role model is displayed to students. *See* Ambach v. Norwick, 441 U.S. at 87–88 n.7 (Blackmun, J., dissenting).

[117] *See generally* Ambach v. Norwick, 441 U.S. 68 (1979). Subject specialization would allow local authorities to minimize aliens' impact on students in areas identified with the spirit of representative government, *i.e.*, history, civics. This, in conjunction with pre-employment investigation, could ensure the satisfaction of the state's avowed interest.

[118] *See, e.g.*, Russo v. Central School Dist. No. 1, 469 F.2d 623 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

[119] *See, e.g.*, Keyishian v. Board of Regents, 385 U.S. 589, 610 (1967).

citizens who profess eagerness to take oaths of allegiance and obedience.

Furthermore, if " 'the robust exchange of ideas' . . . is of paramount importance in the fulfillment of [the educational] mission,"[120] then the New York statute in question affronts such diversity of intellectual interplay. As Justice Blackmun's dissent ably demonstrates, the student populace would be well served by the exposure to various teachers, albeit aliens, who had enjoyed a wealth of cultural and societal experiences unknown to native-born Americans.[121] This interface would be particularly beneficial in the language and the arts.[122]

The statute also appears to be under- and over-inclusive as to its avowed purpose. Private school students, who arguably should be included under the state's interest in ensuring the absence of un-American attitudes within the educational system, do not receive the alleged protection of the statute because they are not within its purview.[123] At the opposite end of the spectrum, the statute is over-inclusive because it draws within its ambit grades of educational instruction where impact on political socialization is probably insignificant, and at best conjectural.[124] Because section 3001(3) is "neither narrowly confined nor precise in its application,"[125] it is in violation of the fourteenth amendment.

The availability of numerous less burdensome alternatives further highlights the overreaching nature of the statute. Moreover, it is an inappropriate exercise of state power because the "pall of orthodoxy" cast by this statute precludes the existence of the multi-faceted elements integral to a complete academic microcosm.[126]

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[120] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

[121] *See* Ambach v. Norwick, 441 U.S. at 87.

[122] Because noted writer Bertrand Russell was an Englishman, he was successfully prohibited from teaching at the City College of New York. Kay v. Board of Higher Educ., 18 N.Y.S.2d 821 (Sup. Ct.), *aff'd*, 20 N.Y.S.2d 1016, *leave to appeal denied*, 21 N.Y.S.2d 396 (1st Dep't); *leave to appeal denied*, 284 N.Y. 578 (1940).

[123] 441 U.S. at 86. 18% of New York state's student population attend private schools. *Id.* Justice Blackmun noted that "[t]he education of . . . private school pupils seems not to be inculcated with something less than what is desirable for citizenship." *Id.*

[124] Wisconsin v. Yoder, 406 U.S. 205, 226–27 (1972). In *Yoder*, the Court declared that "there is at best a speculative gain in terms of meeting the duties of citizenship from compulsory formal education [after the eighth grade]." *Id.* at 226–27.

[125] Sugarman v. Dougall, 413 U.S. at 643.

[126] Norwick v. Nyquist, 417 F. Supp. at 922 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967)).