

# The Burger Court Opinion Writing Database

*Nyquist v. Mauclet*

432 U.S. 1 (1977)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

May 31, 1977

Re: 76-208 - Nyquist v. Mauclet

MEMORANDUM TO THE CONFERENCE:

I am giving thought to circulating a dissent  
along the lines of the attached typed draft.  
Alternatively, I will likely join Bill's dissent.

Regards,

LB B

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice  
MAY 31 1977

Circulated: \_\_\_\_\_

Recirculated: \_\_\_\_\_

No. 76-208 - Nyquist v. Mauclet

MR. CHIEF JUSTICE BURGER, dissenting:

I join Mr. Justice Rehnquist's dissenting opinion, but I add this comment to point out yet another significant difference between this case and our prior cases involving alienage-based classifications. With one exception, the prior cases upon which the Court purports to rely involved statutes which prohibited aliens from engaging in certain occupations or professions, thereby impairing their ability to earn a livelihood. See, e.g., Examining Board of Engineers v. de Otero, 426 U.S. 572 (1976) (Puerto Rico statute permitted only U.S. citizens to practice as private civil engineers); In re Griffith, 412 U.S. 717 (1973) (membership in State Bar limited to citizens); Sugarman v. Dougall, 413 U.S. 634 (1973) (participation in State's competitive civil service limited to citizens); Takahashi v. Fish and Game Comm'n., 334 U.S. 410 (1958) (State statute denied fishing license to persons "ineligible to citizenship");

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

Circulated: JUN 8 1977

Recirculated: \_\_\_\_\_

No. 76-208 - Nyquist v. Mauclet

MR. CHIEF JUSTICE BURGER, dissenting:

I join Mr. Justice Rehnquist's and Mr. Justice Powell's dissenting opinions, but I add this comment to point out other significant differences between this case and our prior cases involving alienage-based classifications.

With one exception, the prior cases upon which the Court purports to rely involved statutes which prohibited aliens from engaging in certain occupations or professions, thereby impairing their ability to earn a livelihood. See, e.g., Examining Board of Engineers v. de Otero, 426 U.S. 572 (1976) (Puerto Rico statute permitted only U.S. citizens to practice as private civil engineers); In re Griffith, 412 U.S. 717 (1973) (membership in State Bar limited to citizens); Sugarman v. Dougall, 413 U.S. 634 (1973) (participation in State's competitive civil service limited to citizens); Takahashi v. Fish and Game Comm'n., 334 U.S. 410 (1958) (State statute denied fishing license to persons "ineligible to citizenship"); Truax v. Raich, 239 U.S. 33 (1915) (State constitution required employers to hire "not less

To: Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
~~Mr. Justice Marshall~~  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: The Chief Justice

1st DRAFT

Circulated: \_\_\_\_\_

SUPREME COURT OF THE UNITED STATES

Re-circulated: **JUN 9 1977**

No. 76-208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, v. Jean-Marie Mauclet et al.	}	On Appeal from the United States District Court for the Western and Eastern Districts of New York.
---	---	---

[June —, 1977]

MR. CHIEF JUSTICE BURGER, dissenting.

I join MR. JUSTICE REHNQUIST's and MR. JUSTICE POWELL's dissenting opinions, but I add this comment to point out yet other significant differences between this case and our prior cases involving alienage-based classifications.

With one exception, the prior cases upon which the Court purports to rely involved statutes which prohibited aliens from engaging in certain occupations or professions, thereby impairing their ability to earn a livelihood. See, e. g., *Examining Board of Engineers v. de Otero*, 426 U. S. 572 (1976) (Puerto Rico statute permitted only U. S. citizens to practice as private civil engineers); *In re Griffith*, 412 U. S. 717 (1973) (membership in State Bar limited to citizens); *Sugarman v. Dougall*, 413 U. S. 634 (1973) (participation in State's competitive civil service limited to citizens); *Takahashi v. Fish and Game Comm'n.*, 334 U. S. 410 (1958) (State statute denied fishing license to persons "ineligible to citizenship"); *Truax v. Raich*, 239 U. S. 33 (1915) (State constitution required employers to hire "not less than eighty (80) percent qualified electors or native-born citizens of the United States"); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886) (city ordinance discriminatorily enforced against aliens so as to prevent Chinese subjects, but not United States citizens, from operating laundries within the city). The only other case

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM.J. BRENNAN, JR.

May 20, 1977

RE: No. 76-208 Nyquist v. Mauclet, et al.

Dear Harry:

I agree.

Sincerely,

*Bul*

Mr. Justice Blackmun

cc: The Conference

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 24, 1977

Re: No. 76-208, Nyquist v. Mauclet

Dear Harry,

I shall await Bill Rehnquist's dissent.

Sincerely yours,

PS  
1.31

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

June 3, 1977

76-208, Nyquist v. Mauclet

Dear Lewis,

Please add my name to your dissenting opinion in this case.

Sincerely yours,

P.S.  
/

Mr. Justice Powell

Copies to the Conference



✓ ✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

June 4, 1977

No. 76-208 - Nyquist v. Mauclet

Dear Harry:

Please join me.

Sincerely,

*Byron*

Mr. Justice Blackmun

Copies to Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

May 20, 1977

Re: No. 76-208 - Nyquist v. Mauclet

Dear Harry:

Please join me.

Sincerely,



T.M.

Mr. Justice Blackmun

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: 5/19/77

Recirculated: \_\_\_\_\_

HAB  
Please join me  
JMM

1st DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner  
of Education of New York,  
et al., Appellants,  
v.  
Jean-Marie Mauclet et al.

On Appeal from the United  
States District Court for  
the Western and Eastern  
Districts of New York.

[May —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

New York, by statute, bars certain *resident* aliens from state financial assistance for higher education. New York Educ. Law § 661 (3) (McKinney Supp. 1976). This litigation presents a constitutional challenge to that statute.

## I

New York provides assistance, primarily in three forms, to students pursuing higher education. The first type is the Regents college scholarship. These are awarded to high school graduates on the basis of performance in a competitive examination. §§ 605 (1) and 670. Currently, in the usual case, a recipient is entitled to \$250 annually for four years of study without regard to need. §§ 670 (2) and (3)(b).<sup>1</sup> The second and chief form of aid is the tuition assistance award. These are noncompetitive; they are available to both graduate

<sup>1</sup> There also are other special competitive awards: Regents professional education in nursing scholarships, N. Y. Educ. Law §§ 605 (2) and 671 (McKinney Supp. 1976); Regents professional education in medicine or dentistry scholarships, §§ 605 (3) and 672; Regents physician shortage scholarships, §§ 605 (4) and 673; Regents war veteran scholarships, §§ 605 (5) and 674; and Regents Cornell University scholarships, § 605 (6).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 26, 1977

MEMORANDUM TO THE CONFERENCE

Re: No. 76-208 - Nyquist v. Mauclet

In response to Bill Rehnquist's dissent, I am revising my footnote 11 to read as follows:

11/

Our Brother Rehnquist argues in dissent that strict scrutiny is inappropriate because under § 661(3) a resident alien can voluntarily withdraw from disfavored status. But this aspect of the statute hardly distinguishes our past decisions. By the logic of the dissenting opinion, the suspect class for alienage would be defined to include at most only those who have resided in this country for less than five years, since after that time, if not before, resident aliens are generally eligible to become citizens. 8 U.S.C. § 1427(a). The Court has never suggested, however, that the suspect class is to be defined so narrowly. In fact, the element of voluntariness in a resident alien's retention of alien status is a recognized element in several of the Court's decisions. For example, the Court acknowledged that Griffiths involved an appellant who was eligible for citizenship, but who had not filed a declaration of intention to become a citizen, and had "no present intention of doing so." 413 U.S., at 718 n. 1. And insofar as the record revealed, nothing precluded the appellees in Sugarman v.

STYLISTIC CHANGES

pp. 6, 7, 8

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: MAY 26 1977

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, v. Jean-Marie Mauclet et al.	}	On Appeal from the United States District Court for the Western and Eastern Districts of New York.
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[May —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

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✓  
p-2

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: JUN 7 1977

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, v. Jean-Marie Mauclet et al.	}	On Appeal from the United States District Court for the Western and Eastern Districts of New York.
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[May —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

New York, by statute, bars certain *resident* aliens from state financial assistance for higher education. New York Educ. Law § 661 (3) (McKinney Supp. 1976). This litigation presents a constitutional challenge to that statute.

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New York provides assistance, primarily in three forms, to students pursuing higher education. The first type is the Regents college scholarship. These are awarded to high school graduates on the basis of performance in a competitive examination. §§ 605 (1) and 670. Currently, in the usual case, a recipient is entitled to \$250 annually for four years of study without regard to need. §§ 670 (2) and (3)(b).<sup>1</sup> The second and chief form of aid is the tuition assistance award. These are noncompetitive; they are available to both graduate

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pp. 647

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: JUN 10 1977

4th DRAFT

# SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, v. Jean-Marie Mauclet et al.	} On Appeal from the United States District Courts for the Western and Eastern Districts of New York.
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[May —, 1977]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

New York, by statute, bars certain *resident* aliens from state financial assistance for higher education. New York Educ. Law § 661 (3) (McKinney Supp. 1976). This litigation presents a constitutional challenge to that statute.

## I

New York provides assistance, primarily in three forms, to students pursuing higher education. The first type is the Regents college scholarship. These are awarded to high school graduates on the basis of performance in a competitive examination. §§ 605 (1) and 670. Currently, in the usual case, a recipient is entitled to \$250 annually for four years of study without regard to need. §§ 670 (2) and (3)(b).<sup>1</sup> The second and chief form of aid is the tuition assistance award. These are noncompetitive; they are available to both graduate

<sup>1</sup> There also are other special competitive awards: Regents professional education in nursing scholarships, N. Y. Educ. Law §§ 605 (2) and 671 (McKinney Supp. 1976); Regents professional education in medicine or dentistry scholarships, §§ 605 (3) and 672; Regents physician shortage scholarships, §§ 605 (4) and 673; Regents war veteran scholarships, §§ 605 (5) and 674; and Regents Cornell University scholarships, § 605 (6).

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

June 13, 1977

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 76-208 - Nyquist v. Mauclet

There are four holds for Mauclet:

1. No. 75-1809 - Rabinovitch v. Nyquist. This is Rabinovitch's cross appeal from that part of the judgment of the District Court denying him money damages, on the basis that such relief was barred by the Eleventh Amendment. He makes three arguments. First, he argues that the provisions of 42 U.S.C. § 1981 constitute implicit congressional authority for a damage remedy. Second, he argues that a claim to vindicate a right of equal protection under the Fourteenth Amendment enjoys an exemption from the Eleventh Amendment. Finally, he argues that a money judgment against appellee, the New York State Higher Education Services Corporation, is not a judgment against the State for purposes of the Eleventh Amendment.

It seems to me that Rabinovitch's first two claims go well beyond Fitzpatrick v. Bitzer, 427 U.S. 445. Indeed, they extend further than I care to go. And as to the third claim, it seems to me that NYSHESC, which is created by statute to administer the State's educational aid programs and which receives the bulk of its funds from appropriations by the State, is properly seen as an arm of the State. Compare Mt. Healthy City Board of Ed. v. Doyle, decided January 11. The case purports to be an appeal. I shall vote to dismiss and deny.

2. No. 76-832 - Jagnandan v. Giles. Petitioners brought suit to challenge a Mississippi statute that required all aliens to pay nonresident tuition at state colleges. A three-judge court declared the statute unconstitutional and granted injunctive relief, but refused to order a refund of excess tuition fees paid. Petitioners appealed from the denial of the tuition refund, and CA 5 concluded that the claim was barred by the Eleventh Amendment. Petitioners raise the questions whether claims for damages arising under the Fourteenth Amendment override the bar of the Eleventh Amendment.



✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 25, 1977

No. 76-208 Nyquist v. Mauclet

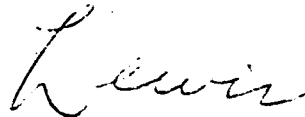
Dear Harry:

As indicated at Conference, I think the State of New York should win this one. Accordingly, I will await Bill Rehnquist's dissent.

I must say, however, that our precedents - including my opinion In re Griffiths - certainly justify an opinion as you have written it. But the state interest here is, I think, perceptively greater than in our prior cases.

I am simply not yet at rest.

Sincerely,



Mr. Justice Blackmun

lfp/ss

cc: The Conference

6/3/77

✓  
To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: JUN 5 1977

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No. 76-208 Nyquist v. Mauclet

MR. JUSTICE POWELL, dissenting.

I am persuaded, for the reasons set forth in Mr. Justice Rehnquist's dissent, that New York's scheme of financial assistance in higher education does not discriminate against a suspect class. The line New York has drawn in this case is not between aliens and citizens, but between aliens who prefer to retain foreign citizenship and all others.

"The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

Our prior cases dealing with discrimination against all aliens as a class, In re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634 (1973), and against sub-classes of aliens without regard to ability or willingness to acquire

pp 1, 2

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
✓ Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated: \_\_\_\_\_

Recirculated: JUN 7 1977

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner  
of Education of New York,  
et al., Appellants,  
v.  
Jean-Marie Mauclet et al.

On Appeal from the United  
States District Court for  
the Western and Eastern  
Districts of New York.

[June —, 1977]

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART  
joins, dissenting.

I am persuaded, for the reasons set forth in MR. JUSTICE REHNQUIST's dissent that New York's scheme of financial assistance in higher education does not discriminate against a suspect class. The line New York has drawn in this case is not between aliens and citizens, but between aliens who prefer to retain foreign citizenship and all others.

"The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist. v. Rodriguez*, 411 U. S., 1, 28 (1973).

Our prior cases dealing with discrimination against all aliens as a class, *In re Griffiths*, 413 U. S. 717 (1973); *Sugarman v. Dougall*, 413 U. S. 634 (1973), and against sub-classes of aliens without regard to ability or willingness to acquire citizenship *Graham v. Richardson*, 403 U. S. 365 (1971) do not justify the application of strict judicial scrutiny to the legislative scheme before us today.\*

\*The Court's reliance on the personal status of the appellant in *In re*

— ✓  
p. 1

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Rehnquist  
Mr. Justice Stevens

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Mr. Justice Powell

No. 76-208

Circulated:

Recirculated: JUN 9 1977

Ewald B. Nyquist, Commissioner  
of Education of New York,  
et al., Appellants,  
v.  
Jean-Marie Mauclet et al.

On Appeal from the United  
States District Court for  
the Western and Eastern  
Districts of New York.

[June —, 1977]

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE  
and MR. JUSTICE STEWART join, dissenting.

I am persuaded, for the reasons set forth in MR. JUSTICE  
REHNQUIST's dissent that New York's scheme of financial  
assistance in higher education does not discriminate against  
a suspect class. The line New York has drawn in this case  
is not between aliens and citizens, but between aliens who  
prefer to retain foreign citizenship and all others.

"The system of alleged discrimination and the class it  
defines have none of the traditional indicia of suspect-  
ness: the class is not saddled with such disabilities, or  
subjected to such a history of purposeful unequal treat-  
ment, or relegated to such a position of political power-  
lessness as to command extraordinary protection from  
the majoritarian political process." *San Antonio School  
Dist. v. Rodriguez*, 411 U. S. 1, 28 (1973).

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as a class, *In re Griffiths*, 413 U. S. 717 (1973); *Sugarman v.  
Dougall*, 413 U. S. 634 (1973), and against sub-classes of  
aliens without regard to ability or willingness to acquire citi-  
zenship, *Graham v. Richardson*, 403 U. S. 365 (1971), do not  
justify the application of strict judicial scrutiny to the legis-  
lative scheme before us today.\*

\*The Court's reliance on the personal status of the appellant in *In re*

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 23, 1977

Re: No. 76-208 Nyquist v. Mauclet

Dear Harry:

In due course, I propose to circulate a dissent, demonstrating (although, I fear, without euclidean precision) that the result you reach in this case does not necessarily follow from Graham, Sugarman, and Griffiths.

Sincerely,

WHR/MS

Mr. Justice Blackmun

Copies to the Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Blackmun  
Mr. Justice Powell  
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: MAY 25 1977

1st DRAFT

Recirculated: \_\_\_\_\_

## SUPREME COURT OF THE UNITED STATES

No. 76-208

Ewald B. Nyquist, Commissioner of Education of New York, et al., Appellants, v. Jean-Marie Mauclet et al.	}	On Appeal from the United States District Court for the Western and Eastern Districts of New York.
---	---	---

[May —, 1977]

MR. JUSTICE REHNQUIST, dissenting.

I am troubled by the somewhat mechanical application of the Court's equal protection jurisprudence to this case. I think one can accept the premise of *Graham v. Richardson*, 403 U. S. 365 (1971); *In re Griffiths*, 413 U. S. 717 (1973); and *Sugarman v. Dougall*, 413 U. S. 634 (1973), and therefore agree with the Court that classifications based on alienage are inherently suspect, but nonetheless feel that this case is wrongly decided. In those cases, the reason postulated for the elevation of alienage classifications to strict scrutiny was directly related to the express exclusion of aliens found in the State's classification. Here, however, we have a significantly different case. The State's classification trenches not at all upon the sole reason underlying the strict scrutiny afforded alienage classifications by this Court.

*Graham v. Richardson* is, of course, the starting point of analysis, as it was the first case to explicitly conclude that alienage classifications, like those based on race or nationality, would be subject to strict scrutiny when challenged under the equal protection clause of the Fourteenth Amendment. *Graham* reasoned, 403 U. S., at 372:

"Aliens as a class are a prime example of a 'discrete and insular' minority (see *United States v. Caroline Products*

✓  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 20, 1977

Re: 76-208 - Nyquist v. Mauclet

Dear Harry:

Please join me.

Respectfully,



Mr. Justice Blackmun

Copies to the Conference