

ORIGINAL

In the

Supreme Court of the United States

GORDON M. AMBACH, as Commissioner of
Education of the State of New York,

VINCENT GAZZETTA, as Director of the
Division of Teacher Education and Certifi-
cation of the Education Department of the
State of New York, and

ROBERT ASHER, as Director of the Division
of Professional Conduct of the Education
Department of the State of New York,

Appellants,

v.

SUSAN M.W. NORWICK,

Appellee,

TARJA U.K. DACHINGER,

Intervenor- Appellee.

No. 76-808

Pages 1 thru 45

Washington, D. C.
January 10, 1979

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Washington, D. C.

Wednesday, January 10, 1979

The above-entitled matter came on for argument at
1:36 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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:

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New York, New York 10047; on behalf of the
Appellants.

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behalf of the Appellees

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 76-808, Ambach and others against Norwick and others.

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:

The principal question presented on this appeal is whether the equal protection clause requires New York to stop qualifying permanent public school teachers in terms of citizenship or application for citizenship.

This New York requirement is statutory; it is codified in education law Section 3001-3. It operates only with respect to elementary and public school teachers, and it asks for applications for citizenship only from immigrant aliens who have the legal capacity to accept or reject the request.

Other provisions of what appellants believe is a finely honed state program permit aliens to receive temporary certificates in certain circumstances. For example, if an alien is under federal disability and for that reason cannot apply for citizenship, he can receive a temporary certificate during the duration of those disabilities for up to five years.

If, as another example, an alien is an exchange teacher

teaching in New York public schools as an example of his own national culture, he also obtains a temporary certificate for up to two years.

The undisputed facts in this case place the appellees at the core of the statutory requirement for citizenship or application for citizenship. Mrs. Norwick has been a permanent resident alien in the United States for 14 years. Mrs. Dachinger has been a permanent resident alien in the United States for 13 years.

During the entirety of that period, and by force of their legal status, they have the capacity to acquire citizenship.

Both of these individuals, both appellees, and there is no class action order in this case, both appellees sought under state law what are called "N through 9" certificates. The certificates that -- pardon me, "N through 6" certificates, the certificates that permit a teacher to teach each and every grade from nursery through sixth grade, and in the circumstances where the classroom teacher is responsible for teaching all of the subject matter within those grades.

QUESTION: Mrs. Gordon, does the state concede that these people, except for alienage, are fully qualified?

MRS. GORDON: Yes, Your Honor, a caveat in the record which I should perhaps call to your attention, and that is,

in addition to the appropriate citizenship requirements, there are other grounds for obtaining provisional as distinguished from permanent certificates.

Mrs. Norwick, at the outset of the case, was denied -- or not the outset of this case, pardon me; the outset of her application to the state authorities -- was denied even a temporary -- pardon me, a permanent certificate, because she had not completed the educational requirement for that certificate, namely, a master's degree.

That aspect of the case was cured during its pendency below, because she did, in fact, get the master's certificate. So she would be qualified under state law except for the failure to comply with Education Law 3001-3.

QUESTION: One other question and I'll let you go.

In the Appendix on page 25, there's a statement under Rule 9(g).

MRS. GORDON: That is correct.

QUESTION: Do the appellants accept that as true and correct?

MRS. GORDON: Yes, Your Honor. If -- we have accepted it as true, but if the implication of your question is that in accepting that statement, the offer of proof which is set forth at page 33 of the Appendix following was inappropriate, then we would dispute that.

Appellants contend that Section 3003 must be

sustained under the equal protection clause, regardless of whether the statute is subjected to relaxed or to strict prudence.

The statute serves the state's substantial purpose in training pupils for their responsibilities as citizens. It does so by the most effective and least drastic means available. It includes those who are willing to accept the responsibilities they must impart, namely, individual participation in democratic decision-making; and it excludes only those individuals who have refused to participate, and who have by that very choice placed themselves at odds with the instructional purposes the statute carries out.

Appellees do not refute the proposition that public education in fact trains pupils for citizenship. They also do not dispute the additional proposition that public education through this training has been a force for social cohesion in the United States, forging, as it were, one nation out of the various immigrants who settled this country, and who continue to come here today.

Indeed, we do not think the appellees could successfully refute that proposition, in face of this Court's oft-repeated statement that the principal purpose, if not the overriding purpose, of public education is in fact training for citizenship.

QUESTION: They are authorized to serve on the school

boards that hire teachers?

MRS. GORDON: Yes, Your Honor; well, not exactly, Your Honor.

Appellees point out, as an example of inconsistency with the statutory program here involved, that in New York City and in New York City only, aliens have been entitled to vote in so-called community board elections and to sit as members of those community school boards.

There are essentially 32 of those school boards.

This entire program, when first enacted in 1969, and is an educational experiment, as we've showed in Exhibit A of our reply brief, again before the legislature in terms of the validity or success of the experiment.

Now, in voting in that kind of an election, and sitting on a school board, the alien who votes or sits does nothing inconsistent with this statutory program, because 3001 is the overriding or supervening state statute which qualifies all elementary and public school teachers in New York State, and with respect to which that alien member of the school board can do nothing; he does not have the discretion to change or affect the role model example of the teacher in the classroom as a member of that board.

QUESTION: One other question: Has New York ever attempted to impose this requirement on teachers in private schools?

MRS. GORDON: No, Your Honor.

QUESTION: Is there a reason for that?

MRS. GORDON: I think so, Your Honor; I think in fact the choice is constitutionally compelled.

The fact that New York views, as this Court has viewed, public education as the agency, or primary agency, through which citizenship is developed, does not mean, by any stretch of the imagination that private schools do or should serve the same interest.

In fact, private schools are acknowledged to be -- and have in opinions of this Court been acknowledged -- to serve quite different interests; largely, religious interests. And they operate in a context where those interests are -- become paramount to other interests it serves.

Indeed, for example, in New York city, we have private schools that operate along the lines of national interests: the Lycee Francaise, which teaches a curriculum entirely in French, leading to a French baccalaureate degree, in preparation for European -- further education in European universities, or perhaps, in American universities.

QUESTION: What about Dalton and Hunter? Places like that?

MRS. GORDON: I beg your pardon, Your Honor.

QUESTION: What about Dalton and Hunter?

MRS. GORDON: Well, Hunter's a public --

QUESTION: They're private schools; they're not denominational schools.

MRS. GORDON: That is --

QUESTION: And there're quite a few in New York City.

MRS. GORDON: Well, I think we have to put aside the example of Hunter, Your Honor, because that is a public school. But in terms of Dalton or Greary or the other private schools in New York, New York has left -- the state, that is -- has left to the --

QUESTION: No, I mean, you kept saying, church schools.

MRS. GORDON: Well, in fact, Your Honor, 588,000 children or so in New York State attend private school. Only 64,000 of the children attend schools of the -- of the Dalton type. All the rest attend religiously identified schools, where indeed the teachers may be members of religious -- international religious --

QUESTION: All I'm asking is, are they included in what you're saying, that's all.

MRS. GORDON: Yes, that's true, Your Honor. We do not limit the qualifications of private school teachers, whether for religious schools or for other private -- for other types of private schools, to citizens or applicants for citizens.

QUESTION: But Mrs. Gordon, is it not true that the private schools, both religious and secular, have as part of their mission training the pupils for citizenship?

And in fact, doesn't the state require certain course content in order to fulfill that objective?

MRS. GORDON: I think the response must be framed in the following way, Your Honor. It is public education that has been accorded the principal responsibility for training for citizenship. Public education in New York is a matter of state constitutional prerogative and protection.

Private school is not. But of course, the state has an interest in the kind of curriculum and the kind of instructions in that -- in those private schools. And the state does by statute, which we recite in our opening brief, require that the instruction in those schools be substantially equivalent.

I call to your attention, it does not require it to be the same, and there is no suggestion in statutory plan that the quality of instruction for the purpose of training for citizenship is the same. The curriculum requirements, the basic curriculum requirements, the twelve common branches in elementary school, and some additional courses in secondary school, are generally required under the substantial equivalent formula, in both public and private schools.

Courses in history are included in both public and

private schools.

However, in terms of curriculum, the state does speak differently to its own public schools. For example, it requires in public schools but not in private schools --

QUESTION: Well, even though there are differences, is not the reason for the regulation of the private schools the state's interest in being sure that all children are properly trained for citizenship?

Isn't that the overriding objective, and the reason for the regulation?

MRS. GORDON: Frankly, Your Honor, no, I don't think so.

I think the state's predominant interest for public education is in fact training for citizenship. I think --

QUESTION: Well, why do they regulate private schools at all, then?

MRS. GORDON: Because there is a fundamental interest for the state in seeing that certain standards, educational standards, are met; that children who go through a course should be able to read and write.

But that doesn't say that the agency that is looked to for this purpose is the -- is predominantly the private school. It is, in fact, the public school.

And perhaps most significantly, to the extent that the religious preferences of parents might be impeded by the

same identical regulation of private schools, then of course it would seem to me that the state has acknowledged that, and has said, no, we will stop short of that; we will let the parent who chooses a different kind of education for his child have the full benefit of the instruction that goes along with it.

And the state says that is fine; only minimum curriculum standards should be met.

QUESTION: Mrs. Gordon, why do you think you need to assert the idea that private schools do not have as part of their mission training for citizenship?

You don't have to defend the statute of New York on the grounds that it's perfect, or that it's perfectly consistent. People who have a private school, who want private schools, just as we have religious schools.

But as Justice Stevens suggested, there are certain minimum requirements which are common to all of them.

MRS. GORDON: That is correct, Your Honor.

QUESTION: But there's no constitutional requirement that state statutes have to be internally consistent, is there?

MRS. GORDON: Well, Your Honor, that brings us to the question in this case, which is whether or not we would apply the rational basis test, and sustain the statute that way under the Fourteenth Amendment, or whether we would apply strict

scrutiny.

The force of my argument here today is largely directed to strict scrutiny, because of course, if the statute survives that test, it must perforce survive the rational basis test.

And accordingly, I directed my answers in that vein.

But equally, Your Honor, we have taken a position in our brief which we by no means eschew, and that is that the appropriate test is one of reasonable relation; and that is because training for citizenship as it has been expressed as a responsibility of the public schools, is an important governmental interest, a proposition which appellees don't dispute, or refute successfully, as I read their papers.

And indeed, the relationship between the teacher as the individual who was present in the classroom and who was the model and the example for the behavior of his students ties him closely and reasonably with the execution of that governmental purpose.

And on those two statements, we think, Your Honors, frankly, that this statute not only survives reasonable basis examination, but also strict scrutiny examination.

Given the posture of the case as we perceive it framed by the arguments offered by appellees, that is, that they do effectively concede, Your Honor, that training for citizenship is a primary mission of the public schools, the

question then becomes whether or not -- or the sole question that remains in the case is whether or not the selection of the positive rather than the negative example, as at Section 3301-3 provides, is in fact reasonably or necessarily related to the instructional purpose that the statute serves.

And I think it is important in this context to examine for a moment what the teaching and learning process is about. Teachers do not merely teach by recitation from a text, if they ever did so; and students do not learn by rote.

Studies, which again, appellees do not seriously oppose, speak to the point that teachers transmit attitudes and values, as well as information by their own examples. The pupils under their control and jurisdiction copy and emulate those attitudes.

And those -- the very attitude that is transmitted --

QUESTION: Mrs. Gordon, what are some of the attitudes and values that the citizen has that the plaintiffs in this case do not have?

MRS. GORDON: The citizen has the capacity to participate in democratic decision-making. That is the attitude and the value that is thought to be transmitted --

QUESTION: You mean, he can vote?

MRS. GORDON: He can vote.

QUESTION: Well, these people can participate in debate, I suppose, which is part of the democratic decision-

making.

Maybe the answer is to let aliens vote.

MRS. GORDON: Well, I don't think that based on Stan-
ford v. Rural Exports that that would be likely, Your Honor.

QUESTION: A state could do it; some states have.

MRS. GORDON: Some states have historically, but not for a very long time, in my understanding.

QUESTION: Do you have any requirement in New York that your teachers must vote in order to hold their jobs?

MRS. GORDON: An interesting point, Your Honor.

I think if we had such a requirement, it would probably be in violation of the First Amendment, because after all, I think the concept embodied there includes the right to remain silent as well as the right to express oneself.

QUESTION: If a teacher fulfills your requirement, the teacher could also be a policeman, couldn't he?

MRS. GORDON: That's right. And one of the -- the regard for the assumption of those kinds of public duties is the kind of attitude and value which is sought to be imparted.

And when we suggest that the value is democratic decision-making, and also regards to public duty, we do not exclude bringing up children to assume the responsibilities of policemen, legislative, and judges. That is exactly what the force of public education is.

I think, as I've been attempting to point out, that

it must be accepted, and it has been accepted in prior decisions of this Court, particularly with Wisconsin v. Yoder most recently, that in fact, teachers do impart principles by their own examples, by this instruction, from their examples, of values and attitudes.

I don't think that we can find that appellees, even if they acted in the utmost good faith, could be the kind of example that is consistent with the statute, because essentially, even if they said that they would select out those attitudes that they thought would be positive reinforcement of the citizenship training they are attempting to provide, they could not effectively do so, because no individual can consciously select those attitudes and values which they will convey.

Teachers convey the body of their attitudes all of the time and in all of the courses that they teach.

Thank you. I will reserve a few minutes for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Ennis.

ORAL ARGUMENT OF BRUCE J. ENNIS, JR., ESQ.,

ON BEHALF OF THE APPELLEES

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

Appellants arguments here, and in this brief, largely ignore the particular facts of this case: New York's unusual,

and even unique statutory scheme, and the narrow and rather traditional legal theory that was the basis for the unanimous judgment below.

Many of the issues raised by appellants need not be resolved in order to affirm the judgment below. For example, this Court could assume, as did the court below, that New York might have a legitimate interest in preventing some aliens from teaching some subjects at some grade levels, and nevertheless conclude, as did the court below, that this particular statute is not necessary to protect that interest, and is impermissibly under and overinclusive.

The statute is under-inclusive because it does not require citizenship for even declarant status for teachers in private schools who teach 18 percent of the elementary and secondary school population in New York State.

Under New York law, private school teachers --

QUESTION: Well, isn't there a difference? We do not permit -- the constitution does not permit teaching religious subjects in the public schools, but it fully protects the right to teach religious subjects in private schools.

MR. ENNIS: Yes, Your Honor. The question here is --

QUESTION: That seems to me -- somewhat dissolves the point you're making.

MR. ENNIS: Well, I think not, Your Honor, for the

following reasons:

The question is not whether New York would be constitutionally required to require teachers in private schools to teach the principles of democracy, or would be constitutionally prevented from doing so.

That is not at issue in this case. The New York State legislature has chosen to require teachers in private schools to teach the principles of democracy, which shows that the state has an interest, whether it's a constitutional interest or not is not an issue in this case, but it shows that the state has an interest in requiring private school teachers to teach the principles of democracy.

But if it is not necessary to insure that private school students learn the principles of democracy to apply --

QUESTION: Parents have a choice about sending their children to private schools. They have no choice about sending their children to a public school, do they, under compulsory attendance laws?

MR. ENNIS: That's entirely correct, Your Honor. But it is also true in New York that parents have no choice, at the present time, whether their private school students are taught the principles of democracy or not. It is required by New York statute that private school students are taught those principles.

Our point here is simply that if citizenship or

declarant status is not necessary to insure that private school students learn those principles, it is not necessary to insure that public school students learn those principles.

QUESTION: But isn't it possible that New York may have felt it was presented with conflicting claims with respect to private schools? That is, their desire for autonomy, and let them run themselves, but at the same time, they have to fulfill some of the functions of public schools?

And so they choose to go just halfway with private schools, prescribe the curriculum, but not ride herd on who might teach?

MR. ENNIS: Again, Your Honor, we are not saying in this case that New York is required by the constitution to have exactly identical requirements for public school and private school teachers.

The point I'm simply making is that the New York State legislature has already by statute required that the principles of democracy be taught by private school teachers.

The New York legislature would clearly have the constitutional authority, in my opinion, if it chose to do such, to require that private school teachers meet the same minimum qualifications as the public school teachers and that would include the same citizenship or declarant status requirement.

QUESTION: Well, the point I was trying to make to

you in my question was that New York could, with equal constitutional validity, decide to stop short with private schools of going as far as it did with public schools, and saying that with public schools, we will require both teaching democratic citizenship, and citizenship or declarant alien status for teachers; but with private schools, we'll simply require the curriculum content, let the private schools choose the teachers themselves.

MR. ENNIS: Your Honor, the point I'm trying to make is not that there is a separate and independent equal protection violation, because of the different citizenship requirements for private schools teachers and public school teachers.

The point I'm simply making is that the state has already indicated it has an interest, a state interest, in making sure that private school students learn the principles of democracy. And the state apparently believes that it can fulfill that interest, at least in the private schools, without also requiring citizenship or declarant status, for the private school teachers.

QUESTION: But isn't it an equally rational inference that the state perhaps felt that private schools would not be quite as sure of fulfilling that interest but nonetheless, in the interests of preserving autonomy of a private school, chose not to force them, the way they chose to force the public schools?

MR. ENNIS: Well, Your Honor, that's entirely a matter of speculation.

QUESTION: Yes.

MR. ENNIS: There's nothing in the record of this case, or in the legislative history of either of those statutes, that could properly answer your question on that point.

QUESTION: I agree, it's speculative.

MR. ENNIS: I think that entirely apart from the private school point, this statute is also under-inclusive, because under a regulation issued by appellants, aliens who are barred by a federal statute from becoming citizens, or even from filing declarations of intent to become citizens, are nevertheless permitted, in some circumstances, to teach even in the public schools.

I think the statute is over-inclusive, because it applies to any alien from any country, and prevents that alien from teaching any subject at any grade level. It therefore applies to aliens such as appellees, who are willing to take an oath to support the state and federal constitution, and who have actually taught the principles of democracy in New York's private schools.

It applies to aliens such as appellees who are married to United States citizens, who are the parents of United States citizens, who have resided here for well over

a decade; and who even received their graduate education in New York's public university.

The statute applies to aliens from countries whose political traditions and values are indistinguishable, if not much the same, as our own. For example, Appellee Norwick was born in Scotland, and is a citizen of Great Britain.

Even if we assume that the state does have an interest in preventing, for example, Russian citizens from teaching civics, must it prevent French citizens from teaching French, or Canadian citizens from teaching math or metalwork, in order to protect that interest?

Finally, despite appellants' erroneous claim that it was only dicta, a reading of Kay v. Board of Education shows that the New York courts have squarely held that the citizenship requirement, quote, is not limited to elementary and secondary schools, and the court therefore holds that Bertrand Russell is not qualified to teach in City College by reason of the provision of this section, close quotes.

Your Honor, one of the important -- Your Honors, one of the important questions in this case is the appropriate standard for review. Now, we believe that even under a rational basis standard, this statute is not necessary and would not survive.

For example, it cannot rationally be supposed that an alien who, on the first day of residence in this country,

files a declaration of intention, and is thereupon permitted to teach in New York's public schools for five years, know more about this country's values and mores, share those values and mores, and be better able to teach them --

QUESTION: Well, you're really arguing for a perfectly tailored statute now, aren't you?

MR. ENNIS: No, Your Honor --

QUESTION: It's always easy to take any statute in any area and, under the scrutiny of a litigated case, think about ways that it could be made more nearly ideal.

MR. ENNIS: That's correct, Your Honor.

We're not arguing for a perfect match here, but I do believe, based on the factors identified in our brief, that this particular statute is substantially and impermissibly under- and over-inclusive. It's not just that there is a small difference, but that there is a great difference; a difference of constitutional significance.

QUESTION: You've used the word "necessary to obtain the state objective."

Do you really mean that? That's the terminology of strict scrutiny.

MR. ENNIS: Well, certainly that's the terminology of strict scrutiny.

QUESTION: I thought you were arguing rational basis.

MR. ENNIS: I'm arguing both, Your Honor. But let

me turn to that point and say to the Court why I believe strict scrutiny is, in fact, the appropriate standard to be applied in this case.

QUESTION: But I thought you just said that even under the rational basis standards, you would think the statute invalid.

MR. ENNIS: I did say that, Your Honor.

QUESTION: But in that context you used the word, "necessary." Was that a slip of the tongue?

MR. ENNIS: Well, actually not, Your Honor, because the previous alien cases of this Court, including, for example, *Foley*, which was decided on the rational basis grounds, state in a footnote in *Foley*, the majority opinion, that even if the state is legislating to define its political community, the statute cannot sweep indiscriminately; that it must make careful choices.

Whether we choose the word, necessary choices, or over- or under-inclusive, I think, is not particularly appropriate.

We were talking about aliens who historically have been a suspect class, deprived of the right to vote, political powers. I think that kind of scrutiny by this Court is warranted.

But let me turn to the point of why I think it's clear that strict scrutiny is in fact required in this case.

Very recently, in Nyquist v. Mauclet, this Court ruled that statutes which limit benefits to citizens or to declarant aliens must be strictly scrutinized.

Now, that was a 5 to 4 decision, but it has not been overruled --

QUESTION: It was also higher education, was it not?

MR. ENNIS: It was financial assistance for higher education.

QUESTION: Graduate -- indeed, graduate education.

MR. ENNIS: That's correct, Your Honor. And as I believe you pointed out, in your opinion in that case, was that was a lesser interest of the plaintiffs involved than would be the interest in this case, which is a right to employment, which you describe in that case as a fundamental personal interest.

The interest in Foley was simply an additional benefit, financial assistance for graduate education, whereas the interest in this case is actually the right to employment.

QUESTION: You have them reversed, I think; Mauclet and Foley.

MR. ENNIS: I'm sorry. I was talking about Mauclet, Your Honor.

At any rate, I think that Mauclet is indistinguishable on that point, and therefore, unless this case falls within the political community exception, first suggested in

Sugarman, and first applied in Foley, a strict scrutiny standard should apply.

I think there are at least six reasons which distinguish this case from Foley. But before discussing those specific reasons, I would like to make one point not made in our brief, which I personally find dispositive.

We contend, as the New York courts actually held in [?] Corsall v. Gowen, [?] that teachers have only very limited discretionary authority, and are subject to close supervision.

But whatever authority teachers have to formulate or execute broad policy, they certainly do not possess as much authority to formulate or execute policy, and do not have as much continuing or overall impact on the political socialization of students, as do their direct superiors, the local community school boards, who under a New York statute, have the authority to hire and fire and select teachers, to specify the curriculum, to select textbooks and other instructional materials, and quote, to generally manage and operate the schools.

As appellants concede, the New York legislature has authorized non-declarant aliens to vote for and serve as members of those school boards. And it seems to me that in New York, at least, it is frivolous to argue that teachers exercise such broad policymaking authority that they come

within the political community exception when their direct superiors do not.

QUESTION: I interrupted you, because what you said startles me when you suggest that a school board member who never goes into a classroom has as much authority over what a pupil is taught to think, and what the value of that pupil may be as a result of being taught by classroom teachers.

Is that your position?

MR. ENNIS: Well, Mr. Justice Powell, let me answer that question in this way:

The studies are cited in both of our briefs which make it clear that social scientists do not yet know whether the role model of the teacher or the curriculum is the more important factor in political socialization. But certainly the curriculum --

QUESTION: How many pupils in New York City do you think know a single member of the school board?

MR. ENNIS: Your Honor, I don't think many students --

QUESTION: Would you rather think -- you don't think any? Except the sons and daughters of the members of the board?

MR. ENNIS: Perhaps not any, Your Honor. But let me say this --

QUESTION: What does that do to your point?

MR. ENNIS: I think it leaves it unimpaired for the

following reason:

The school boards can actually select the teachers which are going to be the role models; that's the first point.

Second, the school boards have an effect on the political socialization of children by deciding what they are going to read and the instructional materials they are going to use, not only for one course, or perhaps for one year, as a teacher might, but throughout their entire school career.

QUESTION: And you want to take away the discretion which the law of New York has given to school boards not to engage aliens.

MR. ENNIS: No, Your Honor --

QUESTION: Including citizens of the U.S.S.R., for example.

MR. ENNIS: No, Your Honor, I have no intention to take away that statutory authority that New York has.

QUESTION: Then why are you here?

If you're not trying to take away this statutory authority, as the three-judge court did.

MR. ENNIS: Excuse me, Your Honor, I thought you were talking about the statutory authority which permits aliens to be members of school boards.

QUESTION: No, I'm talking about the statutory authority to pick the school teachers through a chain of

command; they don't pick them directly.

MR. ENNIS: We're not quarreling in this case with the discretionary judgments of school boards who pick teachers on one or another grounds.

We're only quarreling with the statutory provision which says that no school boards, whether in New York City or outside New York City, can select a teacher for public school who is not a citizen or a declarant alien.

So we're not quarreling here with the discretion of school boards, except for the statutory provision which limits their discretion.

QUESTION: Mr. Ennis?

MR. ENNIS: Yes, sir.

QUESTION: I understand you are arguing that school board members have as much authority and influence over the pupil as teachers do; is that your argument?

MR. ENNIS: I think, Your Honor, that it is difficult for the state to argue that teachers are so close to the core of the political community that they must come within the political community exception when their superiors are not.

QUESTION: You don't have -- you know how textbooks are selected in New York?

MR. ENNIS: Pardon me, Your Honor?

QUESTION: Do you know the process by which textbooks are selected in New York City?

MR. ENNIS: Yes, Your Honor.

There are very minimum qualifications, but as the state points out in their reply brief, basically, the curriculum is set by the community school boards themselves, and the selection of textbooks.

QUESTION: Actually, what happens is, committees of teachers select the books. The school board ratifies those. Often without ever having read any of them. I've been there. I know.

MR. ENNIS: Mr. Justice Powell, I know of your experience with the school board in Virginia, and I'm certainly not going to quarrel with you on how these things happen.

QUESTION: You have to listen to a whole lot of organizations objecting to different books.

MR. ENNIS: I guess that's correct, too.

Let me say this, that even if that point is not dispositive, I think there are at least six grounds why this case is readily distinguishable from Poley.

First, the majority in Poley expressly reaffirmed at two points in the opinion earlier cases requiring close scrutiny when aliens are excluded, as in this case, from quote, licensed professions, close quote.

Second, the majority also stressed that the office of a policeman is in no sense one of the common occupations of the community, close quote, but teaching is the third most

common occupation in New York State, even more common than laborers, and is apparently the largest category of public employment.

QUESTION: You think "common" has been used in these decisions and opinions of the Court in terms of a head count?

MR. ENNIS: Well, Your Honor, the Court has never elaborated on exactly what it does mean by common occupations, but that is certainly an important point. At least four cases decided by this Court in the last five years have quoted that provision of Truax v. Raich which talked about common occupations, and that was relied upon, for example, in Griffiths, involving lawyers. And the Court apparently thought that lawyers were a common occupation, even though they are not as numerous as teachers.

Third, appellants do not dispute the New York case law and the opinions of the New York Attorney General, which expressly holds that teaching is not a public office, and that teachers are employees, not officers, and do not quote, exercise any sovereign power.

In that connection I think it's worth noting that the state's brief in Foley stressed that state police were designated public officers, not employees.

Fourth, the majority in Foley also stressed that, quote, most states expressly confine the employment of police

officers to citizens, close quote.

But even a generous reading of Exhibit C to the state's reply brief shows that over three-fourths of the states do not require citizenship or even declarant status to teach in public schools in those states.

Fifth --

QUESTION: Now, on that point, Mr. Ennis, doesn't your opponent make it clear that about -- a large number of those don't do so because they fear there's a constitutional problem; about fifty-fifty on the policy choice.

MR. ENNIS: Well, Your Honor, I would like to say two things about that.

First, it is of course entirely speculative why ten states in the last few years have abandoned previous requirements for citizenship or declarant status. We don't really know why.

But to the extent the state would be right about that, the attorney's general of those states, concluded after reading this Court's decisions, that citizenship cannot be required for teachers.

QUESTION: Reading all of them except Foley.

MR. ENNIS: Pardon me?

QUESTION: Reading all of them except Foley?

MR. ENNIS: But certainly knowing about the political community exception discussed in Sugarman, and only later

applied --

QUESTION: But not knowing it didn't include policemen; or did include policemen. That came -- I think must have come as quite a surprise to quite a few of those states attorneys general.

MR. ENNIS: Well, Your Honor, I've argued a lot of cases against attorneys general, but I would like to say that I don't think they can all be wrong all the time.

And if the unanimous opinion of all these attorneys general is that this Court's previous decisions do not bring teachers within the political community section discussed in Sugarman, I think that itself is entitled to some weight in deciding what the law in this country is.

Fifth --

QUESTION: That's what the dissent in Foley thought, too.

MR. ENNIS: Correct, Your Honor.

Fifth, alien attorneys do not come within the political community exception to strict scrutiny --

QUESTION: Dissent in one of the concurrences, I might add.

MR. ENNIS: -- and it follows that teachers do not, because lawyers share more of the characteristics of police thought relevant in Foley than do teachers.

As this Court noted in re Primus, the interests of

the states in regulating lawyers is especially great, since lawyers are essentially to the primary governmental function of administering justice, and have historically been officers of the court.

And as this court noted in *Griffiths*, like police, lawyers can invade individual privacy through issuance of subpoenas and compelled depositions; indeed, the Court noted that lawyers can even, quote, command the assistance of police.

Finally, teaching is not a governmental monopoly. All of the alien cases to date in which this Court has not applied strict scrutiny, or has ruled that citizenship is a permissible requirement, involved governmental monopolies.

You cannot have private voting for state or federal officials; or private jury trials; or private state police. But you can have private teachers.

QUESTION: Isn't teaching in a public school a governmental monopoly?

MR. ENNIS: Teaching, per se, Your Honor, is not.

QUESTION: But the rule doesn't apply except in public schools. To the extent that the rule applies, it applies in a governmental monopoly, doesn't it?

MR. ENNIS: I'm simply trying to suggest a distinction between all of the previous cases and this one, which is based on the function of the job, regardless of

whether the state --

QUESTION: How about private security police? I mean, obviously they're not state officials, but nonetheless they perform many of the same functions as police.

Isn't that kind of analogous with what Justice Stevens is talking about?

MR. ENNIS: It is somewhat analogous, Your Honor.

QUESTION: You can define the question so it comes out in your favor, but I don't know that it helps you.

MR. ENNIS: Well, let me say this, Your Honor.

I don't know exactly where the political community exception established by this Court is going to lead in the future.

QUESTION: Neither do I.

MR. ENNIS: All I'm suggesting is that to date, it has only been applied by this Court onto cases involving pure governmental monopolies. And I think that's an appropriate place to draw the line, and not to extend it further than that.

I think --

QUESTION: Doesn't this statute do just that, as Mr. Justice Stevens suggested? It applies only to the governmental monopoly over public schools of a limited category; public primary -- not higher education.

MR. ENNIS: Your Honor, the point I'm trying to make is that the Court should focus on the actual function

involved.

Of course we could have private security police. But the function of teaching is not a governmental monopoly. In fact, this Court ruled in the Rodriguez case that teaching is not only not a governmental monopoly, but it's not even a fundamental right.

There is no constitutional right, even, to a public education.

QUESTION: But that doesn't change the fact -- that doesn't alter the fact that it's a governmental monopoly to teach public schools, does it?

The fact that there's no enforceable right to have a public school, if that's the case.

MR. ENNIS: Your Honor, I think the critical point here is not whether the state has chosen to make its regulations applicable to both public and private schools. It could make the application applicable to private schools.

The point is that the function of teaching has never been thought in this country to be a function that can be reserved only to the public sector, and can be performed only by the public sector.

Previous decisions of this Court -- Pierce v. Society of Sisters and others -- recognized that there is a private right to teach and to learn, and that it is not a government monopoly.

QUESTION: Mr. Ennis, do you happen to know what percentage of the New York State budget is devoted to public education?

MR. ENNIS: I do not know that, Your Honor. All I know on that point is that 18 percent of the students in elementary and secondary schools are in private schools. I do not know the government --

QUESTION: In most states, education is the single largest item in the state budget; that may not be true in New York, in view of your welfare load.

MR. ENNIS: I don't know the answer to that question, Your Honor. But I think it does raise a point that I began with, and that is, the New York statutory scheme is a relatively unique scheme, including the statute which permits aliens to serve on school boards.

And I think the decision of this Court need not be any broader than the New York statutory scheme; would not have to apply necessarily to the teaching profession in other states.

I would like simply to make one other point: Appellant has stated under oath that they -- appellees have stated under oath that they are willing to take an oath to support the state and Federal constitution.

Now if what we're concerned about is not functional reality, about actual ties to the country based on period of

residence, paying taxes, marriage to a U.S. citizen; if what we're concerned about is a piece of paper, it seems to me that that oath is a more specific and also represents a more --

QUESTION: Did they explain anywhere why they were willing to take an oath to support the constitution of the United States, but they don't want citizenship?

MR. ENNIS: Your Honor, under the New York statutory scheme --

QUESTION: Is there anything in the record --

MR. ENNIS: There is nothing in the record.

Under the New York statutory scheme, the reason why a particular permanent resident alien decides not, at a point in time, to apply for citizenship, are entirely immaterial and irrelevant.

QUESTION: Well, I'm just imagining what good the oath is.

MR. ENNIS: Well, let me say this, Your Honor: The declaration of intention is merely a declaration that at some point in the future, the declarant intends to become a citizen.

The actual declaration of intention has nothing in it at all about whether at the present time the declarant agrees with either state or federal constitutional principles.

QUESTION: And there's no reason why your people don't want to sign that?

MR. ENNIS: Decide which, Your Honor?

QUESTION: Why is it they don't sign that?

MR. ENNIS: Your Honor, as I said, there is nothing --

QUESTION: Not that it has anything to do with the case, except if they did sign it, they wouldn't have to bring a lawsuit.

That's one reason.

MR. ENNIS: Well, I can say this in response to your question. I am authorized to represent to the Court --

QUESTION: I don't want anything outside the record. I asked if there was anything in the record.

MR. ENNIS: Nothing in the record, but there is in our brief a representation to the Court that both appellees would immediately petition for citizenship and become United States citizens if they did not have to renounce the land of their birth in order to do that.

Now, the particular reasons why they do not want to make that renunciation are not in the record. I could suggest some for this Court --

QUESTION: I didn't ask for it, but if you just want to go ahead, you go right --

MR. ENNIS: Well, Your Honor, they may, for example, wish to preserve the rather considerable benefits of dual citizenship for their children.

QUESTION: I wonder if those type of people like to

stay on the record.

MR. ENNIS: Then I will not pursue that point further, Your Honor.

QUESTION: What are these named places? Scotch, and the other is what?

MR. ENNIS: From Finland, Your Honor.

QUESTION: Finnish, yeah.

QUESTION: But I suppose, in deciding the case, we might just as well assume that they were from --

QUESTION: Thailand.

QUESTION: -- let us say, Cambodia and the U.S.S.R.

MR. ENNIS: Well, Your Honor, that does raise --

QUESTION: Or North Vietnam, or Vietnam it is now.

MR. ENNIS: Well, Your Honor, that does raise the due process argument in our brief, which I do not want to get into in detail.

But this Court has suggested in all of its previous alien cases that it has expressly left open the question of whether or not alienage might be a permissible consideration for a state in the course of making an individualized determination about a job applicant, rather than making a wholesale ban or class Y judgment

And we do not think that that kind of inquiry would necessarily be precluded by previous decisions of this Court.

I will not discuss the due process argument, or our

academic freedom or supremacy clause arguments, because I think they are covered adequately in our brief.

Thank you.

MR. CHIEF JUSTICE

Do you have anything further, Mrs. Gordon?

MRS. GORDON: I only have approximately one sentence further, Your Honor.

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

ON BEHALF OF THE APPELLANTS

MRS. GORDON: And that is, that it is completely immaterial to this classifying plan where the alien comes from, whether he comes from Cambodia, or whether he comes from Finland or Great Britain.

Because so long as he has the capacity to choose citizenship and refuses to do so, he manifests a negative example that the statute seeks to avoid.

As to the rest of the argument made by the appellees, we think that they are appropriately answered in our reply brief.

Thank you very much.

QUESTION: Mrs. Gordon, let me just ask one question. I don't think it's repetitious.

Is there a characteristic of alienage -- the class that's affected by this rule -- that has any relevance to their teaching ability? And if so, what is it?

MRS. GORDON: Is there a characteristic that is -- there is a characteristic that affects permanent resident aliens who refuse to acquire citizenship that affects their capacity to teach effectively in terms of public education, because they have eschewed, by that choice -- to wit, the choice not to acquire citizenship -- the very example of democratic participation that they are trying -- excuse me, trying to advance to their students.

In terms of the balance of this statutory approach, statutory and regulatory permit, that portion which would given certificates to certain temporary aliens who are under disability, they have a characteristic, or the absence of a characteristic, which allows that their inclusion because they do not have the capacity to choose American citizenship while they are under disability, they do not present the manifestly negative examples that the permanent residents who do have that legal capacity present.

QUESTION: I'm sorry, I really didn't understand your answer.

What is -- could you just tell me in a word -- what is the characteristic of the group that is relevant to their ability to teach?

MRS. GORDON: The capacity to participate in democratic decision-making.

QUESTION: Thank you.

QUESTION: And that applies to everybody from a social science teacher to a printing teacher?

MRS. GORDON: It requires --

QUESTION: To a printing teacher, or a home economics teacher?

MRS. GORDON: That is correct, because all teachers are examples, and in that way, communicate values and attitudes.

But perhaps more significantly, Your Honor, because in New York, as indeed, in every other state with which I am familiar, the curriculum for teachers, for example, in nursery through sixth grade, includes all subject matters.

The curriculum for teachers from seventh through twelfth, where there is an academic departmentalization, naturally has that academic --

QUESTION: You mean it'd take that to teach kindergarten and printing?

MRS. GORDON: No, because we don't offer printing in nursery through sixth grade. But to the extent that you have a high school situation, where there is --

QUESTION: I'm talking about elementary school.

MRS. GORDON: Elementary school? No, sir, we don't teach printing, and all teachers in elementary school teach all subject matters.

QUESTION: Isn't there a rather simple answer to the question raised?

QUESTION: Now wait a minute. Do the teachers in the dancing school on 44th Street teach everything?

MRS. GORDON: You mean the high school of the performing arts?

QUESTION: Yeah.

MRS. GORDON: Well, you just -- we were talking about --

QUESTION: Well, isn't that a public school?

MRS. GORDON: No, we -- you -- the example you gave me, Your Honor, was nursery through sixth grade, and that's how we excluded the printing example.

In secondary schools, where education is departmentalized, naturally the teacher teaches in his subject matter.

But --

QUESTION: You're talking about all the schools in New York? You got schools up around Albany --

MRS. GORDON: Which are not departmentalized?

QUESTION: They are completely departmentalized. Elementary schools.

MRS. GORDON: Well, Your Honor, in New York secondary schools may or may not be departmentalized. Where they are departmentalized, naturally, the teachers teach their particular courses.

However, every teacher, even in the secondary school,

even the printing teacher, can be required by state law to teach on any given day of the week, civics, language, science, and so on.

QUESTION: And mop the floor?

MRS. GORDON: Well, I don't think mop the floor, Your Honor.

QUESTION: While you're at it.

QUESTION: There is shallower water that you could navigate in response to these -- to some of these questions, namely, that as a category, as a class, teachers who are aliens teaching in primary schools and secondary schools are a category of people who reject American citizenship and announce that they prefer citizenship in some other country.

MRS. GORDON: That's exactly so.

QUESTION: And that certainly relates to the role model, if it doesn't affect the substance of the teaching.

MRS. GORDON: That's absolutely true, Your Honor. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

[Whereupon, at 2:28 o'clock, p.m., the case in the above-entitled matter was submitted.]

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