AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Citizenship

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

Susan Norwick was a citizen of the United Kingdom who had lived in the United States since 1965. She married an American citizen, but made no effort to become a citizen herself. In 1973 she applied for a certificate that would enable her to teach in New York elementary schools. She was turned down because New York law "No person shall be employed or authorized to teach in the public schools of the state who is . . . [n]ot a citizen [or not in the process of becoming a citizen." Norwick then filed a lawsuit against Gordon Ambach, the state Commission of Education. She charged that the New York law violated the equal protection clause. A three judge federal district court panel agreed and declared the ban on aliens unconstitutional. Ambach then appealed the decision to the Supreme Court of the United States. The Mexican-American and Asian-American Legal Defense Funds jointly submitted a brief supporting Norwick. That brief asserted,

> *[m]any Mexican-American and Asian-American public school children have a right to bilingual educational opportunities. New York, a State with a large Mexican American and Asian-American population, excludes from the workforce a significant number of persons likely to have the bilingual, bicultural skills needed by those children.*

Justice Powell's majority opinion begins by noting that the justices in some cases had asserted that discrimination against aliens warranted strict scrutiny, but in others, most notably Foley v. Connelie *(1978), the court had insisted on a rational basis standard. On what basis did Powell claim that the justices have distinguished matters that warrant rational scrutiny from matters that warrant more exacting judicial review? Is his analysis of the precedents correct? Which side of the line do you believe* Ambach *falls on?*

Consider a very different explanation for the cases Justice Powell discusses. From 1971 until 1976, the justices always struck down state laws discriminating against aliens. In 1978, Justice Stewart in Foley *for the first time voted to strike down a state discrimination. Stewart's concurring opinion confessed he could see no distinction between* Foley *and the previous cases. He simply had changed his mind.*

Ambach *concerned a state law that discriminated against aliens. In* Hampton v. Sun Mow Wong *(1976), Justice Steven's majority opinion acknowledged that "overriding national interests may provide a justification for a citizenship requirement in the federal service even though an identical requirement may not be enforced by a State." Nevertheless, Stevens insisted that when Congress sought to discriminate against aliens, "some judicial scrutiny of the deprivation is mandated by the Constitution." On this basis and because the prohibition in question had been adopted by an administrative agency rather than Congress, Justice Stevens declared unconstitutional a civil service regulation prohibiting most resident aliens from obtaining federal jobs in American territories. Justice Rehnquist in dissent maintained that any judicial scrutiny of such regulations was inappropriate. He asserted, "the exclusive power of Congress to prescribe the terms and conditions of entry includes the power to regulate aliens in various ways once they are here."*

JUSTICE POWELL delivered the opinion of the Court.

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

long has been subject to constitutional constraints. . . . [I]n *Truax v. Raich* . . . (1915), a law requiring at least 80% of the employees of certain businesses to be citizens was held to be an unconstitutional infringement of an alien's "right to work for a living in the common occupations of the community. . . ." At the same time, however, the Court also has recognized a greater degree of latitude for the States when aliens were sought to be excluded from public employment. At the time *Truax* was decided, the governing doctrine permitted States to exclude aliens from various activities when the restriction pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State. . . ."

Over time, the Court's decisions gradually have restricted the activities from which States are free to exclude aliens. The first sign that the Court would question the constitutionality of discrimination against aliens even in areas affected with a "public interest" appeared in *Oyama v. California* (1948). The Court there held that statutory presumptions designed to discourage evasion of California's ban on alien landholding discriminated against the citizen children of aliens. The same Term, the Court held that the "ownership" a State exercises over fish found in its territorial waters "is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so." *Takahashi v. Fish & Game Comm'n* . . . (1948). This process of withdrawal from the former doctrine culminated in *Graham v. Richardson* (1971) . . . which for the first time treated classifications based on alienage as "inherently suspect and subject to close judicial scrutiny." . . . Applying Graham, this Court has held invalid statutes that prevented aliens from entering a State's classified civil service, *Sugarman v. Dougall* (1973), practicing law, *In re Griffiths* . . . (1973), working as an engineer, *Examining Board v. Flores de Otero* (1976), and receiving state educational benefits, *Nyquist v. Mauclet* (1977).

Although our more recent decisions have departed substantially from the public-interest doctrine of Truax 's day, they have not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government. . . .

The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court. . . . Applying the rational-basis standard, we held last Term that New York could exclude aliens from the ranks of its police force. *Foley v. Connelie* . . . (1978). Because the police function fulfilled "a most fundamental obligation of government to its constituency" and by necessity cloaked policemen with substantial discretionary powers, we view the police force as being one of those appropriately defined classes of positions for which a citizenship requirement could be imposed. . . .

The rule for governmental functions, which is an exception to the general standard applicable to classifications based on alienage, rests on important principles inherent in the Constitution. The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. . . . The assumption of that status, whether by birth or naturalization, denotes an association with the polity which, in a democratic republic, exercises the powers of governance. . . . It is because of this special significance of citizenship that governmental entities, when exercising the functions of government, have wider latitude in limiting the participation of noncitizens.

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

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

necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists. . . .

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

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

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, dissenting.

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We are concerned here with elementary and secondary education in the public schools of New York State. We are not concerned with teaching at the college or graduate levels. It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language. The appellees, to be sure, are resident "aliens" in the technical sense, but there is not a word in the record that either appellee does not have roots in this country or is unqualified in any way, other than the imposed requirement of citizenship, to teach. Both appellee Norwick and appellee Dachinger have been in this country for over 12 years. Each is married to a United States citizen. Each currently meets all the requirements, other than citizenship, that New York has specified for certification as a public school teacher. . . . Each is willing, if required, to subscribe to an oath to support the Constitutions of the United States and of New York. Each lives in an American community, must obey its laws, and must pay all of the taxes citizens are obligated to pay. Appellees, however, have hesitated to give up their respective British and Finnish citizenships. . . .

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[T]he New York statute is all-inclusive in its disqualifying provisions: "No person shall be employed or authorized to teach in the public schools of the state who is . . . [n]ot a citizen." It sweeps indiscriminately. It is "neither narrowly confined nor precise in its application," nor limited to the accomplishment of substantial state interests. . . .

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

way to accomplish the desired result. An artificial citizenship bar is not a rational way. It is, instead, a stultifying provision. . . .

[I]t is logically impossible to differentiate between this case concerning teachers and *In re Griffiths* (1973) concerning attorneys. If a resident alien may not constitutionally be barred from taking a state bar examination and thereby becoming qualified to practice law in the courts of a State, how is one to comprehend why a resident alien may constitutionally be barred from teaching in the elementary and secondary levels of a State's public schools? One may speak proudly of the role model of the teacher, of his ability to mold young minds, of his inculcating force as to national ideals, and of his profound influence in the impartation of our society's values. Are the attributes of an attorney any the less? He represents us in our critical courtroom controversies even when citizenship and loyalty may be questioned. He stands as an officer of every court in which he practices. He is responsible for strict adherence to the announced and implied standards of professional conduct and to the requirements of evolving ethical codes, and for honesty and integrity in his professional and personal life. Despite the almost continuous criticism leveled at the legal profession, he, too, is an influence in legislation, in the community, and in the role-model figure that the professional person enjoys. . . .

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