In the

Supreme Court of the United States

EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL.,
APPELLANTS.
V.
JEAN-MARIE MAUCLET,
APPELLEE
No. 76-208
AND
EWALD B. NYQUIST, COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK, ET AL.,
APPELLANTS.
V.
ALAN RABINOVITCH.
APPELLEE.

Washington, D. C.
March 22, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al., Appellants, v. JEAN-MARIE MAUCLET, Appellee and EWALD B. NYQUIST, Commissioner of Education of the State of New York, et al., Appellants, v. ALAN RABINOVITCH, Appellee.	No. 76-208

Washington, D.C.

Tuesday, March 22, 1977

The above-entitled matter came on for argument at 11:36 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MRS. JUDITH A. GORDON, Assistant Attorney General, State of New York, 2 World Trade Center, New York, New York 10047; on behalf of the appellants.

MICHAEL DAVIDSON, ESQ., 418 John Lord O'Brian Hall, State University of New York, Buffalo, New York 14260; on behalf of Appellee Mauclet.

GARY J. GREENBERG, ESQ., 61 Broadway, New York, New York 10006; on behalf of Appellee Rabinovitch.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Nyquist against Mauclet, Number 76-208.

Mrs. Gordon, you may proceed whenever you're ready.

ORAL ARGUMENT OF MRS. JUDITH A. GORDON, ESQ.,

ON BEHALF OF THE APPELLANTS

MRS. GORDON: Mr. Chief Justice, and may it please the Court:

New York offers grants and subsidized loans to undergraduate and graduate students among its higher education assistance programs.

Only grants are directly in issue on this appeal, particularly Regents' college scholarships, which are awarded competitively on the basis of performance on an examination, and tuition assistance awards, known as TAP, which are available to any qualified student.

The question presented is whether New York may, consistent with the Equal Protection clause, offer these grants to State residents who are citizens, to aliens willing to become citizens, and to certain alien refugees, necessarily excluding other aliens, including aliens like appellees herein, who are permanent residents, but who have refused to become citizens.

The Mauclet case was instituted in the Western

District of New York in February, 1975. The Rabinovitch action was instituted in the Eastern District of New York in August of '74.

Both cases were determined by a Three Judge District Court in the Eastern District which ended in a judgment from which this appeal is taken.

Now appellee Mauclet is a French citizen, and he has been a permanent resident-alien in the United States since 1969. He is a graduate student at the State University of New York at the time the judgment below was entered, and he had been denied a tuition assistance award as a graduate student for the 74-75 academic year on the basis of the State statute involved, Section 661, because, in essence, he refused to become an American citizen.

Appellee Rabinovitch is Canadian. He has been a permanent resident in New York and in the United States since 1964. He was an undergraduate student at Brooklyn College in the City of New York when the judgment was entered, and he was denied a Regents' college scholarship for the same academic year as involved in the Mauclet case because, again, he refused to apply for American citizenship. Indeed, as he states in his affidavit filed below, he has no intention of applying for American citizenship.

QUESTION: Mrs. Gordon, how much are we talking about in dollars, do you have any idea?

MRS. GORDON: Yes, your Honor, we do. We have exactly the figures, as a matter of fact. The direct student aid program which is involved -- which -- and with specific reference to Regents' college scholarships and to tuition assistance is $208 million in the State of New York for this present fiscal period, your Honor.

QUESTION: Well, how many aliens are there who would be eligible if the judgment of this court were upheld? How much are we talking about in dollars from that point of view, or don't you know?

MRS. GORDON: Your Honor, frankly I can't respond on that. It's not as though we didn't try to get the statistics, but because we have a program which has foreclosed some aliens, we do not know what opening that program would mean. And indeed, statistics that would be more potentially relevant, namely an age category of permanent resident aliens in New York were not available from the Immigration and Naturalization service. The ones that were just completely unrealistic.

QUESTION: Of course that's the question I asked is how much are we litigating about in this lawsuit.

MRS. GORDON: Oh, I'm sorry. What would be the difference in cost.

QUESTION: Yes.

MRS. GORDON: Unfortunately, your Honor, we

cannot project that.

QUESTION: We may not be speaking about very much.

MRS. GORDON: That's correct, your Honor, we may not be speaking about very much. However, given the quality of this scholarship program as a selection program, it does have an extension in terms of other scholarships which necessarily equally selection programs, and they may involve a much greater public cost.

Now Regents scholarships --

QUESTION: And I suppose it isn't particularly a question of cost anyway, if these people are eligible, it excludes others who might otherwise get qualified.

MRS. GORDON: Exactly, your Honor.

QUESTION: It's a question of who will get a piece of the pie.

MRS. GORDON: Of course, your Honor. At the base of any selection program that involves a public benefit is, of course, ultimately a finite resource. And of course the question then becomes, who has the better demand on that resource, the people who are included, or all people who are now excluded?

QUESTION: The kind of grants you are talking about here are not ultimately repayable, I take it; they're not loans?

MRS. GORDON: That is exactly right, your Honor. The Regents' scholarships and the TAP awards are pure grants in aid; they are gifts.

Now a separate issue is in fact raised in this case with respect to student loans which, by definition, are repayable.

Now, the State statute in issue, Section 661, covers student loans. And Appellee Rabinovitch has attempted to place the regulation of that statute vis a vis student loans in issue in this case.

We contested his standing to do that below, and the issue was determined against us. We have reraised it on this appeal, and it raises some very significant questions.

However, I think it's sufficient at this point to point out to you that to the extent that loans are in fact subsidized by public money, they are to that extent gifts, and can be fairly analogized to the grants program.

QUESTION: Well, but I would think that you would hav an argument available to you in the loan situation that you don't have in the grants situation, that someone who insists on remaining a national of Portugal is much more apt to avoid service of process if New York tries to compel payment of a loan 20 years from now, than someone who is a resident of the United States.

MRS. GORDON: That's exactly right, your Honor. And it's our position on this appeal, even putting aside the standing question, that a remand would need to be had on the loan issue to raise, indeed, the issue you just mentioned, namely, whether there was a basis to infer that there was this additional rationale that the aliens unwilling to become a citizen would be more likely to leave the jurisdiction and not return than the alien who was willing to become a citizen.

And we do seek a remand, or we believe that unless 661 can be sustained under the Equal Protection clause, that to invalidate the statute would require this remand, because we would want to raise that additional issue, including some other additional issues that pertain specifically to loans, because they are partially federally subsidized. The grants in aid, the TAP awards, and the Regents' college scholarships are not, in fact, in any way federally subsidized. They are completely state funds.

QUESTION: Mrs. Gordon, I'm not sure it would make -- at least for me -- make any difference whether it was 100,000 a year or 10 million a year. But if the District Court is correct, is it unreasonable to speculate that this might bring an influx of graduate students from countries all over the world who would beat a path to our door?

MRS. GORDON: Absolutely. That's exactly the problem -- or, the question you pose is exactly the problem that arises when any program that was formally closed is now opened, and we attempt to calculate what would happen.

Now, obviously, if any alien knew that by his mere presence in the state, either as an immigrant or possibly as a non-immigrant, he could get aid to education, he would presumably want to come here.

Now, it's --

QUESTION: Mrs. Gordon, do you think the government is powerless to keep the aliens from coming?

MRS. GORDON: Do I think the government is powerless to keep the aliens from coming?

QUESTION: Yes.

MRS. GORDON: You mean the state government or the federal government?

QUESTION: The federal government.

MRS. GORDON: Of course not, your Honor. Of course not.

QUESTION: So I don't understand about this great influx. We could stop that easily.

MRS. GORDON: Well, I don't know whether they could stop them from -- whether it would even be realistic to assume, your Honor, that they could stop them from settling in New York State, once they were admitted to the United

States.

However, I should point --

QUESTION: What about United States citizens who are say native Californians who come to New York and stay there temporarily. Are they eligible?

MRS. GORDON: There is a durational residence requirement for TAP awards and for college scholarships, your Honor.

QUESTION: Would the influx problem be any different for worrying about people coming from California than from France, say?

MRS. GORDON: Well, I think it would be different a t least to this extent, your Honor. California, for example, happens to have one of the most major public university systems in the United States, and probably has a durational residence requirement incident to its system, which could be met by an individual going from New York, within a fairly brief period of time, to California. Now the same principle, I don't --

QUESTION: Well, let's assume there's a state -- are there any states that have less desirable programs than New York does?

MRS. GORDON: I believe so, your Honor.

QUESTION: Well, let me take such a state for my hypothetical example, then.

Would your influx problem be any different for people who live in such a state as compared to people who live in a country with -- foreign country with a less desirable program? I suppose it's probably a greater possibility that they'd come from neighboring states. You know, they're more apt to know about it, and one thing and another. We're just worrying about the influx problem.

MRS. GORDON: Yes, well, I think it's obvious, your Honor, that New York, California, and indeed, there are many states in the Union which offer enhanced benefits programs, and possibly for that reason have been population centers within the United States. In other words, they have attracted people to the United States.

Certainly, that was true historically in terms of the North being more attractive to some individuals that the South.

However, there are, I think, a couple of points that need to be emphasized.

First of all, with respect to Canada, for example, Canada states very plainly in its information office through its consulate that it provides no grants in aid of any kind to undergraduate students. Now, I do not have the law on that, although I do have a booklet.

Now, obviously, appellee Rabinovitch is getting in the United States what the American student who went

to his homeland could not get in Canada.

Now we attempted to check out the situation with France, your Honor, but the information was, frankly, not available to us.

QUESTION: Mrs. Gordon, what would you regard as the primary purpose of the statute? I think I have sensed a few that you -- in your remarks. But tell me what you think are the primary purposes of the statute?

MRS. GORDON: Your Honor, the statute operates, in terms of its purposes, and in our view, in a very close nexus with the type of classification that's involved.

Now, we have indicated -- we have argued, and we believe that the legislative history directly supports this, that the statute has a specific purpose in enhancing the educational level of the individuals in New York State who are willing to become identified with that State, namely, those individuals who undertake the responsibilities of citizenship.

QUESTION: Isn't that a federal concern, rather than a state concern, number one. And number two, how do you defeat what Mr. Justice Stevens has been talking about, having a great influx from other states, you can say New Jersey and Connecticut if you want, rather than go away across the country, who might think they can get a better deal in New York, and they're willing to be there for

a few years?

How do you defeat that? You admit them to your program, don't you?

To put it another way, isn't this the same argument that was made here in re Griffith and all the other alien cases?

MRS. GORDON: To take the last point first, no, your Honor. First of all, the influx problem, I think we should perceive it this way: the statute, the classification involved, does ask the alien to declare his intent to become a citizen, or to apply for it. That is some evidence of his willingness to stay in New York.

The interstate resident who comes into New York to live, and meets the durational residence requirement is already a citizen, your Honor. He is fully eligible by virtue of his birth or naturalization in his prior places of abode to participate --

QUESTION: -- that's my point, you see.

MRS. GORDON: Well, the point is that once the citizen satisfied the durational residence requirement, he is able to participate in the state community to the same extent as the state resident who was already here. The alien cannot accept that -- refuses that kind of responsibility until the point in time when he becomes naturalized.

QUESTION: He cannot participate in what sense? Voting?

MRS. GORDON: He cannot vote, he cannot be an office holder, he cannot be a juror, he cannot be a policeman. And indeed, with respect to --

QUESTION: Well, some of those issues are under consideration here right now.

MRS. GORDON: Well, Perkins versus --

QUESTION: I don't think we can assume them.

MRS. GORDON: I'm sorry, your Honor. Perkins versus Smith was affirmed by this Court. And that's the State juror case, your Honor.

There is certainly quite plain language in Dougall versus Sugarman and other opinions of this Court that within officeholding categories, the state may indeed use citizenship as a criteria for those types of positions.

In the case I believe you mentioned that's before you now for disposition here is Foley versus Connelie which in the Southern District sustained its citizenship limitation for police officers.

QUESTION: Does it bar them from admittance to the state universities?

MRS. GORDON: No, your Honor. I'm glad you raised that. Because that's one of the points at issue --

QUESTION: And the difference is?

MRS. GORDON: The difference? First of all, the financial difference is very substantial. The direct student aid budget, a portion of which I gave you before, as I said, was $208 million. One and a quarter billion dollars is spent by the State of New York in sponsoring its state public university and in providing contributions to city universities.

Now the whole purpose -- and some independent colleges -- the whole purpose of that program is to provide reduced tuition rates. Now those reduced tuition rates are available to aliens with very minor exceptions not here relevant, and to citizens on like terms.

Now, as you indicated, your Honor, there is a difference. Why should New York then say with respect to this particular limited category of awards, we are going to exclude some aliens?

I think the answer, your Honor, must be that this is a limited program seeking a limited purpose, namely --

QUESTION: So the other money is just given away? You aren't required to, you say.

MRS. GORDON: I don't believe that we are.

QUESTION: Did I understand you to say that you could exclude them?

MRS. GORDON: From reduced tuition, your Honor.

QUESTION: From admission.

MRS. GORDON: From admission to New York State?

QUESTION: New York State University. If they' ve got a million dollars, and they're paying their own way. Could you exclude them because they're aliens?

MRS. GORDON: Well, your Honor, I don't -- obviously the question is not squarely presented by this case. I would think that certainly that an exclusion like that would parallel cases like Graham versus Richardson, would parallel cases like Sugarman versus Dougall, with a foreclosure on the access of the alien to a substantial program which is very meaningful to him would indeed probably burden his access or burden his ability to enter and abide in the United States inconsistently with the Truax doctrine --

QUESTION: Could you charge an alien with non-resident tuition equal to what you charge non-resident students who are citizens of the United States?

MRS. GORDON: Your Honor, that issue was considered in a recent lower court case, and it held that all aliens could not be classified in terms of reduced to -- as non -residents for reduced tuition purposes. And I think that example again elects a much more substantial barrier --

QUESTION: Do you confine -- do you confine your loan and scholarship program to residents of New York?

MRS. GORDON: Yes, we do, your Honor.

QUESTION: And hence, if they're residents, they're citizens? Of New York?

MRS. GORDON: No, your Honor. Merely to be a resident of New York is not to be a citizen of New York.

QUESTION: Well, when do you get to be a citizen?

MRS. GORDON: Well, a citizen of New York --

QUESTION: I mean, say I moved to New York from New Jersey, and I'm going to reside there. You mean I'm not a citizen?

MRS. GORDON: No; as an American --

QUESTION: Well, that's what I'm asking you. If I become a resident of New York moving from another state, am I a citizen?

MRS. GORDON: Yes, your are, your Honor.

QUESTION: All right. So you confine your loan and scholarship program to citizens?

MRS. GORDON: No, your honor. We confine our loans and scholarship program to citizens who are residents of the Statefor a particular period of time, and we also provide the loans and scholarships --

QUESTION: I'm not -- you cannot -- the net effect of your program is, whether I'm a citizen of the -- even though I'm a citizen of the United States, I cannot participate in your loan program unless I'm a citizen of New York.

MRS. GORDON: That is correct.

QUESTION: Because I have to be a resident.

MRS. GORDON: Yes, your Honor.

QUESTION: All right. So you aren't really treating the alien very much differently. He still has to be a citizen.

MRS. GORDON: Well, exactly, except that the program is somewhat broader than that insofar as the alien can get the benefit of the statute without in fact becoming a citizen. He can get it in effect if he has a certain refugee status, and he can get it in the process of becoming a citizen.

That is why it is somewhat -- it is not, indeed --

QUESTION: Whatif there is some barrier to his becoming a citizen, which you can't control?

MRS. GORDON: Exactly. He cannot presently become a citizen, he is allowed to declare his intent.

Now, your point your Honor distinguishes this case, I think very materially, from prior cases that we've had that the Court has recently reviewed in two ways.

First of all, the classifications in Graham, in #339 Sugarman, in De-Otero , were in fact classifications based on alienage, the status of alienage.

Now, we have argued that this is not such a classification. And I believe it is incumbent upon us to show you that it is not such a classification either in

logic or as a matter of reality.

It is not such a classification because the mere offer of the statement, alienage, under this statute, gets you nowhere. The statute requires alienage and something else. We have said that that is the statement by the alien to the extent that he is willing to identify with what we believe are the interests we believe are served by the statutes.

And he gets the money, in reality, he gets the money for the entire duration of his alien status, assuming he makes the commitment that is requested by the statute.

Now, the statute is also very different from Graham and all these other cases in this respect: in Graham and the cases noted, the alien was barred from access to -- as we noted -- very substantial programs by governmental bar. The foreclosure was as a specific result of the governmental action. There was nothing that the alien could do to get the benefit of that program.

In this situation, the statute places the decision making upon the alien. He may or may not wish to make the commitment that the statute offers to him, but if he in fact makes it, he gets the benefit of the program immediately.

Now, as I indicated, there are certain specific, and we believe, substantial interests involved in the program. And they are --

QUESTION: Well another rather large difference between this case and the others to which reference has been made, and maybe you touched on it and I didn't understand it, is that this involves a system of state largesse, giving money away.

MRS. GORDON: Yes, exactly. And I think we should ask what the consequence of that type of system is as compared to the consequence of denying an alien --

QUESTION: Job opportunities.

MRS. GORDON: -- for example, welfare benefits.

QUESTION: Or job opportunities.

MRS. GORDON: Or job opportunities, right.

QUESTION: Or something to which he is statutorily entitled.

MRS. GORDON: Those can fairly be said, I believe, to burden his right to enter and abide. However, if we give some group of individuals simply a gift, I do not think that we can fairly say that we are burdening or penalizing the individuals who do not receive the gift. For example, I do not think that the in-state limitation, the in-state residence limitation, that is annexed to this type of program, a residence limitation essentially approved by this Court in Vlandis v. Kline can realistically say that we are burdening New Jersey residents who do not get the benefit of this program. This Court affirmed the opinion

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of Spatt versus New York, which involved specifically the use of Regents' college scholarships.

Now, in fact, the individual who brought the claim wanted to take his Regents' college scholarship and use it in New Jersey. Now, we don't permit that. The college scholarship has to be used in New York. And he argued that it's our preclusion of his use of that scholarship in New Jersey penalized him, and this Court affirmed a decision which said that there was indeed no penalty involved.

Now, in contrast to the tuition assistance program, I indicated to you previously the amount of the -- the total amount of money that was involved. But whereas the tuition assistance program, in our view, potentially involves a foreclosure of access, the program here involved is, as I say, limited in terms of the gross amount involved, and very limited in terms of the amount of benefits that any individual receives, namely --

QUESTION: The State also, quote, to use the word, largesse, but what about the amount of money that is put into the university? What is that? That's a huge amount.

MRS. GORDON: It certainly is, your Honor.

QUESTION: You can't bar them from that. But your point is you can't bar them from that, but you can bar them from this extra -- is that a better way of putting it?

MRS. GORDON: I think -- I do not think that the

issue of whether you could bar aliens from reduced tuition has been finally resolved. As I indicated to you, there is one lower court opinion on the point. I do believe that the issue of barring an individual from an access to a publically sponsored education when, for example, in California, the state system is the preeminent system within that territory, places a much more substantial foreclosure on the alien than denying him a gift.

And here, as I was about to indicate, the dimension of that gift, in terms of a Regents' scholarship, is now $250 annually. The dimension of the tuition assistance award is between $100 and $1,500, depending on the income level of the individual. However, the first $200 of such awardsare necessarily in debt, and there is an income ceiling with respect to -- an income ceiling with respect to the eligibility of the candidate to receive the awards.

So that we are not talking about, and the legislative history certainly does not purport to say, that this is a program which is intended to subsidize the complete cost of education. The major subsidy comes at the end of the -- comes inthe reduced tuition.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock, Mrs. Gordon.

[Whereupon, at 12:00 o'clock, noon, the Court was

recessed, to reconvene at 1:00 o'clock, p.m., the same day.]

MR. CHIEF JUSTICE BURGER: Mr. Davidson.

ORAL ARGUMENT OF MICHAEL DAVIDSON, ESQ.,

ON BEHALF OF APPELLEE MAUCLET

MR. DAVIDSON: Mr. Chief Justice, may it please the Court:

Jean-Marie Mauclet is the husband of a citizen. And he and his wife have a citizen child. He is an immigrant to this country, and he is entitled by the Congress of the United States, to make this his permanent home.

If the judgment --

QUESTION: Would it make any difference if he didn't have an American wife or an American child?

MR. DAVIDSON: Yes, I think it would make a difference in that fact that he has an American wife and an American child makes his residency in this country at the heart of the Immigration and Naturalization Act. It's the essential function of the Immigration and Naturalization Act, as it has now been amended in 1965 and as recently as the last session of Congress, is to facilitate the unification of families, families of citizens and immigrants, or families of immigrants. And this is evidenced in a number of ways. The immediate relatives of the United States citizen may be admitted to this country without regard to numerical limitation. Although this country has felt it important to

place limits on the numbers of immigrants since 1921 --

QUESTION: But your argument goes to any legally present resident alien.

MR. DAVIDSON: Yes, it goes to any. But I think it should be recognized that 74 percent of the preferences in the Immigration and Naturalization Act apply to members of families, families of citizens, families of resident aliens.

And I think it is also significant because it is far more than the alien who is injured here. It is his citizen wife and his citizen child who is injured when he is deprived of an equal access to an education which would enable him to support that family unit.

QUESTION: Does the record give any indication as to what percentage of permanent aliens actually are permanent in the sense that they never return to their native homelands?

MR. DAVIDSON: No, there is no such part of this record. The only statistics in -- that we have are statistics in the brief which indicate that we're really talking abouta very small percentage of epeople in the state university system in New York, less than three tenths of one percent.

QUESTION: Does thé record show why your client does not wish to apply for American citizenship?

MR. DAVIDSON: No, it does not. It simply contains his statement that he did not wish, when asked

by the State, to apply for citizenship at that point. The State neither answered nor complained -- answered our affidavit. It simply accepted those statements contained in those documents, treated this matter as having really no disputable issues of fact, and proceeded to move as we did for summary judgment.

To affirm the judgment below would not mean that there would be a massive influx of students to this country who might obtain the benefits of New York assistance. New York has a residency requirement. Non-immigrant students, a very large group of foreign students who come to study here annually, are precluded from obtaining New York residencies. They are precluded by state regulation; in fact, they are precluded by the Immigration and Naturalization Act.

That Act requires that they have some residence somewhere else in the world. And they would be subject to deportation if they claimed to the State of New York that they were residents of thatstate.

Now, the history of this Act, the State act involved, also indicates that we're really talking about a very small number of people. And the state understands that to be true.

QUESTION: Mr. Davidson, what difference does that make in the constitutional sense?

MR. DAVIDSON: Well, I think it even makes the State actions far more capricious than I would argue it is. In

1961, when this program was established, there was no citizenship requirements. And for a period of eight years, immigrant and citizen in New York State were entitled on equal terms to access to State tuition assistance.

In 1969 the State enacted the citizenship requirement which is now under review. The only indication of legislative history, legislative policy involved is an estimate by the staff of the appropriate legislative committee that there might be fifty students in the state who would be excluded by this provision, and the sum of $10,000 saved.

That figure, incidentally, disappeared from all further accountings, and it could very well be that the State anticipates no savings, because if they're right, if it functions as an inducement for people to petition for citizenship, then the net result might be more citizens and no savings in funds.

I think that requires us to criticize any possible suggestion that the State of New York might be bankrupted by a judgment that requires them to treat immigrants and citizens alike.

QUESTION: You mean more bankrupt?

MR. DAVIDSON: More bankrupt.

QUESTION: What would you say, hypothetically--a hypothetical statute of this kind, New York legislature, after conducting hearings, determines that they are lacking

three to four thousand physicians who are need, or the projections are that within five years they will need four thousand more physicians. So they develop a grant program to pay the entire tuition for New York residents for any accredited medical school in New York, and aliens -- citizenship in the United States and residence in New York being required. What would you say to that?

MR. DAVIDSON: I would say that would be an invalid statute. As a matter of fact, the District Court in New York has invalidated the state's citizenship requirements for doctors, following this Court's decisions in regard to engineers and attorneys.

QUESTION: That's a little different from -- I'm t alking about a program whose aim is to induce people to becomephysicians in New York.

MR. DAVIDSON: Yes, and if an immigrant is entitled equally with a citizen to become a doctor, then our argument would be that he's entitled to the opportunity to become a doctor.

QUESTION: Well, then, let me add another clause to the statute, that to secure this grant you must make a pledge to remain in the practice of medicine in the state of New York for not less than ten years, and failing to do so, you would be required to pay one tenth of the total cost of the grant of the scholarship for each year that you failed

to stay in New York.

QUESTION: I believe that would be permissible as a statute. Because it would require the same commitment by citizens as it would require of immigrants. And in fact the State of New York and other jurisdictions have such statutes, in which medicine students pledge to work in designated areas in return for assistance.

The program is more than a program of largesse. It is the judgment of the State of New York that this assistance is necessary to achieve post-secondary education in these times.

It is not our task, nor do we think it is a burden of the Court to decide for itself whether this assistance is necessary. That, in fact, has been the determination of the State of New York. And I think that we are entitled to take the State at its word in that respect.

I think we're also entitled to take the State at its word that if this assistance is unavailable, a large group of people will not receive the adequate, sufficient training to deal in a technical and difficult society. This program involves more than colleges and universities, although people certainly are assisted in large numbers there. It involves assistance to degree-granting trade and technical schools; nursing programs; registered business schools. The means of entree that people have

following secondary education to an opportunity to earn a decent livelihood.

The --

QUESTION: What are the conditions generally upon which these three programs are -- these three sources of money are available? There's the Regents' scholarship, and that's the competitive merit scholarship.

MR. DAVIDSON: That's right; for a limited number of people.

QUESTION: For a limited number of people on the basis of an examination or an oral examination or an interview --

MR. DAVIDSON: A written examination.

QUESTION: And then there's the TAP which is a grant of $250 each. Is that available to anybody who has been admitted by a State university?

MR. DAVIDSON: The Tuition Assistance Program --

QUESTION: Depending on need, of course.

MR. DAVIDSON: -- applies to all schools, whether they be the State University or private schools.

QUESTION: All schools of higher education?

MR. DAVIDSON: All schools above secondary education.

QUESTION: Closed to high school.

MR. DAVIDSON: All right. The grants run from $100

to $1,500, all based on need. If there is no need, there is no grant, for undergraduates; $600 for graduate students.

With those requirements --

QUESTION: If there is need, there is a grant for anybody who has been admitted, or who is in a college or university?

MR. DAVIDSON: Exactly. It is considered to be an entitlement program. Admission to an approved institution and need are the sole requirements for the receipt of this grant.

QUESTION: Of the TAP?

MR. DAVIDSON: Thats' right.

QUESTION: And the loan is similar to the TAP so far as conditions of --

MR. DAVIDSON: No, the loan programs are different. Mauclet has not complained of the denial of a loan. Neither has he complained of the denial of the Regents' scholarship. Both of those programs are different. His focus is entirely on the Tuition Assistance Program.

There is in addition a maximum amount based on the amount of tuition. No person may receive more than the tuition for the program in which he is eligible. So this is not a sum of money which he may use for any different and individual purposes.

The -- may I just return one moment to the

importance which the Immigration and Naturalization Act places on the unification of these families. There is a requirement in the Act that certain categories of immigrants receive certificates from the Secretary of Labor before they may be admitted, which would establish that they would not disadvantage citizen workers, displace them at their work, force a reduction in wages or working conditions.

The Act specifically exempts all immediate relatives, all relatives, in fact, because it is so important to the Congress of the United States that these people have an opportunity to reside permanently in this country, to maintain the integrity of their family units which must be also the integrity of it as an economic unit.

QUESTION: How far in the family -- what's the degree of relationship?

MR. DAVIDSON: Well, in terms of immediate relatives, it's spouses, children and parents. Then the system of preferences moves progressively beyond that ultimately to brothers and sisters.

QUESTION: Grandchildren?

MR. DAVIDSON: I do not believe so, your Honor.

The -- and if the Congress was to make that judgment, that it is so significant as a matter of national policy no matter what the effect on present residence of the United States may be, we think that it is a conflict with that

congressional scheme for the State of New York to impose its own judgments on the matter, and to say that these immigrant families are less worthy of its assistance.

And also the State makes the argument, well, there are other ways in which a person may finance his education. Well, that's true of citizens as well. These are integrated programs. The federal government has its programs, the State of New York has its programs. They are worked together by rule and regulation to provide a composite. When the State of New York says to the student, to an immigrant student, that he may not receive this assistance, the State places in extreme jeapordy that person's opportunity for an education.

Let me conclude this section by indicating that the objectives of the State of New York which it proclaims in this suit, that of encouraging people to become citizens, is an objective which is properly the objective of the national government. And this is another aspect of the State scheme which conflicts with the general national regulation of immigration.

Mauclet has not excluded the possibility of becoming a citizen. He was simply not ready to do so when the state, in essence, commanded him to do at the cost of his education. He may become a citizen later on. The Naturalization Act places no maximum time limit when a

person may petition for citizenship. It only places a minimum period of time.

QUESTION: Could the State of New York, constitutionally in your view, have this provision that we were discussing before, that he would pledge to remain a resident of New York for at least five years after he completed the graduate work?

MR. DAVIDSON: I think it could if it could also require that pledge of its other residents.

QUESTION: What's the difference between that coercion and the kind that's exerted on him now, except that you say it isn't applied across the board. Is there any other difference?

MR. DAVIDSON: Well, the essence of this proceeding in this action is equality, equality as required by the Immigration and Naturalization Act between citizen and immigrant, or equality as required by the Equal Protection clause.

If the State of New York treats its immigrants and citizens alike, then we would have no objection to that.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Greenberg.

ORAL ARGUMENT OF GARY J. GREENBERG, ESQ.,

ON BEHALF OF APPELLEE RABINOVITCH

MR. GREENBERG: Mr. Chief Justice, and may it

please the Court:

I would like tobegin by focussing on Mr. Justice Stewart's reference to New York dispensing its largesse to certain students at institutions of post-secondary education.

We think it can hardly be classified as a gift when what the New York State legislature is doing is taking the tax dollars which aliens, of course, contribute equally with citizens, and determining to dispense them in a particular program.

Now, we do not ask this Court, and we did not ask the District Court to substitute its judgment for the judgment of the New York State legislature. Let me read to you that judgment as articulated in 1961 when the program was really put into high gear, and the tuition assistance awards first came into being.

The New York State legislature said, higher education is no longer a luxury. It is a necessity for strength, fulfillment, and survival.

Now the New York State legislature has determined that this type of program is vital, it is essential to the well being of those people who reside in the State.

QUESTION: Where are you?

MR. GREENBERG: That comes fromthe laws of 1961, Chapter 389, Section 1 (a).

QUESTION: Is it in the Appendix or in the brief?

MR. GREENBURG: I believe actually that it's quoted in full in the brief of the State. And as a further indication of this statutory purpose, and this is something that we have quoted in our brief at page 21, in 1969, when the program was somewhat revised again, Governor Rockefeller in his memorandum indicated -- this is the memorandum of approval of the bill -- that the new revisions would do much to further New York State's goal that no young man or woman with the capacity and desire tc seek a college education, should be prevented from doing so for lack of financial resources. No reference to citizen; simply a recognition --

QUESTION: Is that the same legislature that excluded aliens?

MR. GREENBERG: That's the same legislature --

QUESTION: Well, how could he talk about all of them?

MR. GREENBERG: Well, I don't really -- we don't really know why the legislature ever excluded the aliens. We have no legislative history, and aliens have been excluded in one fashion or another, but not in a consistent manner, since approximately 1917, yet the New York State legislature has never told us why they have opted to exclude aliens. To the extent the legislative history gives any guide, it is one administrative convenience, and two, the

saving of $10,000.

We think the jurisprudence of this Court makes it clear that those purposes clearly cannot satisfy New York's burden when it invokes this type of invidious classification.

QUESTION: Could the New York legislature give the resident aliens of this category the right to vote in New York elections? Could they do it under their constitution?

MR. GREENBERG: Under the present constitution, they could not do it. In fact, at one point, I think until 1825, New York in fact allowed resident aliens to vote, as I think virtually every state did at that point in our history.

I think it's clear that this Court has determined that New York can exclude resident aliens from voting; it can exclude them from holding elective office; it can exclude them from high policymaking offices; and the issue before this court, maybe in the next case, will be whether that includes the State police officer.

QUESTION: Are there any statistics in the record that would indicate whether the parents of the aliens who capply for this sort of grant are themselves residents of New York, or rather, residents of the United States, or to the contrary, residents of some othercountry?

MR. GREENBERG: There are no such statistics. The facts in this case indicate that Mr. Rabinovitch, his entire family, is resident in New York and has been since 1964.

There are no statistics as to -- in general.

QUESTION: Percentages, or anything.

MR. GREENBERG: No, we do not have that. And I don't know if such statistics are maintained anywhere, frankly.

The state argues, and perhaps there was some suggestion that this issue troubled the Court, and I refer specifically to Justice White's question, that we really don't have a discrimination against aliens here; that the statutory distinction is something different.

The State argues, we're not discriminating between citizen and alien; that what this statute does is, it discriminates within the class of aliens.

We think that reasoning, as the District Court put it, simply defies logic. Indeed, in preparing for this argument, I had occasion to look at your decision last term in Matthews versus Lucas. That involved the social security dependency allowance to legitimate children, with certain presumptions as to dependency for legitimates and certain presumptions within the category of illegitimates. And apparently the Solicitor General argued this was not a discrimination between legitimate and illegitimate. And in a footnote, footnote 11, this Court says, that's nonsense. Just because you have distinctions within the class of illegitimates, you cannot argue logically that therefore

this is not a distinction between legitimate and illegitimate children.

We have here a statute which, on its face, says citizens, and those aliens who are willing to apply for citizenship, will receive a certain benefit.

QUESTION: Didn't Matthews versus Diaz last year though contain language contrary to that which you just suggest? Is it permissible to distinguish within classes of aliens when the federal government does this?

MR. GREENBERG: Yes. When the federal government does it, that kind of distinction is permissible. And the fourth part of the Matthews opinion makes the very clear distinction that while it is the normal everyday constitutional function of the federal government to distinguish within the class of aliens and between citizens and aliens, entirely different considerations are involved when a State makes that kind of discrimination.

QUESTION: But then it doesn't make any sense to say that these are really not discrimination, or thatthey really are discrimination. What you're really saying is that one level of government as the right to make them and the other doesn't, not that when one makes the same that the other does, they are discriminations and that in the other case they are not.

MR. GREENBERG: Oh, no. Absolutely; they are

clearly classifications of discrimination. And what Matthews holds is that the federal government has the power. And reading Hampton together with Matthews, at least the President and the Congress have the power to make such discrimination. What Matthews I think quite clearly holds, in the fourth part of the opinion, is that the state governments do not have the similar power, unless -- and I have heard very little today about the unless part -- unless the discrimination satisfies some legitimate and substantial state interests.

We look to see what the state interest is in this particular statutory classification. And frankly, the argument put forward by the state we think is nothing but a convenient, but false, post hoc rationalization. The State tells us that they're seeking to encourage, in essence, voter registration and office holding.

Now, how does a statute which simply provides tuition assistance, Regents' scholarships or student loans encourage voter registration or office holding?

Indeed, when confronted with this particular statutory purpose the District Court said, not only can't the State satisfy it's substantial interest here; there isn't even a rational relationship between this asserted purpose and the statute under consideration.

We search at length to seek a method by which this

statute would somehow further these goals.

And indeed it is interesting to note, as the brief from Mauclet points out in detail, New York has a variety -- a whole host of these habitual reflexive discriminations against aliens. And they're in Court on many of these cases right now.

In everyone of these cases, the same rationalization is used. We are told that requiring citizenship for the licensing of physicians promotes the New York political community. The State argued, believe it or not, thatthe same political community rationalejustified their requirement that physical therapists becitizens of the United States.

It is a ubiquitous argument trotted out on every occasion by the New York Attorney General, presumably seeking to find support in the Sugarman caveat as to what would be a substantial state interest.

In this particular case, we don't see how the statute even approaches anything which we could consider to be a substantial interest. We don't see how the statute is narrowly and precisely drawn to promote the interest. Indeed, we think it's clear, and we think legislative memorandum number eight, focusing on the $10,000 saving, we think its clear that what New York was doing was out of habit, focusing on a traditionally discriminated class, and seeking to save a few dollars at their expense, and doing it in a situation

where the New York legislature has already determined the significance and importance of this program to the individual.

Now, the fact that total foreclosure is not the consequence of this program should make, we think, no difference.

QUESTION: That is, you mean, the fact that some aliens are eligible?

MR. GREENBERG: The fact that some aliens are eligible; the fact that aliens can go to universities if they can fund the particular costs themselves without any student assistance.

What the --

QUESTION: Well, I suppose there is student assistance -- there generally is -- at institutions of higher learning today. The students don't pay the full costs.

MR. GREENBERG: Oh --

QUESTION: I mean, even though they pay the full fee, that's not the full cost.

MR. GREENBERG: Oh, absolutely.

QUESTION: It's generally about fifty, sixty percent of it at the most.

MR. GREENBERG: That's right. But in the case, for example, of Mr. Rabinovitch, he now has a $900 -- I mean $925 annual tuition cost. If he were a citizen -- and in his case, he'd have to do more than declare intention;

he would actually have to apply to be eligible -- he would get, via the Regents' scholarship, which he won on a competitive examination, and via tuition assistance, that full amount covered.

In his economic circumstances, this imposes an enormous burden on him and his family, because he gets no assistance, none whatsoever.

Now I should like to make two additional points before closing. With reference to the loan program, the State made some reference to a requirement or a request for a remand.

I frankly don't understand what they are talking about. The State had a full opportunity to try this case below. The State moved for summary judgment. The State didn't seek to introduce any additional evidence. The considerations of the loan program are, quite frankly, exactly the same.

QUESTION: Did your client ask for a loan?

MR. GREENBERG: My client indicated that the -- he might, for purposes of graduate school, require a loan. He has never actually applied for a loan --

QUESTION: Well, how does he have standing to raise the loan question?

MR. GREENBERG: Well, we think because we have a single statutory prescription; that is to say, 6613 covers

all three programs. Because he has been injured in connection with two of the programs. Because the State has admitted, and admitted in the argument below, and it's reflected in the opinion, that if he applies for a loan, he will automatically be denied assistance.

QUESTION: His standing, then, is based on how the codifiers number the sections of the statutes?

MR. GREENBERG: Well, I don't think it's based simply on the numbering. But we do have a single, statutory program here. And it would make very little sense to require Rabinovitch to go back, file his application, have it denied, and come right back up on issues that would be virtually identical.

So we see that there's no -- remand in this case can serve no purpose. And indeed, the State has never asked for it, or sought to introduce any evidence, or deal with the loan program in any way differently until this moment.

Finally we would point to the supremacy --

QUESTION: Except I thought the state had always taken the position that you -- your client does not have standing to raise the loan --

MR. GREENBERG: Yes, the standing point they have raised from the beginning.

QUESTION: That's what I thought.

MR. GREENBERG: Finally, with regard to the

supremacy argument, I think it is very important to recognize that the United States Government has allowed the appellees in this case to enter and reside inthe United States. And they've done so, without requiring any declaration of intention to become a citizen at any time.

Second of all, there is a statutory provision, 42 U.S.C. 1981, which this Court has relied upon in Takahashi and Graham, which indicates that resident aliens have a right to enter to abide within all of the United States, and in equality of legal privilege and right; and that when New York enacts this program, it is clearly interfering with the general plan and program articulated by the federal government in the Immigration and Nationality Act.

Indeed -- I'm sorry, I see my time is up.

MR. CHIEF JUSTICE BURGER: You may finish your sentence.

MR. GREENBERG: All right. Indeed, the enactment of the parole-refugee provision is simply New York's recognition that by keeping out of the program people whom the federal government has allowed into the United States, they are burdening the residence of these people, and they are imposing upon them burdens not contemplated when the federal government allowed them entry and residence in this country. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Greenberg.

Do you have anything further, Mrs. Gordon?

MRS. GORDON: Yes, your Honor. I have a few minutes.

REBUTTAL ARGUMENT OF MRS. JUDITH A. GORDON, ESQ., ON BEHALF OF THE APPELLANTS.

MRS. GORDON: "The future progress of the state and nation, and the general welfare of the people, depend upon the individual development of the maximum number of citizen leaders to provide a broad range of leadership.

"It is in the vital interests of the people of this State to develop this reservoir of talent and future leadership."

That is a quotation from the same legislative history that Mr. Greenberg quoted a few moments ago. It appears in part at pages 12 and 13 of our brief, and it appeals in the main volume of McKinney's , the pertinent education law sections, where it is set forth in full.

So much for post hoc rationalization. And indeed, however, if the State were to infer any purpose from the face of a given statute absent any prior legislative history, there would be absolutely nothing wrong with that imprint under a strict scrutiny standard or under a reasonable relationship standard.

Now, the citizenship and national affinity

requirements with respect to the program s in issue have a 57 year history in the State of New York. They were started in 1920 when the Regents -- with respect to Regents' scholarships. They were expanded gradually throughout the years, until they reached substantially their present form in 1962. And indeed, as you can see, the programs themselves were expanded, loans coming shortly after Regents' scholarships in 1957, and scholar-incentive awards coming shortly after that in 1961.

Now, appellees refer you -- both appellees refer you -- to a figure, $10,000 and 50 students. They come to that figure by starting their- legislative research in1961 with the birth of the scholar incentive program, putting aside the 40 years of customary history that attach to the Regents' scholarship program.

Now, appellees say -- and there is a difficulty here, but it is easily resolved --- At the birth of the scholar-incentive program, that bill was in the same package of bills; they occasioned revisions to the Regents' scholarship program.

One of the revisions of the Regents' scholarship program was a reference to the Board of Regents to e stablish an appropriate rule regarding citizenship and affinity for Regents' scholarships.

Accordingly, the scholar-incentive program, as I

indicated, was enacted at exactly the same time, they didn't have a rule. But the legislative history that I just read you was enacted with respect to that program.

Appellants have submitted that it was the purpose of the legislature at that point, to have the Regents make a rule for both programs.

Appellee Mauclet comes in, and he says, no; impossible. The Board of Regents didn't have the power. They only had the power to make rules with respect to Regents' scholarships, not with respect to scholar-incentive.

The answer to that question is quite simple: the power is found in Section 603 of the Education Law as it appears in the main volume of McKinney's, which was in fact added to include Board of Regents' power over scholarship incentives in 1961 when that program was created.

Now the $10,000. As it turned out, over the period of time when scholar-incentives were first enforced, and this reference to the Board of Regents was first enforced, the Board of Regents in fact made a rule for Regents' scholarships; it did not in fact make a rule for scholar-incentive.

As a result, in 1969, the legislature in its essence adopted the Board of Regents rules for scholarships, and codified them into statutes for both programs.

Now, in that re-enactment in effect of this rule,

there are two legislative documents that the appellees refer to.

The first is report 8, which started at the beginning, apparently, at the beginning of the 1969 legislative session. It says, in effect, we want to put the citizenship requirement back. And there is an indication inthat bill that the savings will be $10,000. There was also an indication in that bill that other items would have certain savings, and there was also an indication in every New York State bill about what the fiscal ramifications of a given piece of legislation are.

Notably, the very next report, and indeed the one before the legislature apparently enacted report 9, deletes the reference to $10,000 and 50 students. Why does it do that? I think because it was an obviously gross error.

The question of where the $10,000 figure came from, and the question of where 50 students came from is never explained. And indeed, there is, as appellees themselves indicate in this immediately following report, the reference itself was deleted.

According, I don't think we can infer anything from that. What we can infer is that this particular -- that Section 661 in its present form is a matter of customary history in the State of New York over a very substantial period

of time.

Now, I would just like to take a few moments with respect to a point raised by Justice Rehnquist. It is true that Section 661(3) now regulates three programs. It is equally true that these three programs are separate, and they are found in different portions of the statutes, and they have different types of criteria incident to them.

The one appellant's position with respect to Rabinovitch's standing here: it's not a mere formality that he didn't obtain a final adjudication or final administrative determination of his rights, although I certainly think that would be sufficient in itself, the point is, he never alleged a present need for the loan. And there is absolutely no evidence in the record that he would have a deficiency between his anticipated expenses and his income that would warrant a loan.

He says, in his brief in response here, that, well, he wouldn't ask for an interest free loan, which is one of the subsidies provided by the program. Of course the additional subsidy provided by this program --

QUESTION: Does the application for a loan have a blank to say whether you're a citizen or not?

MRS. GORDON: Yes, it does, your Honor.

QUESTION: Well, what would be the sense of him filing it?

MRS. GORDON: Well, first of all, he didn't file it, and we don't -- first of all --

QUESTION: What would be the sense?

MRS. GORDON: In reality, your Honor, the loan application usually goes first to the Bank. The lender, under this program, is not the State of New York, or the New York State higher education services corporation, but a bank. And it goes to a bank for the obvious purpose that all loan applications go toa bank, to see if the individual who wants to borrow the money needs the money.

Now, granted, there is a provision about citizenship. But we don't know how this application would have been disposed of, and we certainly don't know whether he needs the money within any defintiion of the word --

QUESTION: Well, don't I assume that if a New York official paid money to a non-resident alien who said he didn't ever intend to be an alien would be proper?

MRS. GORDON: You mean if he paid it out in violation of the statute?

QUESTION: Could he do that?

MRS. GORDON: Obviously not, your Honor.

QUESTION: Well, why should he have to go through that, when there's no way hecould get it?

MRS. GORDON: Your Honor, the same New York official who, in fact, as I just pointed out, does not pay out the

money, would be equally in violation of law, or certainly be exercising extraordinarily poor judgment if he paid out the money to somebody who didn't need it. I mean, need, that's the whole point, your Honor.

First of all, the claim is premature, and its effect is speculative.

I would just like to close -- well, it appears I have closed.

Thank you.

QUESTION: Well, can I ask you before you close?

MRS. GORDON: Certainly.

QUESTION: What's your understanding on the power of New York to impose a residency requirement for the disbursement of these funds?

MRS. GORDON: I think that New York has that unquestioned power under the Graham decision.

QUESTION: And what's your understanding of the State's power to impose, say, a one year's residency requirement?

MRS. GORDON: I think it has that power, your Honor.

QUESTION: And New York apparently thinks that is not sufficient?

MRS. GORDON: Your Honor, the statute asks exactly the same commitment from citizens and aliens: a

commitment to the United States is possessed by any United States citizen by virtue of his status.

QUESTION: So your answer is, no, New York does not think that's adequate; is that right?

MRS. GORDON: The answer is, no, New York does not think that's adequate, that the citizen and the alien both are treated identically under the statute, and that the result is a benign classification.

Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 1:39 o'clock, p.m., the case in the above-entitled matter was submitted.]