

Are Aliens Still A Suspect Class After *Norwick*?

by
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I. INTRODUCTION

In deciding *Ambach v. Norwick*,¹ the Supreme Court admitted at the outset that its stance in reviewing statutory classifications based on alienage has "not formed an unwavering line over the years."² Although the line appeared to have steadied after *Graham v. Richardson*³ was decided in 1971 and was reinforced by *Sugarman v. Dougall*⁴ in 1973, the recent decisions of *Foley v. Connelie*⁵ in 1978 and now *Norwick* in 1979 have set the line quivering once more. This note will show how the *Foley* and *Norwick* Courts have misapplied an important dictum in the *Sugarman* case and, as a result, have deprived aliens of their full protection as a suspect class.

In *Norwick*, the Supreme Court upheld by a 5-4 vote the constitutionality of section 3001(3) of the New York Education Law barring noncitizens from teaching in the public schools, unless they apply for citizenship and become citizens in due course.⁶ Plaintiffs *Norwick* and *Dachinger* had

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1. 441 U.S. 68 (1979).

2. *Id.* at 72. For good summaries of the history of legislation and litigation concerning aliens, see, e.g., Walter, *The Alien's Right to Work and the Political Community's Right to Govern*, 25 WAYNE L. REV. 1181, 1181-92 (1979); Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 FORDHAM L. REV. 835 (1977); and D. CARLINER, *THE RIGHTS OF ALIENS* (1977).

3. 403 U.S. 365 (1971).

4. 413 U.S. 634 (1973).

5. 435 U.S. 291 (1978).

6. N.Y. EDUC. LAW. § 3001(3) (McKinney 1970): "No person shall be employed or authorized to teach in the public schools of the state who is: . . . 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply, after July first, nineteenth hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment."

applied for certification to teach in the New York elementary schools and were both rejected on the ground that they were not U.S. citizens. The Department of Education aide who rejected their applications, however, conceded that they both met the academic requirements for permanent certification.⁷ Plaintiffs then brought suit against the Commissioner of the Department of Education of the State of New York⁸ for a declaration that the statute violated the Equal Protection Clause and for an injunction prohibiting the Commissioner from enforcing it. The three-judge district court granted the plaintiffs summary judgment,⁹ and the State appealed directly to the Supreme Court¹⁰ which reversed.

II. ALIENAGE IS A SUSPECT CLASSIFICATION

Before discussing the specific alienage classification involved in *Norwick*, it is necessary to investigate previous Supreme Court decisions which dealt with the rights of aliens. In 1886, the Court held that an alien is a "person" within the meaning of the Equal Protection Clause.¹¹ This declaration, though, did not really assure aliens of full protection from discriminatory legislation because under the traditional rational relationship test applied by the Court to equal protection questions a statute is granted a presumption of constitutionality which plaintiffs can rebut only by a showing of capriciousness.¹² In the 1960's, however, the Court began applying

7. Brief for Appellees, *Ambach v. Norwick*, 441 U.S. 68 (1979) (Docket No. 76-808). The Complaint further asserted that Susan Norwick had earned a B.A. degree, *summa cum laude*, from North Adams State College, North Adams, Massachusetts. At the time of the district court proceedings, she was pursuing a M.S. degree in Developmental Reading at the State University of New York at Albany. She had taught at the Riverside Elementary School, a private school in New York City, from 1967-72, and worked as an editor of The Reading Laboratory in New York City from 1965-67. Before these jobs, she had taught for five years at elementary schools in England and Scotland.

The Intervenor's Complaint asserted that Tarja Dachinger had received a B.A. degree, *cum laude*, in German and a M.S. degree in Early Childhood, both from Lehman College of the City University of New York City. She worked at the Victory Day Care Center in the Bronx as an assistant teacher from October, 1966 through June, 1967 and as a group teacher from September through December, 1970. She temporarily stopped teaching in order to raise her two children.

8. In the district court proceedings, the Commissioner was Ewald Nyquist. By the time the case reached the Supreme Court, Gordon Ambach had succeeded him.

9. *Norwick v. Nyquist*, 417 F. Supp. 913 (S.D.N.Y. 1976).

10. The appeal was made pursuant to 28 U.S.C. § 1253 (1976).

11. "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

12. "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination

"strict" or close judicial scrutiny to equal protection questions when a suspect class or personal fundamental interest was at stake. Under this standard of review, the State must show that it has employed only *necessary* and *precisely drawn* means to effectuate its *substantial* interest.¹³

With the advent of this heightened judicial approach to equal protection questions came the express declaration in *Graham v. Richardson* that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."¹⁴ *Graham* then invalidated a Pennsylvania statute which denied welfare benefits to non-citizens and an Arizona statute which denied welfare benefits to aliens who had not resided in the United States for 15 years.

The *Graham* decision laid the foundation for a string of cases holding statutory classifications based on alienage violative of the Equal Protection Clause under a strict scrutiny standard of review.¹⁵ The most significant of these cases is *Sugarman v. Dougall*,¹⁶ which held that a New York statute barring aliens from the "competitive class" of the state civil service was unconstitutional. The Court characterized the competitive class as spanning "nearly the full range of work tasks, that is, all the way from the menial to the policy making."¹⁷ In applying strict scrutiny, the Court found that, although the State had a substantial interest "in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community,' . . . with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose."¹⁸ Consequently, New York's blanket statutory exclusion of aliens from the competitive class was declared unconstitutional primarily because it was "neither narrowly confined nor precise in its application"¹⁹ and thereby failed the "means" aspect of the strict scrutiny test. Essentially, the means were so broad as to encompass areas of employment outside the "political community" and thus infringed on areas in which the State lacked the substantial interest required under strict scrutiny review.

will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961) (sustaining Maryland Sunday Blue Laws).

13. See, e.g., *In re Griffiths*, 413 U.S. 717, 721-22 (1973).

14. 403 U.S. at 372.

15. See note 33 *infra*.

16. 413 U.S. 634 (1973).

17. *Id.* at 640.

18. *Id.* at 642-43 (quoting in part *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

19. *Id.* at 643. As the Court earlier expressed it, "the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose." *Id.* at 642. Thus, the statute was both over-inclusive and under-inclusive.

The importance of *Sugarman*, though, lies not so much in its holding as in its dictum which outlines the areas in which the State's interest in its political community is substantial enough to justify requiring citizenship:

And this power and responsibility of the State [to preserve the basic conception of a political community] applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.²⁰

Justice Blackmun's majority opinion went on to say that when such a position is involved "our scrutiny will not be so demanding."²¹ Although on its face this statement seems to indicate that the Court will apply a standard of review less rigorous than strict scrutiny, Justice Blackmun appears to have reinstated adherence to strict scrutiny later in his opinion by restricting permissible alienage classifications concerning the political community to those which are "narrowly confined"²²—terminology which is synonymous with such formulations of the "means" aspect of the strict scrutiny test as "necessary" or "precisely drawn."²³ Since the State's interest in preserving its political community is described as an "obligation" and "responsibility,"²⁴ it constitutes not merely a legitimate state interest for purposes of the rational relationship test but also a substantial interest for purposes of strict scrutiny. Thus, although Justice Blackmun earlier maintained that a less demanding standard of review would be applied to alienage classifications concerning the political community, he later merely presented a situation where a classification will be upheld even under strict scrutiny provided it is narrowly confined. Consequently, this dictum should not be viewed as authority for applying a standard of review less than strict scrutiny but rather as authority for validating a classification *in spite of* the application of strict scrutiny.²⁵

20. *Id.* at 647 (quoted in *Norwick*, 441 U.S. at 74; quoted in part in *Foley v. Connelie*, 435 U.S. 291, 296 (1978)).

21. *Id.* at 648.

22. *Id.* at 649.

23. Justice Blackmun uses forms of the words "narrow" and "precise" interchangeably. See, e.g., *id.* at 643.

24. *Id.* at 647.

25. Although *Korematsu v. United States*, 323 U.S. 214 (1944), appears to be the only case in which a racial classification subject to strict scrutiny was sustained, Justice Brennan recently declared—although in dissent—that "racial classifications are not per se invalid under the Fourteenth Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 356 (1978) (Brennan, J., dissenting). Thus, according to the *Korematsu* Court and Justice Brennan, along with his concurring Justices White, Marshall, and Blackmun, a classification may, although rarely, pass muster even under strict scrutiny.

The Court in the later case of *Foley v. Connelie*,²⁶ however, interpreted the *Sugarman* dictum to mean that only a rational relationship test should be applied to an alienage classification concerning the political community.²⁷ Moreover, the *Norwick* Court, in explaining why it was applying the rational relationship test, went so far as to declare the *Sugarman* dictum "an exception to the general standard applicable to classifications based on alienage."²⁸ In effect, then, the Court is now saying either that alienage is not always a suspect classification or that, even though alienage is a suspect classification, it is not suspect enough to demand strict scrutiny in all cases. Neither approach expresses a disciplined judicial standard. A suspect class by definition is suspect for all purposes and thus should receive the full judicial protection accorded such a designation in all cases. By treating a suspect class differently in different situations, the Court not only damages the credibility of the initial declaration that such a class is suspect, but also impeaches the validity of the judicially created concept of suspect classes in general. Consequently, if the present Court would read the *Sugarman* dictum as only authorizing the validation of alienage classifications concerning the political community under strict scrutiny instead of reading it as allowing the application of a less rigorous rational relationship test, it would be logically and consistently adhering to its view in *Graham* that alienage is indeed a suspect classification.

Perhaps, though, the Court has now come to regret its previous declaration that alienage is a suspect classification. If that is the case, it may be unjustifiably enlarging the scope of the *Sugarman* dictum in order to strip aliens of the special protection accorded a suspect class. Through this roundabout method, the Court would save itself the embarrassment of admitting it was wrong in declaring aliens a suspect class. For, the consequence of this admission would be to endanger the status of the only other suspect classification—race—by implying that it, too, can be demoted from its special position and deprived of the benefits of strict scrutiny review whenever five justices regret that it was once declared suspect. Such an im-

In First Amendment cases, statutes are sometimes sustained even though a test similar—if not identical—to strict scrutiny is applied. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968), which upheld a conviction for burning a draft card. It would seem unusual, then, for the Court to sustain under a strict scrutiny test statutes allegedly infringing First Amendment rights—considered by many the most cherished and sacred rights guaranteed by the Constitution—while at the same time espousing the policy that no statute subject to the same test under the Equal Protection Clause may stand. Consequently, the argument that suspect classifications may be upheld despite the application of strict scrutiny is not so farfetched as it might at first seem.

26. 435 U.S. 291 (1978).

27. "The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification." *Id.* at 296.

28. 441 U.S. at 75.

plication would effectively destroy the concept of suspect classes, which is based on a finding that a group is a "discrete and insular minorit[y]," within the meaning of footnote 4 of *United States v. Carolene Products Co.*,²⁹ which possesses "an immutable characteristic determined solely by the accident of birth."³⁰ Consequently, the only justifiable way for the Court to deprive a suspect class of its special protection is for it to hold that the class is no longer suspect because it is no longer a discrete and insular minority with immutable characteristics determined solely by the accident of birth. Such a reversal, however, would subject the Court itself to vicious accusations of discrimination and capriciousness. Therefore, the declaration that a class is suspect is practicably irrevocable. Moreover, consideration of the irrevocability of the declaration has undoubtedly weighed heavily in the minds of the justices and contributed significantly to the result that only race and alienage have been declared suspect classifications.³¹ Since the Court stopped short in *Foley* and *Norwick* of revoking aliens' suspect class status, it should not have chipped away at the concept of suspect classes to achieve the same result.³²

III. FOLEY SUSTAINED AN ALIENAGE CLASSIFICATION

After *Sugarman*, the Court invalidated statutory alienage classifications in three cases,³³ basically because it held that the regulated areas were not

29. 304 U.S. 144, 152-53 (1938).

30. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Although *Frontiero* involves a gender-based classification which a majority of the Court has never held to be suspect, the reasoning by analogy to race and alienage explains why these two classes are considered suspect.

31. The reluctance of the Court to declare a class suspect, even under great pressure from within the Court itself and from society in general, is best illustrated by the line of gender-based discrimination cases. Although in *Frontiero v. Richardson*, *id.*, a plurality (Justices Brennan, Douglas, White, and Marshall) of the Court held sex a suspect classification, a majority has never so declared it. Even Justice Brennan has later lowered the level of judicial review to an intermediate level falling between the rational relationship test and strict scrutiny. See, e.g., *Orr v. Orr*, 440 U.S. 268 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); and *Craig v. Boren*, 429 U.S. 190 (1976).

Other classifications which have been denied suspect status by the Court include illegitimacy, see, e.g., *Lalli v. Lalli*, 439 U.S. 259 (1978), *Trimble v. Gordon*, 430 U.S. 762 (1977), *Mathews v. Lucas*, 427 U.S. 495 (1976), *Labine v. Vincent*, 401 U.S. 532 (1971); wealth, see, e.g., *San Antonio Ind. School District v. Rodriguez*, 411 U.S. 1 (1973), *Dandridge v. Williams*, 397 U.S. 471 (1970); and age, see, e.g., *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

32. Justice Stewart, in fact, pointed out in his concurrence in *Foley* that *Foley* was practically irreconcilable with previous decisions. He had the courage to admit, though, that he had changed his mind about the validity of those decisions, in some of which he had concurred. See 435 U.S. at 300 (Stewart, J., concurring).

33. *In re Griffiths*, 413 U.S. 717 (1973), was decided on the same day as *Sugarman* and held that a Connecticut state court rule prohibiting aliens from taking the state bar examination violated the Equal Protection Clause. Although the only mention of *Sugarman* in *Griffiths*

part of the political community. In 1978, however, *Foley v. Connelie*³⁴ upheld a New York statute excluding aliens from the position of state police trooper and thus became the first important Supreme Court case in which the *Sugarman* dictum was found applicable.³⁵ Although the position of trooper falls within the same competitive class³⁶ of the New York civil service as the jobs of the plaintiffs in *Sugarman*, the ban on aliens in *Foley* was expressed in a statute³⁷ entirely devoted to state police officers, rather than in the general statute in *Sugarman*³⁸ which banned all aliens from all competitive class positions. Consequently, the State of New York, as defendant, was not bound by the stare decisis effect of *Sugarman*, because the statute in *Foley* was much narrower in scope.³⁹

Foley held that the *Sugarman* dictum was applicable to the position of police officer because police "very clearly fall within the category of 'important nonelective . . . officers who participate directly in the . . . execution . . . of broad public policy.'"⁴⁰ The *Foley* Court reached this conclusion by reasoning that state police utilize "discretionary decisionmaking, or execution of policy, which substantially affects members of the political community."⁴¹ To demonstrate the wide bounds of this discretion, the Court

appears in Justice Rehnquist's dissent which applies to both cases, the *Griffiths* Court held that practicing law does not entail exercising judicial or legislative powers to the extent that it would impinge on the governmental process—reasoning based on the contours of the *Sugarman* dictum.

Examining Board v. Flores de Otero, 426 U.S. 572 (1976), held unconstitutional a Puerto Rico statute almost totally banning aliens from the private practice of engineering. The Court decided that such a statute neither reflected a legitimate state interest nor was precisely enough drawn in order to achieve its purposes. Consequently, the Court did not have to address the *Sugarman* dictum concerning the political community.

In *Nyquist v. Mauclet*, 432 U.S. 1 (1977), however, the Court held that a New York statute, which excluded aliens who do not declare an intention to apply for citizenship from receiving state financial aid for higher education, could not be justified under the *Sugarman* dictum because it did not involve "the basic conception of a political community." *Id.* at 11. Moreover, the *Mauclet* Court stated that *In re Griffiths* reflected "the narrowness of the exception [*i.e.*, the dictum]" in *Sugarman. Id.*

34. 435 U.S. 291 (1978).

35. The district court in *Perkins v. Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd mem.*, 426 U.S. 913 (1976), had earlier found the *Sugarman* dictum applicable in holding that jurors are "persons holding . . . important nonelective . . . judicial positions," from which states may exclude aliens. 370 F. Supp. at 137. Since the Supreme Court summarily affirmed, however, *Perkins* provides no explanation of or expansion on the *Sugarman* dictum. Consequently, it merely places the position of juror within the Court's definition of "political community."

36. N.Y. CIV. SERV. LAW § 44 (McKinney 1973).

37. N.Y. EXEC. LAW § 215(3) (McKinney 1972).

38. N.Y. CIV. SERV. LAW § 53(1) (McKinney 1973).

39. Since the statute in *Sugarman* was invalidated mainly because it swept too broadly, *see* note 19 *supra*, the State had a valid argument that it had rectified the defect in the narrower statute involved in *Foley*.

40. 435 U.S. at 300 (Emphasis in original.) (quoting *Sugarman*, 413 U.S. at 647).

41. *Id.* at 296.

pointed out that police may invade the privacy of an individual in public places, break down a door to enter a dwelling or other building in the execution of a warrant, stop vehicles traveling on public highways, and make arrests.⁴²

Justice Marshall's dissent, however, argued that the position of state police officer did not fall within the *Sugarman* dictum because:

the phrase "execution of broad public policy" in *Sugarman* cannot be read to mean simply the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature.⁴³

He reasoned that the police officer's discretion involved only a factual decision as to what policy, already formulated by statute and regulation, he or she should apply under particular circumstances.⁴⁴

As stated before,⁴⁵ the *Foley* Court relied on the *Sugarman* dictum as authority for applying only a rational relationship test to statutory alienage classifications concerning the political community. Although it has already been argued in this note⁴⁶ that the standard of review applied in *Foley* is objectionable because it is based on the notion that the *Sugarman* dictum does not require the application of strict scrutiny, it is difficult to disagree with the result in *Foley* for several reasons not expressed by the Court. First, the Court's assertion that "[t]he police function fulfills a most fundamental obligation of government to its constituency"⁴⁷ and the ensuing discussion of the police function⁴⁸ indicate that the Court considered the maintenance of the police department not merely a *legitimate* state interest which the rational relationship test requires but also a *substantial* state interest which would satisfy part of the strict scrutiny test. Second, because the *Sugarman* dictum dealt exclusively with the political ramifications of *administrative* positions and failed to consider the practical consequences of the physical power the police alone hold over citizens, the *Foley* Court could have taken

42. See *id.* at 297-98.

43. *Id.* at 304 (Marshall, J., dissenting).

44. "[T]he judgments required are factual in nature; the policy judgments that govern an officer's conduct are contained in the Federal and State Constitutions, statutes, and regulations. The officer responding to a particular situation is only applying the basic policy choices—which he has no role in shaping—to the facts as he perceives them." *Id.* at 304-05. See also, Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 *FORDHAM L. REV.* 835, 845 (1977): "A state trooper, who carries out the orders he is given, implements rather than formulates public policy."

45. See text accompanying note 27 *supra*.

46. See text accompanying notes 20-25 *supra*.

47. 435 U.S. at 297.

48. *Id.* at 297-300.

the opportunity to explain why the reasoning of the dictum is even more cogent in this context.⁴⁹ After all, if the reviewable, nonphysical functions of these administrative positions require that only citizens may hold them, the physical—sometimes irreparable—actions of police officers could arguably demand the same citizenship requirement regardless of the role of the police in the political community. The majority's view, then, that police "can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator"⁵⁰ could have been based simply on the officer's ability to threaten and use force rather than on the strained argument that his or her discretion to use force affects the political community. In practical terms, a ban on alien police officers can be seen as "represent[ing] the choice, and right, of the people to be governed by their citizen peers"⁵¹ on the theory that it might seem more repugnant to citizens to know that they may be physically controlled by aliens than by fellow citizens. Thus, the *Foley* Court could have found a substantial state interest in confining the constituency of the police force to citizens.

The *Foley* Court, in continuing its relaxed standard of review, easily found that "the police function is one where citizenship bears a rational relationship to the special demands of the particular position."⁵² Surprisingly, even under the "means" aspect of the strict scrutiny test, a general ban on alien police officers could arguably be considered narrowly confined, provided the previously stated assertion that forceable regulation by *any* alien is repugnant to citizens is accepted.⁵³ However, such a rationale must be confined to special areas where the alien would have the potential opportunity to exercise physical force over the citizens. Otherwise, the argument that any control whatsoever by an alien over a citizen is repugnant to citizens could unreasonably be used as justification for banning aliens from a job as menial as tollbooth attendant. Consequently, even though it is objectionable that the *Foley* Court applied a rational relationship test instead of a strict scrutiny test, the statute might arguably have passed muster under

49. All the named plaintiffs in *Sugarman* worked at the New York City Human Resources Administration. The opinion does not discuss how the additional authority to exercise physical force in the course of employment should affect the state's right to exclude aliens from a job. This inability to foresee and account for all possible situations demonstrates the drawbacks that dicta have in common with advisory opinions.

50. 435 U.S. at 296.

51. *Id.*

52. *Id.* at 300.

53. Acceptance of this assertion would answer one commentator's charge that the statute lacks a rational relationship to the state interest because "[t]he Court did not clearly identify . . . the specific objectionable characteristic of all permanent residents that makes them unsuitable candidates for employment as policemen." Recent Developments, *Constitutional Law—Equal Protection—Aliens—State Restrictions on Employment*, 46 TENN. L. REV. 692, 706-07 (1979).

strict scrutiny because a substantial state interest could have been found which was implemented in a narrowly confined manner.

IV. NORWICK HELD THAT TEACHING IN THE PUBLIC SCHOOLS GOES TO THE HEART OF REPRESENTATIVE GOVERNMENT

The *Foley* Court's reliance on the *Sugarman* dictum as authority for applying a rational relationship test has unfortunately provided the *Norwick* Court with a precedent for justifying the use of the rational relationship test instead of strict scrutiny. Therefore, since the *Norwick* Court failed to acknowledge that the *Sugarman* dictum requires the State to show a substantial state interest, it looked for and found merely a legitimate state interest in the New York provision excluding aliens from teaching in the public schools.⁵⁴ Unlike the classification in *Foley*, though, the classification in *Norwick* most likely could not pass a strict scrutiny test.

The *Norwick* Court began its application of the *Sugarman* dictum and reliance on *Foley* by quoting a passage from *Brown v. Board of Education*⁵⁵ in an attempt to show how integral a role education plays in preparing children for participation in the political community. It is misleading, however, to cite *Brown* as authority for views on education. Since the real problem at issue in *Brown* was segregation in general and not merely black children's right to education,⁵⁶ the Supreme Court, anticipating the attacks that the decision would ignite,⁵⁷ most likely exaggerated its own view of the impor-

54. "Accordingly, the Constitution requires only that a citizenship requirement applicable to teaching in the public schools bear a rational relationship to a legitimate state interest." 441 U.S. at 80.

55. "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. *It is the very foundation of good citizenship.* Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)." 441 U.S. at 76-77 (Emphasis added by author.)

56. Professor Wechsler stated, "I find it hard to think the judgment really turned upon the facts. Rather, it seems to me, it must have rested on the view that racial segregation is, in principal, a denial of equality to the minority against whom it is directed . . ." Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959).

57. In discussing the Court's dismissal of appeals in *Naim v. Naim*, 350 U.S. 985 (1956) (anti-miscegenation statute sustained), Professor Bickel illustrated the political tensions of the times:

But would it have been wise, at a time when the Court had just pronounced its new integration principle, when it was subject to scurrilous attack by men who predicted that integration of the schools would lead directly to "mongrelization of the race" and that this was the result the Court had really willed, would it have been wise, just then, in the first case of its sort, on an issue that the Negro community as a whole

tance of public education in shaping good citizens in order to provide ample justification for ruling school segregation unconstitutional. The *Norwick* Court then cited many famous cases⁵⁸ and education and social science experts⁵⁹ in order to substantiate its assertion of the "importance of public schools in the preparation of individuals for participation as citizens"⁶⁰

The Court attempted to point out that New York had made the importance of this purpose clear in several sections of the state education law.⁶¹ In discussing the sections, however, the Court did not present strong evidence that the curricular requirements of the public school system do in fact contribute to "the development of the understanding that is prerequisite to intelligent participation in the democratic process."⁶² The Court's quotation from § 801(1) merely expressed a vague goal to provide instruction "to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war"⁶³ The general directives in subsections (2) and (3) of § 801 to prescribe such courses of instruction, when read in conjunction with §§ 3204(3)(a)(1), (2), which prescribe the required courses of study, make clear that the promotion required by § 801(1) is intended to take place only when the teacher is teaching a course in civics or New York or American history. Furthermore, even when a teacher is teaching these courses, the goal expressed by § 801(1) is much too vague to be considered a function of the teacher which goes to the heart of representative government or affects the political community in a direct enough way as to bring it within the realm of the *Sugarman* dictum. The Court also pointed out that saluting the flag is required by § 802, "as loyalty is a characteristic of citizenship essential to the preservation of a country."⁶⁴ It did not mention, however, that *West Virginia State Board of Education v. Barnette*⁶⁵ held in 1943 that a state may not compel anyone to salute the flag. Thus, because § 802 is open to constitutional attack, it is poor evidence for showing that the function of public schools is to instill in the students a sense of citizenship.

The Court then used its own assertion to launch into a panegyric ex-

can hardly be said to be pressing hard at the moment, to declare that the states may not prohibit racial intermarriage?

A. BICKEL, *THE LEAST DANGEROUS BRANCH* 174 (1962).

58. 441 U.S. at 77.

59. *Id.* at 77-78.

60. *Id.* at 76.

61. N.Y. EDUC. LAW §§ 801(1) and 802 (McKinney 1969); N.Y. EDUC. LAW §§ 3240(3)(a)(1), (2) (McKinney 1970). See 441 U.S. at 78, n.8.

62. 441 U.S. at 78, n.8.

63. N.Y. EDUC. LAW § 801(1) (McKinney 1969).

64. 441 U.S. at 78, n.8.

65. 319 U.S. 624 (1943).

planation of a teacher's functions in society and of how teachers can strongly influence the minds of our children:

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.⁶⁶

Clearly, the Court was implying that such power is potentially dangerous in the hands of aliens.

The underlying fear that alien teachers can damage our whole democratic, political community by instilling in our children anti-American or just plain un-American thoughts or by simply failing to teach them "American ways" belongs more to the McCarthy era than to 1979.⁶⁷ It is surprising that the Court could even intimate such fears in the face of such strong precedent as *Meyer v. Nebraska*,⁶⁸ which invalidated the prohibition of teaching subjects in a foreign language in any school and of teaching the foreign languages themselves in levels below the eighth grade. Although the *Meyer* Court admitted that "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate,"⁶⁹ it rejected the following reasoning it quoted from the Nebraska Supreme Court:

[To educate children in the foreign language] was to educate them so that they must always think in that language, and, as a consequence, naturally *inculcate in them the ideas and sentiments foreign to the best interests of this country.*⁷⁰

66. 441 U.S. at 78-79.

67. "This influence [of the teacher over the student's views of citizenship and government] is crucial to the continued good health of a democracy." *Id.* at 79.

68. 262 U.S. 390 (1923).

69. *Id.* at 402.

70. *Id.* at 398 (Emphasis added by author.) (quoting *Meyer v. State*, 107 Neb. 657, 662, 187 N.W. 100, 102 (1922)).

Thus, *Meyer*, unless it was overruled *sub silentio* in *Norwick*, still declares that a State's interest in instilling American thoughts in its students, coupled with its fear that foreign ideas will taint them, is not enough to justify prohibiting teachers from teaching foreign languages or subjects in foreign languages.

Since the citizenship of the defendant in *Meyer* was not at issue, *Norwick's* adherents could try to distinguish *Meyer* by limiting it to issues of the teaching subject matter and by pointing out that the teaching of subjects in foreign languages and the foreign languages themselves is not prohibited in New York. But does this distinction make any sense? As Justice Blackmun expressed in his dissent in *Norwick*:

It seems constitutionally absurd, to say the least, that in these lower levels of public education a Frenchman may not teach French or, indeed, an Englishwoman may not teach the grammar of the English language.⁷¹

Consequently, the *Norwick* Court's failure to espouse the reasoning of *Meyer* leaves us with the logically inconsistent result that the teaching of foreign languages or subjects in foreign languages may not be prohibited but that the State may bar from teaching these courses aliens who are native speakers of the languages and who may very well provide the best educational experience for the students.⁷²

The *Norwick* Court repeatedly stated in different ways that "teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society."⁷³ However, the Court refrained from explaining why it is so important for students to develop such attitudes or what exactly "the role of citizens in our society" entails. The only conceivable reasons are so that they will be intellectually prepared to hold elective office or to vote. Since the vast majority of citizens never hold office, however, the purpose must be to prepare them to vote intelligently. The Court, though, failed to follow through to this logical conclusion because there is strong authority to the effect that such a purpose is not constitutionally mandated. In *San Antonio Ind. School District v. Rodriguez*,⁷⁴ the Court acknowledged the validity of arguments that an

71. 441 U.S. at 84 (Blackmun, J., dissenting).

72. "Is it preferable to have a citizen who has never seen Spain or a Latin American country teach Spanish to eighth graders and to deny that opportunity to a resident alien who may have lived for 20 years in the culture of Spain or Latin America?" *Id.* at 87. Even New York, in setting up guidelines for bilingual education, recognizes the need "to impart to students a knowledge of the history and culture associated with their languages." N.Y. EDUC. LAW § 3204(2-a)(b) (McKinney 1970). What better way to accomplish this goal than by providing the students with teachers who are native speakers?

73. 441 U.S. at 78.

74. 411 U.S. 1 (1973).

intellectually prepared electorate is desirable but stated that "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice,"⁷⁵ in holding that a high-quality education is not a right guaranteed by the Constitution. Consequently, the argument that New York desires to provide its students with an education of higher quality than is constitutionally required should not be used to supersede the constitutional right of aliens to be free from discriminatory exclusion in the employment field.

If the *Norwick* Court had acknowledged that the *Sugarman* dictum demands the application of strict scrutiny and had required the State to demonstrate a substantial instead of legitimate state interest, it would not have approved of such weak excuses for the New York statute. Rather, the Court would have immediately rejected such contentions and judicially noticed that society considers that the main purpose and actual result of education is to prepare the student for living and working in our complex modern society, and not for participating in the political community. No one is arguing that the State lacks a substantial interest in education itself or that instilling in the students a sense of citizenship is not a *legitimate* interest. Instead, the argument is that these factors do not draw the position of public school teacher within the *Sugarman* dictum and therefore do not justify excluding aliens from such positions.

V. NORWICK FOUND THE ALIENAGE CLASSIFICATION RATIONALLY RELATED TO THE STATE INTEREST

Even if this state interest in instilling a sense of citizenship and government in the students could be considered substantial, the *Sugarman* dictum still demands that the classification be "narrowly confined."⁷⁶ The *Norwick* district court, in granting summary judgment to the plaintiffs, maintained that:

[i]t is inconceivable that defendants [*i.e.*, the State] could establish, on the basis of the proposed testimony of Dr. Terino, that a broad exclusion of *all* non-applicant aliens from *all* teaching positions is necessary to the advancement of New York's claimed interest.⁷⁷

Justice Blackmun, in his dissent in *Norwick*, agreed with the district court and cited⁷⁸ the "narrowly confined" language which appeared in *Sugarman*

75. *Id.* at 36 (Emphasis in original.). See *Norwick*, 441 U.S. at 77, n.7.

76. 413 U.S. at 649. See text accompanying note 22 *supra*.

77. 417 F. Supp. 913, 922 (S.D.N.Y. 1976) (Emphasis in original.).

78. "[The New York statute] is 'neither narrowly confined nor precise in its application,' nor limited to the accomplishment of substantial state interests. *Sugarman v. Dougall*, 413 U.S. at 643" 441 U.S. at 87 (Blackmun, J., dissenting).

before the dictum. He charged that "the New York statute is all-inclusive in its disqualifying provisions . . . [and] [i]t sweeps indiscriminately."⁷⁹

Even if New York's interest is conceded to be substantial, it failed to use narrowly confined means for accomplishing its goal. As one commentator pointed out,⁸⁰ the exclusion of aliens should be limited to teaching positions involving courses such as civics and history. However, since in the elementary schools teachers usually teach all subjects, the State would be required to establish positions for specialists in these areas. The added cost of specialists would be outweighed by the greater benefit derived from the diverse elements which teachers from abroad would bring to the classroom.⁸¹ The *Norwick* Court, however, after declaring that it is the duty of *all* teachers to promote this interest,⁸² would assuredly reject such a proposal.

Nevertheless, although the New York statute covers teachers in both the elementary and secondary schools, *Norwick's* holding should be confined to excluding aliens from teaching in only the elementary schools. First, both plaintiffs in *Norwick* were applying for positions in the elementary schools. Second, only elementary school teachers teach a wide range of courses. Therefore, in spite of the Court's contention that even secondary school teachers *may* be called upon to teach other subjects outside their specialty for up to five hours a week⁸³ and that all teachers—regardless of their specialty—should help further the state interest of instilling in the students a sense of government and citizenship,⁸⁴ a more narrowly confined means of effecting that state interest would be to exclude aliens solely from positions of teaching civics and American and New York history in the secondary schools. Third, since the Court recognized in *Wisconsin v. Yoder*⁸⁵ that "there is at best a speculative gain, *in terms of meeting the duties of citizenship*, from an additional one or two years of compulsory formal education"⁸⁶ beyond the eighth grade, New York's interest in instilling in its students a sense of citizenship dissipates greatly after the elementary school years and therefore does not justify excluding aliens from teaching in the secondary schools. Thus, an alien who wants to teach in the secondary

79. *Id.*

80. Note, *Aliens' Right to Teach: Political Socialization and the Public Schools*, 85 YALE L.J. 90, 110-11 (1975).

81. See note 72 *supra*.

82. "[I]t is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system." 441 U.S. at 79-80.

83. *Id.* at 80, n.12. The Court did not, however, state how frequently this possibility occurs in reality. See 8 N.Y.C.R.R. § 80.2(c) (1978).

84. 441 U.S. at 79-80.

85. 406 U.S. 205 (1972) (declaring that the State cannot require Amish children to attend school after the eighth grade).

86. *Id.* at 227 (Emphasis added.).

schools could possibly effect a narrowing of New York's blanket exclusion of alien teachers in the public schools by bringing suit and by distinguishing *Norwick* on its facts concerning elementary schools and citing *Yoder*.

The statute is poorly designed in another respect. Since it allows an alien to teach if he or she has shown the intention to become a citizen,⁸⁷ the Court concluded that "[a]ppellees, and aliens similarly situated, in effect have chosen to classify themselves"⁸⁸ by refusing to apply for citizenship. The Court in *Nyquist v. Mauclet*,⁸⁹ however, had earlier made it clear that such reasoning is misleading when it quoted⁹⁰ the district court: "Because some aliens agree under the statute's coercion to change their status does not alter the fact that the classification is based solely on alienage."⁹¹ Although *Mathews v. Diaz*⁹² allows a federal statute to classify within the general class of aliens by conditioning eligibility in a federal medical insurance program on continuous residence in the United States for a five-year period and admission for permanent residence, this technique of subclassification with its tendency to cause some aliens "to classify themselves" cannot be relied on in *Norwick* because federal alienage classifications are not subject to strict scrutiny, due to Congress' plenary powers to regulate immigration granted in Article I, section 8 of the Constitution.⁹³ Nor could the State argue that its subclassification was intended to encourage naturalization. For, as the *Mauclet* Court stated, encouragement of naturalization "is not a permissible [purpose] for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."⁹⁴ Furthermore, "[i]f the encouragement of naturalization through these [state] programs were seen as adequate, then every discrimination against aliens could be similarly justified. The exception would swallow the rule."⁹⁵ Consequently, the *Norwick* Court's conclusion that the "restriction is carefully framed to serve its purpose, as it bars from teaching only those aliens who have demonstrated their unwillingness to obtain United States citizenship"⁹⁶ is wrong if it is based on the invalid premise that the State may encourage naturalization by placing economic pressure on aliens.

87. See N.Y. EDUC. LAW § 3001(3), note 6 *supra*.

88. 441 U.S. at 80.

89. 432 U.S. 1 (1977). See note 33 *supra* for facts and holding.

90. *Id.* at 8, n.10.

91. *Mauclet v. Nyquist*, 406 F. Supp. 1233, 1235 (W.D.N.Y. 1976).

92. 426 U.S. 67 (1976).

93. "[I]t is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization." *Id.* at 86-87.

94. 432 U.S. at 10.

95. *Id.* at 11.

96. 441 U.S. at 80.

All of the above arguments⁹⁷ show that the statute involved in *Norwick* was not "narrowly confined" as the *Sugarman* dictum requires. The *Norwick* Court, though, applied the laxer standard of a rational relationship test. It does not come as a surprise, then, that the Court easily found the classification to pass muster under a rational relationship test, for a reasonable basis can usually be found for just about any nonarbitrary statute.⁹⁸ The Court's reasoning, however, is particularly offensive:

But the legislature, having in mind the importance of education to state and local governments [reference to *Brown*] may determine eligibility for the key position in discharging that function on the assumption that *generally* persons who are citizens, or who have not declined the opportunity to seek United States citizenship, are better qualified than are those who have elected to remain aliens.⁹⁹

It is frustrating to see the Court approving of such a broad generalization, especially since the equal protection approach of the last two decades has denied the validity of generalizations and stereotypes concerning suspect classes. The Court's attitude, moreover, is repugnant to the rationale of cases like *Elfbrandt v. Russell*,¹⁰⁰ which voided a statute subjecting to criminal prosecution state employees who belonged to the communist party, and *Keyishian v. Board of Regents*,¹⁰¹ which invalidated the Feinberg law whose provisions subjected to removal teachers who belonged to the communist party. *Elfbrandt* stated that:

A law which applies to membership without the "specific intent" to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of "guilt by association" which has no place here.¹⁰²

Thus, joining a political party merely with knowledge of the doctrines it espouses is not enough of a reason by itself for the State to adopt the generalization that all members have the specific intent to fulfill the party's goals.

97. See text accompanying notes 76-96 *supra*.

98. Under the rational relationship test, the Warren Court invalidated only one statute. *Morey v. Doud*, 354 U.S. 457 (1957). Although the Burger Court has invalidated more statutes under a rational relationship test than its predecessor, most of the statutes appear to have been blatantly arbitrary. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (Social Security benefits to widow but not to widower); *Stanley v. Illinois*, 405 U.S. 645 (1972) (children of unwed father become wards of the State upon death of the mother); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (criminal sanctions for giving contraceptives to an unmarried person); *Reed v. Reed*, 404 U.S. 71 (1971) (automatic preference of men over women who have the same relationship to the deceased in selecting the administrator of the deceased's estate).

99. 441 U.S. at 81, n.14 (Emphasis in original.).

100. 384 U.S. 11 (1966).

101. 385 U.S. 589 (1967).

102. 384 U.S. at 19. *Keyishian* quotes the passage, 385 U.S. at 607.

Why, then, should the status of alienage—which can be viewed as a voluntary, informed choice *only* by the alien's passive failure to apply for U.S. citizenship—be sufficient ground for the State to generalize that the alien necessarily adheres only to the principles of his native land, remains loyal only to his native land, and does not believe in the democratic institutions of the United States or understand them well enough to teach them? If such generalizations are allowable and valid, how could the federal government have risked the dangers of espionage by inducting aliens into the armed services?¹⁰³

In reality, the *Norwick* plaintiffs had merely nonpolitical, sentimental reasons for refusing to apply for citizenship. Norwick said, "I maintained British citizenship because it's important to me. . . . I'm very proud of my country. I've been British for 38 years."¹⁰⁴ Dachinger said, "It's an emotional thing. All my family is in Finland. My children are American citizens. I wanted to keep that emotional dimension."¹⁰⁵ Would applying for and receiving U.S. citizenship have made the plaintiffs "better qualified"¹⁰⁶ to instill in students a sense of government and citizenship? What deficiency would citizenship have removed? Merely their sentimental attachments. Application of a strict scrutiny standard of review might have taken such factors into account and held that a blanket exclusion based on a generalization is not a narrowly confined classification.

VI. CONCLUSION

The *Sugarman* dictum states that certain *narrowly confined* alienage classifications will be deemed valid if they effectuate a *substantial* state interest in preserving the political community. Thus, the dictum presents a rare instance where an alienage classification will be sustained even under strict scrutiny. The *Foley* and *Norwick* Courts, however, have read the dictum to allow the application of merely a rational relationship test to alienage classifications in areas affecting the political community. In effect, the *Foley* and *Norwick* decisions have deprived aliens of their full protection as a suspect class by depriving them of the benefits of strict scrutiny review in cases concerning the political community. Such inconsistent treatment of a suspect class casts great doubt on the continuing validity of the concept of suspect classes in general. Strict adherence to application of the strict scrutiny test as required by the *Sugarman* dictum, however, would restore full protection to aliens as a suspect class and prevent the demise of the concept of suspect classes.

103. Selective Service Act of 1967, 50 U.S.C. § 454(a).

104. *Plaintiffs in Case Dismayed by Supreme Court Verdict*, N.Y. Times, Apr. 18, 1979, § B, at 3, col. 5.

105. *Id.*

106. See the quotation from *Norwick* accompanying note 99 *supra*.