Louisiana Law Review

Volume 40 | Number 4
Summer 1980

Ambach v. Norwick: A Further Retreat from Graham

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Repository Citation
Jan C. Holloway, *Ambach v. Norwick: A Further Retreat from Graham*, 40 La. L. Rev. (1980)
Available at: http://digitalcommons.law.lsu.edu/lalrev/vol40/iss4/9

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represented in *J.R.* and *Institutionalized Juveniles*, these recent decisions reveal an unwillingness to depart from more firmly established rights of family autonomy and a belief that, in cases of immature and/or incompetent children, their most fundamental right is protection from their own poor judgment.[68] Traditionally, the family has functioned as the guardian of its individual members, particularly those incapable of protecting their own interests. Relative to these children, the traditional family role continues to receive maximum constitutional protection and the support of a majority of the Court.

Theresa Gallion

Ambach v. Norwick: A FURTHER RETREAT FROM *Graham*

Two permanent-resident alien[1] school teachers[2] instituted an action to contest the constitutionality of a New York statute[3] pro-

68. For expansion on this proposition, *see* Hafen, *supra* note 64, at 651-52.

1. "The term 'alien' means any person not a citizen or national of the United States." Immigration and Nationality Act § 101(a)(3), 8 U.S.C. § 1101(a)(3) (1976). An alien who has been granted the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws is said to have been "lawfully admitted for permanent residence." *See id.* §§ 101(a)(15), 101(a)(20) & 245, 8 U.S.C. §§ 1101(a)(15), 1101(a)(20) & 1255 (1976). For an outline of the regulations pertaining to adjusting one's status from that of a nonimmigrant to that of a person admitted for permanent residence, *see* E. RUBIN, IMMIGRATION PRACTICE A87-A92 (1978).

This note is limited primarily to a discussion of discrimination against resident aliens.

2. The original plaintiff, S. Norwick, was born in Scotland and is a British subject. T. Dachinger, who obtained leave to intervene as a plaintiff, was born in Finland and remains a citizen of that country. The plaintiffs' applications for teaching certificates were denied because of their failure to meet the citizenship requirements of section 3001(3) of the New York Education Law. Ambach v. Norwick, 99 S. Ct. 1589, 1591-92 (1979). For the text of section 3001(3), see note 3, *infra*.

3. N.Y. EDUC. LAW § 3001(3) (McKinney 1967). Section 3001(3) 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.

This statute provides that temporary permits can be issued for persons who are ineligible for citizenship because of oversubscribed quotas. The Commissioner of Education can and has provided for temporary certificates for aliens who are not yet eligible for citizenship. 99 S. Ct. at 1591 n.2.

hibiting the permanent certification as a public school teacher of any alien who has not manifested an intention to apply for United States citizenship. A three-judge district court panel, employing "close judicial scrutiny,"[4] granted plaintiffs' motion for summary judgment, finding that the statute discriminated against aliens in violation of the equal protection clause of the fourteenth amendment.[5] The United States Supreme Court reversed and *held* that the statute was constitutional because the citizenship-based classification bore a rational relationship to the legitimate state interest of promoting civic values in the public school system. *Ambach v. Norwick*, 99 S. Ct. 1589 (1979).

The Supreme Court as long ago as 1886 in *Yick Wo v. Hopkins*[6] ruled that an alien is a "person" entitled to the benefit of the equal protection clause of the fourteenth amendment.[7] Although the Court

4. Norwick v. Nyquist, 417 F. Supp. 913, 917-19 (S.D.N.Y. 1976).

In reviewing equal protection challenges to statutes, the Supreme Court has developed and generally has utilized a two-tiered analytical approach based on the nature of the right being regulated and/or the type of classification which the regulation creates. *See* Cox, *The Supreme Court, 1965 Term, Foreward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076 (1969) [hereinafter cited as *Developments*]; Gunther, *The Supreme Court, 1971 Term, Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Legislative classifications impairing the exercise of a fundamental right or discriminating against suspect categories are subject to close judicial scrutiny. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 654-55 (1966). Rights which are explicitly or implicitly guaranteed by the Constitution are fundamental rights. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). Classifications affecting discrete and insular minorities, against whom prejudice acts to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, may call for a "searching judicial inquiry." *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). To survive an equal protection challenge under close judicial scrutiny, such a statutory classifiction must be necessary to promote a compelling state interest and must be narrowly drawn so that it furthers only the compelling state interest advanced in support of it. *See* Roe v. Wade, 410 U.S. 113, 155 (1973). Under this two-tiered analytical approach, classifications which do not evoke close judicial scrutiny must only pass a rational relationship test to survive an equal protection challenge. Under this test the statute is presumed to be constitutional unless the classification itself is irrational or the classification does not rationally promote a legitimate governmental function. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961).

This two-tiered approach was developed by the Warren Court during the 1960's. The Burger Court's discontent with the sharp dichotomy of the two-tiered approach has led to the formulation of a third basis for analysis. Using this approach, the Court has struck down legislative classifications without finding a fundamental right or suspect category. *See generally* Gunther, *supra*, at 10-24.

5. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

6. 118 U.S. 356 (1886).

7. In *Yick Wo* the Court invalidated a San Francisco municipal ordinance

in *Yick Wo* held that aliens are protected by the fourteenth amendment, during the next few decades it routinely upheld classifications based on alienage. The Court gave recognition to a state's police power to regulate harmful and dangerous occupations[8] and a state's proprietary interest in the public domain[9] in developing what came to be known as the "public interest doctrine."[10] In applying this doc-

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regulating the operation of laundries on the ground that the ordinance was discriminatorily enforced against Chinese operators. The ordinance prohibited the operation of a laundry in a wooden structure within the limits of the city and county of San Francisco unless the Board of Supervisors gave its permission. In 1880 (the time of passage of the ordinance) there were 320 laundries in the city and county of which 310 were constructed of wood and 240 were owned and operated by Chinese. All Chinese applications for permission to operate were denied and all those of Caucasians were granted. *Id.* at 358-59 & 361. The Court held:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Id. at 369.

8. *See, e.g.*, Clarke v. Deckebach, 274 U.S. 392 (1927). The *Clarke* Court, upholding a Cincinnati ordinance prohibiting aliens from owning and operating pool halls, noted that the "harmful and vicious tendencies of public billiard and pool rooms" caused it to be a business of dangerous tendencies from which aliens could be excluded due to the "associations, experiences and interests of members of the class." *Id.* at 397.

9. *See, e.g.*, Terrace v. Thompson, 263 U.S. 197 (1923) (upholding a Washington statute denying aliens the right to own farm land); Heim v. McCall, 239 U.S. 175 (1915) (upholding a New York statute requiring citizenship before one could be awarded public works contracts); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (upholding a Pennsylvania statute prohibiting aliens from killing wild game).

10. The Court expressly rejected what it called the "special public-interest doctrine" in *Graham v. Richardson*, 403 U.S. 365 (1971). See text at notes 21-23, *infra*. Judge (later Justice) Cardozo's words in the case of *People v. Crane*, 108 N.E. 427, 214 N.Y. 154, *aff'd*, 239 U.S. 195 (1915), upholding a New York statute prohibiting the employment of aliens on public works are illustrative of the breadth of the doctrine:

> The members of the state are its citizens. Those who are not citizens are not members of the state. . . . Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest; and hence results a difference in the measure of his right. To disqualify citizens from employment of the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination, indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.
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> . . . .
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> The equal protection of the laws is due to aliens as to citizens; but equal protection does not mean that those who have no interest in the common property of the state must share in that property on the same terms as those who have an interest.

Id. at 429, 214 N.Y. at 160-62 (citations omitted).

trine, the Court excluded aliens from a variety of enterprises.[11]

Yet, there were areas which the Court found to be outside the scope of the public interest doctrine. In 1915 the Court struck down an Arizona law which required that at least eighty percent of the employees in businesses with more than five workers be citizens,[12] holding that a state's interest in the public domain cannot support the exclusion of aliens from the "common occupations of the community."[13] Although the Court declared the law unconstitutional because of its violation of the equal protection clause of the fourteenth amendment,[14] the Court also noted that a state's decision to deny an alien the right to work in the common occupations of the community would be inconsistent with the federal government's decision that he should be allowed to enter and reside within the United States. On this basis, the Court implied that such a state policy was impermissible.[15]

No real inroads into the public interest doctrine were made until a 1948 decision, *Takahashi v. Fish and Game Commission*,[16] in which the Court, on both equal protection and federal preemption grounds, invalidated a California statute forbidding the issuance of a com-

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11. *See* Note, *A Dual Standard for State Discrimination Against Aliens*, 92 HARV. L. REV. 1516 (1979).

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

13. *Id.* at 41. The Court wrote:

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it is the purpose of the [fourteenth] Amendment to secure. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

Id. (citation omitted).

The Court noted, however, that the statute in question did not "pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States." *Id.* at 39-40.

14. *Id.* at 43.

15. According to the Court:

> The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality.

Id. at 42 (citations omitted).

16. 334 U.S. 410 (1948).

merical fishing license to any person ineligible for citizenship.[17] The Court stated that "the power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[18] California argued that, since the federal government regulated immigration and naturalization in part on the basis of race and color classifications, the state should be allowed to use these classifications to prevent resident aliens from earning a living in the same manner as the state's citizens.[19] In rejecting the state's argument, the Court asserted that a state cannot interfere with the conditions imposed by the federal government regarding the entrance, naturalization, or residence of aliens.[20]

Finally, in 1971 the Court in *Graham v. Richardson*[21] abandoned the special public interest doctrine altogether in invalidating Arizona and Pennsylvania statutes denying welfare benefits to resident aliens. The Court held that legislative classifications based on alienage are "inherently suspect and subject to close judicial scrutiny."[22] Furthermore, the decision was based on the fact that the

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17. In *Oyama v. California*, 332 U.S. 633 (1948), the Court had struck down a California statute which forbade aliens ineligible for United States citizenship from acquiring, owning, occupying, leasing, or transferring agricultural land. The Court had done so, however, because the law discriminated against the alien owner's son who was a United States citizen.

18. 334 U.S. at 420.

19. *Id.* at 418-19.

20. The Court wrote:

> 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. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration . . . .

Id. at 419 (citation omitted).

21. 403 U.S. 365 (1971).

22. *Id.* at 372. In analyzing the classification, the Court added: "Aliens as a class are a prime example of a 'discrete and insular' minority for whom heightened judicial solicitude is appropriate." *Id.* See note 4, *supra.*

Justice Rehnquist, however, has maintained that legislative classifications based on alienage should not be a suspect category:

> The Fourteenth Amendment . . . contains no language concerning "inherently suspect classifications," or, for that matter, merely "suspect classifications." The principal purpose of those who drafted and adopted the Amendment was to prohibit the States from invidiously discriminating by reason of race, and, because, of this plainly manifested intent, classifications based on race have rightly been held "suspect" under the Amendment. But there is no language used in the Amendment, or any historical evidence as to the intent of the Framers, which would sug-

states' actions in this area were inconsistent with the federal government's power to regulate aliens' entrance and residence and were, therefore, constitutionally impermissible.[23]

But two years later the Court seemingly provided for an exception to this strict scrutiny treatment in dicta in the case of *Sugarman v. Dougall*.[24] Using strict scrutiny as dictated by *Graham*, the Court in *Sugarman* invalidated a New York law[25] providing that only United States citizens could hold permanent positions in the competitive class of the state civil service. However, the Court distinguished the situation presented from that in which the challenged classification is applied to voter qualifications or to state elective or important nonelective executive, legislative, and judicial

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> gest to the slightest degree that it was intended to render alienage a "suspect" classification, [or] that it was designed in any way to protect "discrete and insular minorities" other than racial minorities . . . .

Sugarman v. Dougall, 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting) (citations omitted). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1052-53 (1978).

23. 403 U.S. at 376-80. However, in *Mathews v. Diaz*, 426 U.S. 67 (1976), the Supreme Court upheld a *federal* statute conditioning an alien's eligibility for federal medical insurance program benefits on continuous residency in the United States for a five-year period and on admission for permanent residence. The Court reasoned that Congress in the exercise of its control over naturalization and immigration could make laws which would be unacceptable if applied to citizens. Concerning this federal power, the Court stated:

> Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary.

Id. at 81.

24. 413 U.S. 634 (1973).

25. N.Y. CIV. SERV. LAW § 53(1) (1958). In *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), the Supreme Court held that a Civil Service Commission regulation excluding resident aliens from the competitive service of the Federal Civil Service System was unconstitutional as a violation of the *procedural* requirements of the due process clause of the fifth amendment because neither the President nor the Congress mandated the regulation. But the Court stated that the "paramount federal power over immigration and naturalization foreclosed a simple extension of the holding in *Sugarman* as decisive of this case." *Id.* at 100.

The Court implied that such a regulation authorized by the President or Congress would be constitutional, and listed with apparent approval a number of reasons to support the regulation at the federal level. *Id.* at 103-05. Apparently, the Court would rely on the President's treaty-making power and the federal government's power over immigration and naturalization to uphold such a federal regulation:

> We may assume with the petitioners that if the Congress or the President has expressly imposed the citizenship requirement, it would be justified by the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiating. . . .

Id. at 105.

positions; then, a rational relationship standard[26] would properly be used to scrutinize the classification.[27] The Court reasoned that a state has a "historical power to exclude aliens from participation in its democratic political institutions"[28] and "officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government."[29]

In re Griffiths,[30] handed down the same day as *Sugarman*, indicated the restricted scope to be given this "governmental function" exception.[31] Refusing to equate the practice of law with the essential governmental functions outlined in *Sugarman*, the Court struck down a Connecticut statute which prohibited aliens from practicing law in the state. The Court found that, although a lawyer was an important professional leader with access to the courts, he was not close enough to the core of the political process to be characterized as a formulator of governmental policy.[32]

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26. See note 4, *supra*.
27. 413 U.S. at 647.
28. *Id.* at 648.
29. *Id.* at 647. The Court explained:

> [O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. This is no more than a recognition of a state's historical power to exclude aliens from participation in its democratic institutions, and a recognition of a State's constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders.

Id. at 648 (citations omitted).
30. 413 U.S. 717 (1973).
31. In *Foley v. Connalie*, 435 U.S. 291 (1978), Chief Justice Burger, writing for the majority, described the police function as "one of the basic functions of government." *Id.* at 297. In *Ambach v. Norwick*, 99 S. Ct. 1589 (1979), Justice Powell's majority opinion spoke of "[t]he rule for governmental functions" as an exception to the general strict scrutiny standard. *Id.* at 1593. This exception will be referred to as the "governmental function" exception throughout the remainder of this note.

In recent years, the Court in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572 (1976), and in *Nyquist v. Mauclet*, 432 U.S. 1 (1977), has indicated that the establishment of the governmental function exception was not a prelude to a wave of new exceptions nor an abandonment of *Graham*. In *Examining Board*, the Court, using strict scrutiny, declared unconstitutional a Puerto Rico statute which permitted only United States citizens to practice as civil engineers. In *Nyquist*, the Court, again employing strict scrutiny, invalidated a New York law barring certain aliens from state financial assistance to higher education. In describing the governmental function exception, the *Nyquist* Court wrote:

> [A]s *Sugarman* makes quite clear, the Court had in mind a State's historical and constitutional powers to define the qualifications of voters, or of "elective or important nonelective" officials "who participate directly in the formulation, execution, or review of broad public policy." *In re Griffiths*, decided the same day, reflects the narrowness of the exception.

Id. at 11 (citations omitted).
32. 413 U.S. at 729.

In 1978 in *Foley v. Connalie,*[33] the Court applied the governmental function exception thus placing a New York statute, which required all police officers to be citizens of the United States, within the confines of the rational relationship test instead of subjecting it to close judicial scrutiny. The Court emphasized that the police function fulfilled a fundamental obligation of a government to its constituency[34] and that the plenary discretionary powers[35] of the policeman made him a member of the category of "'important nonelective . . . officers who participate directly in the . . . *execution* . . . of broad public policy.'"[36] Thus, the citizenship requirement bore a rational relationship to the special demands of being a police officer. Since the state could reasonably presume that a citizen is more "familiar with and sympathetic to American traditions,"[37] it could lawfully restrict "the performance of this important responsibility to citizens of the United States."[38]

In the instant case, *Ambach v. Norwick,*[39] a divided Court[40] refused to subject to close judicial scrutiny[41] a New York statute[42] refusing aliens the right to employment as public school teachers.[43] In determining whether, for equal protection analysis, teaching in public schools was within the governmental function exception, the Court examined two factors: (1) the role of public education in a democratic society and (2) the degree of responsibility and discretion teachers possess in fulfilling that role.[44]

Addressing the first factor, the Court stated that "[p]ublic education, like the police function, 'fulfills a most fundamental

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33. 435 U.S. 291 (1978).

34. *Id.* at 297.

35. The Court stated that police officers are "clothed with authority to exercise an almost infinite variety of discretionary powers" the execution of which "affects members of the public significantly and often in the most sensitive areas of daily life." *Id.*

36. *Id.* at 300, *quoting* Sugarman v. Dougall, 413 U.S. at 647 (emphasis in original).

37. 435 U.S. at 299-300.

38. *Id.* at 300.

39. 99 S. Ct. 1589 (1979).

40. Justice Powell wrote the opinion of the Court, in which Chief Justice Burger and Justices Stewart, White, and Rehnquist joined. Justice Blackmun filed a dissenting opinion, in which Justices Brennan, Marshall, and Stevens joined. The voting pattern duplicated the vote in *Foley* except that Justice Blackmun concurred in that result and voted to uphold the statute in question.

41. See note 4, *supra.*

42. See note 3, *supra.*

43. See note 2, *supra.* Both women had married United States citizens, had lived in the United States since the mid-sixties, and, although eligible for United States citizenship, had chosen not to apply for such citizenship.

44. 99 S. Ct. at 1594.

obligation of government to its constituency.'"[45] Noted by the Court as having a history of judicial recognition were the public school's functions of preparing individuals for participation as citizens and preserving the values upon which our society rests.[46]

The Court then found that the teachers within the public school system have a critical role in developing a student's attitude toward government and understanding of the role of citizens in our society. This finding was based on the Court's observations that: (1) teachers have direct, day-to-day contact with the student in both classroom and other activities of the school; (2) teachers have wide discretion over the way the course material is communicated to students; and (3) teachers serve as role models for their students.[47] Additionally, even those teachers whose specialty is not in courses most closely related to government play a role in civic understanding.[48]

Having found that teachers were within the governmental function exception, the Court had only to examine the contested statute using a rational relationship test. The Court observed that the statute was carefully drawn since it only excluded aliens who had demonstrated their unwillingness to apply for United States citizenship.[49] Sustaining the statute, the Court acknowledged that "[t]he

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45. *Id.*, *quoting* Foley v. Connalie, 435 U.S. at 297.

46. 99 S. Ct. at 1594. The Court cited an extensive list of cases. *Id.* at 1595. Quoting from *Brown v. Board of Education*, 347 U.S. 483, 493 (1954), the Court wrote:

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

99 S. Ct. at 1594-95. The Court perceived the public school as "inculcating fundamental values necessary to the maintenance of a democratic political system." *Id.* at 1595. Several ways in which the New York Education Law reflected the school's role as a promoter of patriotism and citizenship were specifically referred to, such as the requirement of saluting the flag and other patriotic exercises; the requirement that courses such as civics, United States and New York history, and principles of American government be taught; and the requirement that the schools provide instruction "'to promote a spirit of patroitic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war.'" *Id.* at 1595 n.8, *quoting* N.Y. EDUC. LAW § 801(1) (McKinney 1970).

47. 99 S. Ct. at 1595-96. The Court recognized that "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 citizen's social responsibilities." *Id.* at 1596.

48. *Id.*

49. *Id.* at 1596. See note 43, *supra*.

people of New York . . . 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."[50]

Arguably, the result of the *Ambach* decision is an expansion of the *Sugarman* notion of governmental function. As outlined in *Sugarman*, the governmental function exception was based on a state's obligation to preserve the basic concept of its political community. Thus, the state has the power to exclude aliens from voting and from holding important positions in which they would participate directly in the formulation, execution, or review of broad public policy.[51] In *Ambach* the Court looked to two factors to determine that teaching in a public elementary or secondary school is a governmental function requiring only a rational relationship to uphold the legislative classification: (1) the role the particular activity plays in democratic society and (2) the degree of responsibility and discretion of the person fulfilling that role. In contrast, the *Foley* Court had looked to the role of the activity in democratic society and the degree of responsibility and discretion of the person fulfilling that role only in the context of the "formulation, execution, or review of broad public policy" language of *Sugarman*.[52] The Court in *Foley* did not expressly single out these two factors as did the *Ambach* Court.

Thus, in *Ambach* the Court seems to have equated the phrase "broad public policy" with an activity which is important in democratic society; similarly, the *Ambach* Court associated the phrase "participate directly in the formulation, execution, or review of broad public policy" with one who has great responsibility and discretion in fulfilling an important activity in democratic society. That this approach expands the governmental function exception is apparent when one considers that, within the context of the *Sugarman* language, an argument might be made that a police officer participates much more directly, and exercises much more discretion, in the execution of broad public policy than does a school teacher. Justice Blackmun apparently took this view, since, using the *Sugarman* language as his guide, he concurred with the result reached by the Court in *Foley* and, yet, dissented in *Ambach*.

This arguably uneven application of the governmental function exception is a by-product of the Court's decision in *Graham* which declared alienage a suspect classification. The basic problem lies in according strict scrutiny to classifications based on alienage. Subjec-

50. 99 S. Ct. at 1597.
51. See text at notes 24-29, *supra*.
52. See text at notes 33-38, *supra*.

ting such classifications to this higher level of scrutiny is inconsistent with the Constitution's own discriminations against aliens. There are eleven instances of differentiation between citizens and aliens in the Constitution,[53] most of which limit federal office holding and guarantees of the right to vote to citizens. Moreover, the first sentence of the fourteenth amendment establishes the distinction between citizens and aliens;[54] it is, therefore, difficult to believe that the second sentence of the fourteenth amendment, guaranteeing all persons due process and equal protection of the laws, was meant by its framers to preclude legislative distinctions between citizens and aliens.[55]

In light of the Constitution's discriminations against aliens, the suspect classification rationale of *Graham* cannot survive.[56] The Court itself has implicitly recognized this by setting up a confusing scheme of dual standards for reviewing equal protection challenges

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53. These eleven instances are: U.S. CONST. art. I, § 2, cl. 2; art. I § 3, cl. 3; art. I § 8, cl. 4; art. II, § 1, cl. 5; art. III, § 2, cl. 1; art. IV, § 2, cl. 1; amends. XI, XV, XIX, XXIV & XXVI. *See* Sugarman v. Dougall, 413 U.S. at 651-52 (Rehnquist, J., dissenting).

54. The first sentence of the fourteenth amendment provides: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Justice Rehnquist, in his *Sugarman* dissent wrote:

> Not only do the numerous classifications on the basis of citizenship that are set forth in the Constitution cut against both the analysis used and the results reached by the Court in these cases; the very Amendment which the Court reads to prohibit classifications based on citizenship establishes the very distinction which the Court now condemns as "suspect."

413 U.S. at 652 (Rehnquist, J., dissenting).

55. In his dissenting opinion in *Sugarman*, Justice Rehnquist stated:

> Decisions of this Court holding that an alien is a "person" within the meaning of the Equal Protection Clause of the Fourteenth Amendment are simply irrelevant to the question of whether that Amendment prohibits legislative classifications based upon this particular status. Since that Amendment by its own terms first defined those who had the status as a lesser included class of all "persons," the Court's failure to articulate why such classifications under the same Amendment are now forbidden serves only to illuminate the absence of any constitutional foundation for these instant decisions.

Id. at 653.

The Court in *Graham*, on the other hand, invoked Justice Stone's famous footnote four from *Carolene Products* to support its designation of alienage as a suspect classification: "Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938)) for whom such heightened judicial solicitude is appropriate." 403 U.S. at 372. Whether strict scrutiny represents the appropriate degree of "judicial solicitude," however, is questionable given the Constitution's sanctioning of some discrimination against aliens, see note 53, *supra*.

56. This is not to say that the result reached in *Graham* is incorrect. See text at note 60, *infra*.

in alienage cases.[57] Moreover, the Court has also recognized "paramount federal power over immigration and naturalization,"[58] and has upheld a federal statute which used an alienage-based classification.[59] Such recognition belies a strict scrutiny approach for alienage classifications.

In reviewing a state statute which discriminates on the basis of alienage, the starting point of analysis should be an investigation into the possibility of preemption by the federal government, since state restrictions on aliens cannot contravene the federal decision to allow an alien the privilege of residing in the United States. The Court has given broad scope to the notion of federal preemption, striking down statutes that have infringed in some way upon the alien's ability to support himself as inconsistent with the federal government's decision to allow the alien to live in the United States.[60] Given the sweep of the preemption doctrine, the fact that

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57. On the desirability of a consistent standard for a given classificatory trait, *see Developments, supra* note 4, at 1124-27. *But see* Note, *supra* note 11, at 1516.

58. Hampton v. Mow Sun Wong, 426 U.S. 88, 100 (1976). See note 25, *supra*.

59. Mathews v. Diaz, 426 U.S. 67 (1976). See note 23, *supra*. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (Court implied it would uphold a regulation restricting the Federal Civil Service to citizens if the President or Congress authorized it). See note 25, *supra*.

60. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915). See notes 15 & 20, *supra*.

Since the Constitution grants to the federal government the power over naturalization and immigration, U.S. CONST. art. I, § 8, cl. 4, the federal government is able to act with greater freedom than state governments in matters involving aliens. Therefore, although the level of review should be the same for equal protection purposes at the federal and state levels, the federal government is free to impose restrictions on aliens that the state cannot. This can be seen by comparing *Diaz* with *Graham*.

In *Diaz* the federal government was allowed to deny aliens the right to Medicare supplemental medical insurance program benefits unless they had resided in the United States for at least five years. In *Graham* the Court denied Arizona the ability to restrict certain welfare benefits to aliens who had resided in the United States for fifteen years. The Court in *Graham* gave as one basis for its decision federal-state relations:

> Congress has broadly declared as federal policy that lawfully admitted resident aliens who become public charges for causes arising after their entry are not subject to deportation, and that as long as they are here they are entitled to the full and equal benefit of all state laws for the security of persons and property. The state statutes at issue in the instant cases impose auxiliary burdens upon the entrance or residence of aliens who suffer the distress, after entry, of economic dependency on public assistance.

403 U.S. at 378-79. By comparison, in *Diaz* the Court emphasized the important power of the federal government over aliens which it said should not be restricted by a rule of constitutional law which would "inhibit the flexibility of the political branches of [the federal] government to respond to changing world conditions." 426 U.S. at 81.

an alienage classification is not subject to strict scrutiny does not mean that prohibitions directed at aliens would routinely be sustained.

The state should be allowed to distinguish between citizens and aliens in areas analogous to the Constitution's own differentiations between citizens and aliens. If the Constitution establishes the basis for a distinction between citizens and aliens insofar as office-holding and voting guarantees are concerned,[61] then the states should also be permitted to act on the basis of this differentiation. Apparently the Court in *Sugarman* was attempting to establish this analogy with its governmental function language since it said: "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's *constitutional* prerogatives."[62] The provisions which distinguish citizens and aliens in the Constitution establish a conceptual notion of a political community from which a non-member can be excluded. Thus, in cases in which the state law is analogous to the Constitution's differentiations between citizens and aliens, the state law is presumably constitutional.

How do public school teachers stand in relation to this notion of a political community? If one accepts the Court's finding as to the importance of a teacher's influence over his students' attitudes regarding citizenship,[63] an argument can be made that limiting employment as public school teachers to citizens and those desirous of citizenship is necessary to preserve the political community. Yet, how analogous is the function that teachers serve to the Constitution's limitations on office-holding and guarantees of voting? And if public school teachers are so related to the notion of political community, what other activities fall within the protected relationship?

One area which will undoubtedly be challenged in the near future is state restrictions on an alien's right to own and enjoy real property.[64] If one looks to the *Sugarman* language alone it is difficult

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61. See note 53, *supra*, and accompanying text.

62. 413 U.S. at 648 (emphasis added).

63. The findings of the Court in this area were based on its interpretation of educational-psychological-sociological studies. 99 S. Ct. at 1595-96.

64. Alien ownership of real property is an area of growing concern among states, particularly in relation to farm land. *See generally* Fisch, *State Regulation of Alien Land Ownership*, 43 Mo. L. Rev. 407 (1978). Several states already have legislation restricting an alien's right to own, use, or dispose of real property. *See, e.g.*, Minn. Stat. § 500.22 (1945); Wyo. Stat. § 34-15-101 (1959). Many of the states which do not have such legislation have had bills proposed in their most recent legislative sessions which infringe upon the alien's rights to own and enjoy real property. *See, e.g.* Mont. H.B. 101 (1979); N.M. H.B. 545 (1979); Pa. H.B. 853 (1979); S.C. H.B. 2217 (1979); Wash. S.B. 2334 (1979).

to see how ownership of real property relates to voting or the holding of high public office. Even if one argued that the expanded *Ambach-Sugarman* two-step "test"[65] should be used, such legislation would apparently fall outside that "test" since the Court in *Ambach* expressly limited its examination to areas of public employment.[66] It is difficult to see how the Court could sustain legislation which would prohibit the resident alien from owning real property. Such a statute seems inconsistent with the federal government's decision to allow the alien to reside permanently in the United States.[67] Moreover, ownership of real property does not seem to relate to the notion of a political community recognized by the Constitution.[68]

However, if a state restricted only non-resident aliens' ownership of land, a different question would be posed. There would be no inquiry into federal preemption because that doctrine relates to aliens lawfully admitted into the United States.[69] The determinative factor thus would be the level of scrutiny. If the Court adheres to *Graham's* strict scrutiny, it would seem that no compelling state interest could be advanced to support such a classification.[70] On the other hand, if the Court abandons *Graham*, as the logic of the Constitution would seem to compel, then the question is an open one. A state's interest in keeping ownership in the hands of residents might support such a classification if a standard less exacting than

65. In *Ambach* the Court looked to (1) the role an activity plays in democratic society and (2) the degree of responsibility and discretion exercised by the person fulfilling that role. 99 S. Ct. at 1594. If a state legislature were to become concerned with increasing ownership of real property by aliens (and some apparently have become concerned, see note 64, *supra*), then an argument in support of a ban on alien ownership of real property might emphasize the role landowning has had historically in the United States and the landowner's discretion in using his property in a manner inimical to the "political community's" interest.

66. 99 S. Ct. at 1594 n.6.

67. See notes 15 & 20, *supra*.

68. See text at notes 61-62, *supra*.

69. See the cases cited in note 60, *supra*. In *DeCanas v. Bica*, 424 U.S. 351 (1976), the Supreme Court ruled that the federal power over immigration did not preempt California's right to pass a statute forbidding employers from knowingly employing illegal aliens.

70. A compelling state interest is rarely found in examining a state statute under close judicial scrutiny. Professor Gunther has stated that the close judicial scrutiny standard is "'strict' in theory and fatal in fact." Gunther, *supra* note 4, at 8. The only statutory-type rules explicitly discriminating on the basis of race and/or nationality, which were upheld by the Court after subjecting them to close judicial scrutiny, were tested during World War II. Korematsu v. United States, 323 U.S. 214 (1944) (upholding a military order excluding Americans of Japanese origin from designated West Coast areas after Pearl Harbor); Hirabayashi v. United States, 320 U.S. 81 (1943) (sustaining a military curfew on persons of Japanese ancestry in West Coast areas during the early months of World War II). *See* L. TRIBE, *supra* note 22, at 1000.

strict scrutiny were used.[71] The constitutionality of excluding aliens from land ownership is just one of the many questions that the Court must answer in trying to escape from the analytical morass created by the *Graham* opinion. Hopefully, any new analytical structure adopted by the Court will rest on firmer ground.

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AN OVERVIEW OF IMPLIED RIGHTS OF ACTION: *Cannon v. University of Chicago*

Plaintiff, a female denied admission to two private medical schools, filed a complaint with the local office of the United States Department of Health, Education and Welfare (HEW) alleging that both schools violated Title IX of the federal Education Amendments of 1972[1] which prohibits sex discrimination in most educational institutions. When the department delayed taking any action on the complaint, plaintiff filed a private suit in federal district court. The district court held that plaintiff had no private cause of action under Title IX because Congress, in providing for an administrative scheme of enforcement within the provisions of the Act, intended that to be the only available remedy for violation of the Act. The United States Court of Appeals for the Seventh Circuit affirmed the district court decision. Reversing the lower court decision, the United States Supreme Court *held* that a private litigant may pursue a private cause of action under Title IX. *Cannon v. University of Chicago*, 99 S. Ct. 1946 (1979).

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71. See note 4, *supra*. The state's interest might be weighty enough if non-resident aliens were purchasing real property to such an extent that the health of the economy might be affected.

One author has implied that the real thrust of the *DeCanas* holding, that a state may, without preemption, forbid employers from hiring illegal aliens, see note 69, *supra*, is indicated by the use of equal protection language in a preemption case. That author suggests that the Court is indicating a lesser standard than strict scrutiny. Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1081 (1979). There may be a further question as to whether a non-resident alien who is precluded from purchasing land in this country is even entitled to the benefit of the equal protection clause. *Id.* at 1080-81. In *Yick Wo* the Court had said only that equal protection was a pledge to "all persons within the jurisdiction of the United States." 118 U.S. at 369.

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1. 20 U.S.C. §§ 1681-86 (1976).