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CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—EQUAL PROTECTION—ALIENS' RIGHTS—GOVERNMENTAL FUNCTION DOCTRINE—The Supreme Court of the United States has held that a state may exclude aliens from deputy probation officer positions which involve the exercise of the sovereign police power.

Cabell v. Chavez-Salido, 102 S. Ct. 735 (1982).

In 1975, Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra, lawfully admitted resident aliens,[1] applied for positions as Deputy Probation Officers with the Los Angeles County Probation Department.[2] All three were denied employment under California Government Code section 1031(a),[3] which requires that appointees be United States citizens, although two of the three had clearly demonstrated themselves to be otherwise qualified for the position.[4] The three then filed suit against Los Angeles County[5] in the United States District Court for the Central District of California, alleging the unconstitutionality of section 1031(a)'s citizenship requirement under the equal protection clause of the fourteenth amendment, and under the provisions of 42 U.S.C. §§ 1981 and

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1. Cabell v. Chavez-Salido, 102 S. Ct. 735, 736 (1982). *See* Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *vacated sub nom.* County of Los Angeles v. Chavez-Salido, 436 U.S. 901 (1978), *on remand sub nom.* Chavez-Salido v. Cabell, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 102 S. Ct. 735 (1982). Chavez-Salido had been a permanent legal resident since 1955, Bohorquez since 1961, and Ybarra since 1972. 102 S. Ct. at 744 n.1. Chavez-Salido ultimately became a citizen in 1976; however, at that time there were no openings for the position he was previously denied. *Id.* at 736 n.1.

2. 102 S. Ct. at 736-37.

3. CAL. GOV'T CODE § 1031(a) (West Supp. 1981-1982) provides that public officers or employees who are classified by law as peace officers "shall be citizens of the United States." *See also* CAL. PENAL CODE § 830 (West Supp. 1981-1982) which lists over seventy job classifications included and excluded from the category of peace officer. CAL. PENAL CODE § 830.5 (West Supp. 1981-1982) provides that any parole or probation officer is a peace officer.

4. One of the appellees held a master's degree, the other two, bachelor's degrees. 102 S. Ct. at 744 n.1. Chavez-Salido and Ybarra both received passing scores on the qualifying oral examination for Deputy Probation Officer II; Bohorquez did not appeal his failing score, after being informed that it would be futile to do so since he was not a citizen. *Id.* at n.2.

5. *Id.* at 737. Also named as defendants in the complaint were various county officials serving in their official capacity. *Id.* The County contested the jurisdiction of the federal court; however, the district court held that the plaintiffs stated a claim against the County on both fourteenth amendment and § 1981 grounds. *Id.* at n.4.

1983.[6] The plaintiffs claimed that the statute unlawfully discriminated against them on the basis of alienage,[7] and asked for injunctive relief, monetary damages, and attorneys' fees,[8] as well as a declaratory judgment invalidating the statute.[9]

A three-judge district court,[10] employing a strict scrutiny test,[11] held that the statutory citizenship requirement of section 1031(a) was unconstitutional both on its face and as applied.[12] The district court based its decision primarily on the United States Supreme Court's holding in *Sugarman v. Dougall.*[13] On appeal, the Supreme Court vacated and remanded[14] the district court's judgment for further consideration in light of the Supreme Court's decision in *Foley v. Connelie.*[15] On remand,[16] the district court reconsidered

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6. 42 U.S.C. § 1981 (1976) provides in pertinent part that all persons within the jurisdiction of the United States shall have the same right in every state to make and enforce contracts, to sue, and to the full and equal benefit of all laws and proceedings. 42 U.S.C. § 1983 (1976) provides that liability is imposed on any person who, under color of state law, deprives another of any rights, privileges, or immunities secured by the Constitution.

7. 102 S. Ct. at 737. The appellees also asserted that § 1031(a) infringed upon the right to travel and upon Congress' exclusive power to regulate aliens. *Id.* The district court declined to address these claims. *See* 427 F. Supp. at 172.

8. 102 S. Ct. at 737. Chavez-Salido and Ybarra sought back pay as damages; Bohorquez only requrested the opportunity to take a new examination. *Id.* at n.3.

9. *Id.* at 737.

10. The three-judge district court was convened pursuant to 28 U.S.C. § 2281 (1970) (repealed 1976), and 28 U.S.C. § 2284 (1970) (amended 1976). Subsequent to the commencement of this action, Congress has limited the use of three-judge courts. 102 S. Ct. at 737 n.5. *See* The Three-Judge Court Amendments of 1976, Pub. L. No. 94-381, 90 Stat. 1119 (1976) (codified as amended at 28 U.S.C. § 2284 (1976)).

11. 427 F. Supp. at 169. When a suspect classification affects a substantial right, such as employment opportunities, a heavy burden of justification is placed on the state to show that the classification serves a substantial and constitutionally permissible interest, and that the use of the classification is absolutely necessary to achieve that purpose. Also, the means employed to achieve the purpose must be precisely drawn. *See In re* Griffiths, 413 U.S. 717 (1973) (state court rule requiring citizenship for admission to bar unconstitutionally discriminates against aliens).

12. 102 S. Ct. at 737.

13. 427 F. Supp. at 170. *See* Sugarman v. Dougall, 413 U.S. 634 (1973). In *Sugarman,* the Court struck down a New York civil service provision requiring citizenship for appointment to any position in the state's competitive civil service. While the Court recognized a state's interest in defining its political community, and in limiting participation in its government to those within the political community, it stated that any statute employing discrimination against aliens must be precisely drawn to achieve an acknowledged state interest in the performance of a basic government function. *Id.* at 642-43.

14. County of Los Angeles v. Chavez-Salido, 436 U.S. 901 (1978).

15. 425 U.S. 291 (1978). The Court in *Foley* upheld a New York statute requiring state troopers to be United States citizens, reasoning that the police power is a basic governmental function which justified the exclusion of non-citizens. The Court rejected a strict scru-

its decision, guided by both *Foley* and *Ambach v. Norwick*,[17] and again reached its original conclusion.[18] The Supreme Court noted probable jurisdiction,[19] and reversed, holding that the statutory citizenship requirement and section 1031(a) were valid,[20] and that the position of probation officer, which involves the exercise of the state's coercive power, may be limited to citizens.[21]

Justice White, speaking for the majority,[22] first outlined the development of constitutional restraints on a state's power to enact classifications based on alienage, and acknowledged that the Court's decisions had not always formed a straight line.[23] The Court noted that in its earlier decisions, it had evaluated state alienage classifications by distinguishing between government distribution of public resources, which, under the classification system, could be limited to citizens, and government intervention in the private market, from which aliens could not be excluded.[24]

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tiny analysis as unnecessary where a rational relationship exists between the state interest sought to be protected and the limiting classification. *Id.* at 301.

16. Chavez-Salido v. Cabell, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 102 S. Ct. 735 (1982).

17. 441 U.S. 68 (1979). In *Ambach*, the Court held that a New York statute denying public school teacher certification to non-citizens who had not manifested an intention to apply for citizenship did not violate the equal protection clause. The Court concluded that public education came within the governmental function doctrine recognized in *Sugarman* and *Foley*, and that therefore only a rational basis test, and not a strict scrutiny standard, need be applied. *Id.* at 75.

18. 490 F. Supp. at 990. The district court again applied a strict scrutiny standard and concluded that no compelling state interest existed to justify limiting the position of probation officer to citizens. It reasoned that these positions, unlike those of state trooper and teacher, lacked the characteristics which would bring them within the basic governmental function exception. *Id.* Judge Curtis dissented, concluding that probation officers should be included within the exception, and that a citizenship requirement bore a rational relationship to a legitimate state interest. *Id.* at 995 (Curtis, J., dissenting).

19. 450 U.S. 978 (1981).

20. 102 S. Ct. at 738.

21. *Id.* at 743.

22. *Id.* at 736. Chief Justice Burger, along with Justices Rehnquist, O'Connor, and Stewart joined Justice White in the majority opinion.

23. *Id.* at 738. Justice White noted that this pattern is not an unusual one in legal development where broad principles, gradually narrowed when applied to new questions, must be replaced when their underlying distinctions become archaic. *Id.*

24. *Id. See* Truax v. Raich, 239 U.S. 33 (1915) (state statute requiring all employers of more than five workers to employ no less than eighty percent citizens violated the fourteenth amendment); Heim v. McCall, 239 U.S. 175 (1915) (state statute requiring that only citizens shall be employed on public works projects did not violate the equal protection clause); Patsone v. Pennsylvania, 232 U.S. 138 (1914) (state statute limiting the taking of wild game to citizens was not unconstitutional); Yick Wo v. Hopkins, 118 U.S. 356 (1886)

This distinction began to erode with the Court's decision in *Takahashi v. Fish and Game Commission*,[25] which held that whatever ownership interest the State of California purported to have in off-shore fish was inadequate to justify excluding resident aliens from making a living by fishing.[26] Later, Justice White explained, *Graham v. Richardson*[27] further eroded the public/private distinction,[28] by holding that a state could not withhold welfare benefits from resident aliens.[29] The *Graham* Court, employing the two-tiered equal protection analysis,[30] had stated that aliens as a class are a primary example of a "discrete and insular" minority for whom heightened judicial scrutiny should be invoked.[31] Justice White interpreted *Graham* as implying that a state may legitimately distinguish between citizens and resident aliens in very few instances.[32]

Since *Graham*,[33] Justice White noted, the Court has reached its decisions concerning alienage classifications by making a distinction between the economic and sovereign functions of government, beginning with *Sugarman v. Dougall*.[34] In *Sugarman*, the Court recognized a state's interest in limiting participation in its government to those within its political community.[35] Although not abandoning the view that restrictions that essentially affect the economic benefits of aliens are still subject to heightened judicial scrutiny,[36] the Court concluded that when a restriction serves a po-

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(resident aliens fall within the protection of the equal protection clause; a state may not deny to resident aliens the right to work in private occupations available to citizens).

25. 334 U.S. 410 (1948).

26. *Id.* at 421.

27. 403 U.S. 365 (1971). *Graham* interpreted *Takahashi* as casting doubt on the validity of the public interest doctrine. *Id.* at 374.

28. *Id.*

29. *Id.* at 376.

30. *Id.* at 371-72.

31. *Id.* at 372.

32. 102 S. Ct. at 739.

33. Prior cases, including *Graham*, dealt almost exclusively with attempts by the states to withhold certain economic and social benefits from non-citizens. *Id.*

34. 413 U.S. 634 (1973). *See supra* note 13.

35. *Id.* at 642.

36. 102 S. Ct. at 739. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977) (New York statute barring certain resident aliens from state educational financial assistance violated equal protection clause); Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (Puerto Rico statute denying licensing as civil engineer to anyone but citizens violated the fourteenth amendment); *In re* Griffiths, 413 U.S. 717 (1973) (state court rule requiring citizenship for admission to bar unconstitutionally discriminated against aliens).

litical function, particularly in determining membership in the political community, strict scrutiny is inappropriate.[37] Rather, Justice White explained, the Court will apply a two-step process to evaluate a state's claim that a restriction serves political rather than economic goals,[38] as dictated by *Sugarman:* (1) the classification must be sufficiently tailored to support the state's claim;[39] and (2) the classification must be applicable only to positions involving discretionary decision-making or the formulation and execution of public policy.[40] The *Cabell* Court found that section 1031(a) met both of the *Sugarman* standards.[41]

The Court next rejected the district court's conclusion that if section 1031(a) was overinclusive at all, it could not stand,[42] indicating that the district court had neglected to employ any standard at all in drawing its conclusion.[43] The proper standard of review, according to Justice White, involves an inquiry into whether the restriction is so broad and indiscriminate that it defeats the state's claim that it serves only to limit the exercise of an important function to citizens.[44] Employing this test, the California statute was held to be facially valid.[45] In examining the positions included within the category of peace officer, the Court found that the uni-

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37. 102 S. Ct. at 739. The Court further indicated that it would not employ strict scrutiny in matters dealing exclusively with a state's constitutional prerogatives or the operation of its government. *Id.* (quoting Sugarman v. Dougall, 413 U.S. 634 (1973)). *See supra* note 13.

38. 102 S. Ct. at 740. The Court acknowledged that this distinction has replaced the public/private distinction. The newer view is prompted by the necessity in a democratic system of defining the scope of the community involved in the processes of self-government. The exclusion of aliens from these processes is an unavoidable consequence. *Id.*

39. The classification in *Sugarman* did not meet the Supreme Court's standard because it swept indiscriminately in its restricting of all civil service positions to citizens. 413 U.S. at 643.

40. 102 S. Ct. at 740. *See Sugarman,* 413 U.S. at 647. The classification may be applied only to those "functions that go to the heart of representative government." *Id.*

41. 102 S. Ct. at 740. The Court stated that the importance of the government function, rather than the scope of the policy judgments involved, should be a significant consideration. *Id.* at n.7.

42. *Id.* at 740-41. The Court determined that both the district court and the parties were mistaken in their use of the doctrine of overbreadth, which is employed primarily in first amendment cases. *Id.* at n.8.

43. *Id.*

44. 102 S. Ct. at 741. *See* Ambach v. Norwick, 441 U.S. 68, 75 (1979). Under *Ambach's* standard, Justice White noted, classifications need not be exact; there must only be a substantial fit. 102 S. Ct. at 741.

45. 102 S. Ct. at 741.

fying characteristic of these positions was their law enforcement power,[46] and, as made clear by *Foley*, the exercise of the state's police power may properly be limited to citizens.[47] Justice White held that the statutes at issue were an attempt by California to limit the exericise of its police power to citizens, and thus were sufficiently tailored to meet the lower level of scrutiny required by *Sugarman*.[48]

Justice White next addressed the citizenship requirement as applied to the position of deputy probation officer, and again concluded that the district court misapplied *Foley* and *Ambach*, stating that these cases did not define the parameters of permissible citizenship requirements.[49] The Court also pointed out that the responsibility of defining the fundamental sovereign functions of the political environment rests in the legislative branches of government, and is subject to limited review by the judiciary.[50] After examining the broad functions and responsibilities of probation officers, which are exercised with a great deal of discretion and without direct supervision,[51] the Court concluded that a probation officer acts as an arm of the judicial authority to set the conditions under which probationers live, and of the executive authority to ensure obedience to these conditions.[52] Applying the governmental function exception as developed by *Foley* and *Ambach*, the Court held the citizenship requirement of section 1031(a) as applied to probation officers to be an appropriate limitation on those who

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46. *Id.* All of the persons holding the enumerated positions classified as peace officers in § 830 have the power to make arrests, and all receive training in the use of firearms. *Id.* at 742.

47. 102 S. Ct. at 742. *See* Foley v. Connelie, 435 U.S. 291 (1978).

48. 102 S. Ct. at 742.

49. *Id.* The Court added that in addition to teachers and state troopers, judges and jurors could also be required to be citizens, although a judge deals only with a narrow segment of the community, and a juror acts with little discretion under a specific set of instructions, unlike teachers and state troopers, who deal with much larger segments of a community, and frequently with a great amount of discretion. *Id.* at 743.

50. *Id.* at 742.

51. Justice White noted that these functions include the power to arrest and release probationers over which the probation officer has jurisdiction, and power to ensure that the conditions of probation are met, and the responsibility to determine whether to release or detain juvenile offenders, as well as whether to institute judicial proceedings affecting them. *Id.* at 743.

52. *Id.* The Court noted that to the probationer, the probation officer may personify and symbolize the authority of the state's police power. *Id.*

both exercise and symbolize the state's sovereign powers.[53]

Justice Blackmun, writing in dissent,[54] stated that the majority had misapplied the standard of review which has historically been applied to alienage classifications.[55] He advanced his belief that the majority had ignored both history and its own precedents, while regressing to a parochial view of public employment.[56]

After reviewing the prospective employees' job qualifications,[57] Justice Blackmun traced the development of the Court's decisions regarding state discrimination against resident aliens,[58] ending with the two-step evaluation prescribed by *Sugarman*,[59] *Foley*,[60] and *Ambach*,[61] and concluded that section 1031(a) could not survive the rigorous standard mandated by those decisions.[62]

Justice Blackmun also found that facially, the statute clearly violated the equal protection clause.[63] The listing of over seventy apparently unrelated positions included under the category of peace officer appeared arbitrary in that no reason had been given by the legislature for the inclusion of such a variety of positions,[64] nor had the legislature provided any criteria by which it would decide which positions should be considered peace officers.[65] Justice Blackmun considered significant the fact that prior to 1961, California did not require any of its peace officers to be citizens; then, without stating a rationale, the legislature passed section 1031, applying the citizenship requirement to all positions classified as peace officers, even to those for which the requirement may have

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53. *Id.*

54. *Id.* at 744 (Blackmun, J., dissenting). Justices Brennan, Marshall, and Stevens joined Justice Blackmun in the dissent.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See supra* note 21.

59. 413 U.S. 634 (1973). *See supra* note 13.

60. 435 U.S. 291 (1978). *See supra* note 15.

61. 441 U.S. 68 (1979). *See supra* note 17.

62. 102 S. Ct. at 746 (Blackmun, J., dissenting).

63. *Id.* at 745 (Blackmun, J., dissenting).

64. *Id.* The list of positions originally included those of toll service employees, livestock inspectors, cemetery sextons, fish and game wardens, furniture and bedding inspectors, voluntary fire wardens, and racetrack investigators. However, some of these were eliminated by amendments to the California Penal Code passed in 1980. *Id.* at n.4. *See* current version at CAL. PENAL CODE § 830 (West Supp. 1981).

65. 102 S. Ct. at 745 (Blackmun, J., dissenting).

been plainly irrelevant.[66]

Justice Blackmun criticized the majority's failure to review the history of section 1031(a) before drawing a conclusion that distorts the holding of *Sugarman*.[67] He explained that the Court's interpretation of that case expands the boundaries of the narrow exception which permits a state to limit to citizens those positions which involve direct participation in the creation and performance of public policy,[68] while ignoring what the dissent considered an important aspect of the *Sugarman* standard: that even a statute which legitimately bars aliens from positions within the political community nevertheless violates the equal protection clause if it excludes aliens from other public jobs in an indiscriminate manner.[69] Justice Blackmun agreed with the district court that section 1031(a) is just such an exercise of state power because some of the peace officer positions from which aliens have been barred cannot be viewed as members of the political community.[70]

Justice Blackmun found the statute to be as critically overinclusive and underinclusive as the statute in *Sugarman* in that, while it bars noncitizens from obtaining positions for which citizenship appears irrelevant, it allows noncitizens to obtain other positions for which citizenship seems to be a more logical requirement.[71] Justice Blackmun viewed the majority opinion as a defiance of the Court's earlier holdings which prohibited the states from excluding aliens from any occupation for which a citizenship requirement could not be reasonably imposed.[72] He saw the government function exception of *Sugarman* as extremely narrow and limited, allowing a lower level of scrutiny only for those positions involving participation in the state's political institutions or the operation of its government.[73] To exclude aliens under the exception, the state

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66. Justice Blackmun noted that in 1970, the California Attorney General was of the opinion that there was no compelling state interest to justify limiting certain of the listed peace officer positions to citizens. *Id.* at 746 (Blackmun, J., dissenting).

67. *Id.*

68. *Id.*

69. *Id.* at 747 (Blackmun, J., dissenting).

70. *Id.*

71. *Id.*

72. *Id.* at 748 (Blackmun, J., dissenting). *See* Truax v. Raich, 229 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See supra* note 24.

73. *Id.* at 748 (Blackmun, J., dissenting). Justice Blackmun considered the Court's opinions prior to and after *Sugarman* as buttressing this view. *Id. See* Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948) (California statute denying fishing licenses to cer-

should be required to make a substantial showing that the position entails these responsibilities.[74]

Justice Blackmun then opined that the Court's holdings in *Foley* and *Ambach* require a state to pass the rigorous test of demonstrating, not only that the position in question involves the exercise of coercive authority and control without intervening supervision, but also that the requirement of citizenship bears a rational relationship to the demands of the position.[75] He disagreed with the majority's application of the *Sugarman* standard in its conclusion that probation officers perform important sovereign functions of the political community. The same functions that the majority viewed as so important were seen by Justice Blackmun as not justifying alien exclusion when examined in a context including other public positions.[76] Justice Blackmun noted that probation officers are authorized to arrest or detain only in prescribed circumstances,[77] and further noted that the state had given this power to other employees not classified as peace officers, but also not required to be citizens.[78] He also accused the majority of ignoring the reality that arrest power is given to all private persons in some circumstances.[79] While refusing to go so far as to say that probation officers exercise no discretion, Justice Blackmun pointed out that their decisions are closely supervised and regulated by statute.[80] Further, he found it significant that aliens may practice law

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tain resident aliens violated fourteenth amendment); *In re* Griffiths, 413 U.S. 717 (1973) (Connecticut statute excluding aliens from admission to state bar association violated fourteenth amendment; subject to strict judicial scrutiny); Nyquist v. Mauclet, 432 U.S. 1 (1977) (New York statute barring certain resident aliens from state higher education financial assistance subject to strict scrutiny and violates the equal protection clause).

74. 102 S. Ct. at 748 (Blackmun, J., dissenting).

75. *Id.* at 749 (Blackmun, J., dissenting). Justice Blackmun was of the opinion that without the application of such a rigorous test, the *Sugarman* exception would absorb the *Sugarman* rule. *Id.*

76. *Id.*

77. Justice Blackmun pointed out that the number of persons subject to the probation officer's authority is limited, and that the arrest power over these individuals is restricted to bringing them before the court, which ultimately decides if they should be held. When the probationer is a juvenile, he or she may be detained only in emergencies and only for short periods. Also, the probation officer alone cannot declare a revocation of probation. *Id.*

78. *Id., see* CAL. PENAL CODE § 830.7 (West Supp. 1981-1982), describing persons not peace officers but having powers of arrest.

79. 102 S. Ct. at 749 (Blackmun, J., dissenting). *See* CAL. PENAL CODE § 834, § 837 (West Supp. 1981-1982).

80. 102 S. Ct. at 750 (Blackmun, J., dissenting). The probation officer's discretion is exercised primarily in preparing reports, investigating and supervising probationers, and

as well as be appointed to the positions of superior court judges and supreme court justices in California,[81] and may even become a chief juvenile probation officer, if warranted by the interests of the community.[82] Justice Blackmun believed that such varied and illogical results of the state's statutory scheme belied any claim that the state was merely attempting to ensure that an important government function remained in the hands of citizens.[83]

Finally, Justice Blackmun disagreed with the majority's view of the significance of the position as an extension of the judicial authority and as a symbol of the state's sovereign power, again addressing the anomaly that non-citizen attorneys may serve as officers of the court.[84] Justice Blackmun also expressed concern that if almost any government position can be seen as symbolizing the state's authority, the limitations on the application of the *Sugarman* exception would be destroyed.[85]

In Justice Blackmun's view, the state failed to advance any argument why non-citizens as a class should be prevented from holding this position, or why these Spanish-speaking individuals with graduate degrees were not qualified to deal with a possibly Spanish-speaking, non-citizen probationer population.[86] Further, the state would be precluded from challenging these aliens' loyalty, as they were willing to take an oath to support the Constitution; nor could the state encroach on what is exclusively a federal interest by a claim that the statute encouraged aliens to apply for citizenship.[87] Justice Blackmun concluded that the only reason for the exclusion of aliens from these positions appeared to be state parochialism and animosity toward aliens.[88] On this basis, Justice Blackmun viewed section 1031(a) as being unconstitutional both facially and as applied.[89]

The Supreme Court's decision in *Cabell v. Chavez-Salido* is only

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recommending the terms of probation. *Id.*

81. *Id.*

82. *Id. See* CAL. GOV'T CODE § 24001 (West Supp. 1981-1982).

83. 102 S. Ct. at 750 (Blackmun, J., dissenting).

84. *Id.* at 751 (Blackmun, J., dissenting). *See In re* Griffiths, 413 U.S. 717 (1973), *supra* note 11.

85. 102 S. Ct. at 751 (Blackmun, J., dissenting).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

the third in recent history to uphold a state law excluding lawfully admitted resident aliens from specific occupations.[90] The decision also seems to be another step backwards from the application of a strict scrutiny standard to classifications in employment based on alienage, as well as an expansion of the governmental function exception, a doctrine first advanced in *Sugarman v. Dougall.*[91]

Through the time of the Court's holding in *Sugarman,* it appeared that very few distinctions between citizens and non-citizens in the area of employment would be held permissible, unless the employment position at issue could be construed as falling within the boundaries of the governmental function exception.[92] As originally stated, the exception appeared to be a narrow one: by virtue of its responsibility and power to define its political community, the state could limit certain appropriately defined classes of positions to citizens. A broad and indiscriminately overinclusive classification would continue to be subject to strict scrutiny, but when a class of positions fell within a state prerogative granted by the Constitution, the Court's scrutiny would demand only a rational justification for alien exclusion.[93] The Court in this way recognized that non-citizens might be excluded from participation in a state's political institutions.

The Court, however, provided only vague indications of what types of positions might be included by such a government function. The language chosen by the Court to frame the exception was as significant for what was not, as well as for what was, expressed,[94] and it seemed that the exception would include a relatively limited number of positions. Only later would the *Sugarman* exception grow to include state troopers,[95] public school teachers,[96] and in *Chavez-Salido,* probation officers.

Prior to *Sugarman,* the Court's decisions concerning alienage-

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90. *See* Foley v. Connelie, 435 U.S. 291 (1978), *see also* Ambach v. Norwick, 441 U.S. 68 (1979).

91. 413 U.S. 634 (1973).

92. *Id.*

93. 102 S. Ct. at 741.

94. The Court stated that the power to exclude aliens applied to "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 . . . ." 413 U.S. at 647-48.

95. *See* Foley v. Connelie, 435 U.S. 291 (1978). *See also supra* note 15.

96. *See* Ambach v. Norwick, 441 U.S. 68 (1979). *See also supra* note 17.

based classifications reflected an increasing tendency to erase distinctions in employment between citizens and non-citizens,[97] and firmly established the right of aliens to engage in the "common occupations of the community."[98] These decisions were reached by the Court's application of a strict scrutiny standard, the use of which is warranted when a statute employing a suspect classification[99] is challenged on equal protection grounds. To justify the classification, the state must show both that it seeks to accomplish purposes, or protect interests, that are substantial, and that use of the classification is necessary to the achievement of that goal.[100]

The first case to offer an indication of the boundaries of the governmental function exception, as well as the standard of review required, was *Foley v. Connelie*.[101] The Court based its inclusion of state troopers within the governmental function fold by rejecting the notion that such a position could be one of the common occupations of the community.[102] This required a determination that the position involved discretionary decision-making, or the execution of policy affecting members of the political community, specifically citizens. The police power of a state was considered an im-

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97. *See* Nyquist v. Mauclet, 432 U.S. 1 (1977) (New York statute denying higher education financial assistance to certain resident aliens violated equal protection clause); *see also* Examining Board v. Flores de Otero, 426 U.S. 572 (1976) (Puerto Rico statute denying licensing as civil engineer to anyone but citizens violated fourteenth amendment); In re Griffiths, 413 U.S. 717 (1973) (state court rule requiring citizenship for admission to bar violated fourteenth amendment).

98. *See* Truax v. Raich, 239 U.S. 33, 41 (1915). *See also supra* note 24. Cases upholding the right to work in the common occupations of the community reveal a repugnance to exclude the alien from employment for no substantial reason other than the individual's alienage, and with no determination of the individual's fitness or qualifications. *See* In re Griffiths, 413 U.S. 717 (1973).

99. Even before *Sugarman*, classifications employing alienage as a basis were considered suspect, and warranted strict judicial scrutiny. Like other discrete classes based on nationality or race, and historically subject to discrimination, aliens merited increased judicial protection. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971). *See also supra* note 27 and accompanying text.

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

101. 435 U.S. 291 (1978).

102. *Id.* at 298. The *Foley* Court considered of primary significance the fact that police officers are endowed with the authority to arrest *citizens*, which in conjunction with a broad spectrum of powers over people generally, requires a high degree of judgment and discretion. *Id.* at 299. Further, the Court itself stated a rational basis for alien exclusion here by way of a reminder that many nations do not share our belief in personal freedoms, and that therefore a requirement that those entrusted with the enforcement of the laws express their allegiance to the Constitution by being or becoming citizens is not impermissible. *Id.* at 300.

portant example of a uniquely governmental function.[103]

Once it has been demonstrated that a job falls within the government function exception, a different standard of review is appropriate. Under the exception, to justify an alienage classification, a state need only show a rational relationship between the limiting classification and the interest it seeks to protect.[104] In *Foley,* that interest was the right to govern, which is reserved to citizens.[105] This standard constituted recognition by the Court that the discretionary exercise of policy, here exemplified by the exercise of police power, can have a profound effect on the lives of a vast number of citizens.[106]

In *Ambach v. Norwick,*[107] the Court modified the emphasis of the inquiry demanded by *Foley.* In expanding the governmental function exception to include public school teachers, the *Ambach* Court all but ignored the requirement that the position in issue involve the formulation or review of public policy.[108] Instead, the Court's determination was based on its conclusion that teachers perform a significant function of government in educating and shaping the development of the children of the community,[109] a responsibility that "goes to the heart of representative government."[110] Teachers do not exercise the same direct power as police officers, nor can it be said that teachers formulate public policy; nevertheless, they execute, however indirectly or subtly, the policy of the state in the performance of one of its more important responsibilities.[111] By framing the issue differently, the *Ambach* Court stated a broader view of the governmental function exception, thereby permitting the inclusion of positions which would have been excluded by the narrower view of *Foley.*

Central to the decisions applying a rational basis rather than a strict scrutiny standard, is the Court's view of the meaning and

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103. *Id.*

104. *Id.* at 296.

105. *Id.* at 297.

106. *Id.*

107. 441 U.S. 68 (1979). *See supra* note 17.

108. *Id.* at 76.

109. *Id.* at 75. Of particular importance to the Court was the teacher's obligation to promote civic virtues, in addition to the opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. *Id.* at 78.

110. *Id.* at 79-80.

111. *Id.* at 80.

importance of citizenship.[112] The majority in *Ambach* were of the opinion that the form of the association with the political community is significant; a mere oath of allegiance to the Constitution[113] does not constitute a substitute "for the unequivocal bond of citizenship."[114] This conception of the importance of citizenship has the result of allowing a state greater freedom in limiting the employment of aliens; it reduces to a large degree the effect of the principle that individual qualifications rather than class held characteristics should determine opportunities for employment.

The effect of the application of a rational basis test in *Chavez-Salido* is the exclusion of resident aliens from the position of probation officer in Los Angeles. The Court has reaffirmed its refusal to apply a strict scrutiny standard to a restrictive classification claimed by the state to serve a political purpose.[115] The inclusion of this position within the exception may be arguable, as evidenced by the Court's division concerning the question.[116]

The district court in *Chavez-Salido* considered section 1031(a) to be insufficiently tailored, with its inclusion of toll service employees and cemetery sextons, to support the state's contention that it served a legitimate political purpose.[117] The Supreme Court upheld the statute, although in *Foley* it had reaffirmed the rule that a state may not accomplish its stated purpose with a citizenship requirement that is applied to a wide variety of occupations without consideration of the differences among the positions.[118]

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112. *Id.* at 76. The status of citizenship connotes an association with the processes and institutions of democratic government. The significance of citizenship is reflected in the Constitution itself, which requires citizenship for the offices of President, U.S. CONST. art. II, § 1, cl. 5; Senator, *id.* art. I, § 3, cl. 3; and Representative, *id.* art. I, § 2, cl. 2.

113. *Compare In re* Griffiths, 413 U.S. 717 (1973), in which the Court rejected the contention that only citizens can, in good conscience, take an oath to support the Constitution. *Id.* at 726. The *Griffiths* Court commented favorably on the willingness of the resident alien who was seeking admission to the Bar, to subscribe to such an oath. *Id.*

114. Ambach v. Norwick, 441 U.S. at 75.

115. 102 S. Ct. at 739.

116. This confusion is demonstrated by the district court twice holding the California statute violative of the equal protection clause, even after its examination of the classification under *Foley* and *Ambach*. *See* 427 F. Supp. 158 (C.D. Cal. 1977), *vacated sub nom.* County of Los Angeles v. Chavez-Salido, 436 U.S. 901 (1978), *on remand sub nom.* Chavez-Salido v. Cabell, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 102 S. Ct. 735 (1982).

117. Chavez-Salido v. Cabell, 490 F. Supp. at 986. This problem, however, was rendered moot by the deletion of these positions by amendments passed in 1980. *See* CAL. PENAL CODE § 830.4 (West Supp. 1981).

118. *See* 435 U.S. at 296. *See also supra* note 15.

Here, the Court stated that the classification employed will not be required to be exact, but must only be sufficiently tailored to support a state's argument that the classification is warranted by its right to restrict the exercise of governmental power to citizens.[119] Under this deferential standard, the Court accepted California's claim that the statute fulfilled a significant purpose: that of limiting the exercise of the police power, here designated the law enforcement function,[120] to those within the political community.

The decision that a probation officer is included within the *Sugarman* exception and is not one of the common occupations of the community turns upon the Court's interpretation of the position's duties and responsibilities, the scope of which was a central issue in *Chavez-Salido*.[121] The critical element to the Court was the law enforcement character of the position. The Court found significant the probation officer's power to exercise coercive force over others, including the power to arrest,[122] a power which may properly be limited to citizens.[123] The Court's conclusion appears grounded in the character of the position as a personification of the state's power to punish and rehabilitate criminals, rather than in the size of its area of influence, or the extent to which the manner of the performance of those powers is within the discretion of the probation officer.[124]

In cases such as *Chavez-Salido,* the Court is presented with a difficult problem in line-drawing: given the proliferation of public employment, the question becomes which positions should be held to be an exercise of a government function, and which should be

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119. *See* 102 S. Ct. at 741.

120. *Id.*

121. The appellees stressed the highly circumscribed authority and discretion given the probation officer, and the limited population over whom these are exercised, emphasizing dissimilarities of teachers and police officers. *See* Brief for Appellees at 6. The appellants more successfully contended that the responsibilities of probation officers were uniquely governmental, having no counterpart in the private sector. *See* Reply Brief for Appellants at 6.

122. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973) in which the Court had occasion to consider the role played by the probation or parole officer. The Court noted that these positions are endowed with broad discretion to judge the probationer's progress and rehabilitation, and also with the power to recommend revocation of parole or probation. *Id.* at 784.

123. 102 S. Ct. at 743.

124. In contrast, both *Foley* and *Ambach* emphasized the community-wide responsibilities of teachers and police officers, and the unsupervised discretion permitted to both. *Id.* at 742.

considered common occupations of the community. The development of the law in this area does not facilitate predictable results. For example, an attorney, while not exercising governmental authority, is nevertheless an officer of the court, and is a position from which a resident alien may not be barred.[125] Yet, while a probationer's counsel may not be required to be a citizen, his probation officer may be so required.[126]

With its decision in *Chavez-Salido,* the Court has moved toward the position that only a rational justification should be required to uphold alienage classifications, and has moved away from the position that such classifications will always be suspect. The origin of this trend can be seen in Justice Rehnquist's dissent in *Sugarman.*[127] Justice Rehnquist was of the opinion that alienage as a basis for discrimination was unlike race or nationality in that the status of being an alien is one that may be remedied by the individual by taking steps toward naturalization.[128] He sought to remind the Court that the Constitution itself admits to differences between citizens and non-citizens,[129] and that the first sentence of the fourteenth amendment distinguishes between persons who by birth or naturalization are citizens, and persons in general.[130] Before *Foley,* the Court's decisions may have been interpreted as implying that both native-born and naturalized citizens are really no different from aliens, an implication that Justice Rehnquist found disturbing.[131] As one method of preventing the further blurring of the distinctions between citizens and non-citizens, Justice Rehnquist favored the application of a rational basis test when judging these classifications.[132]

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125. *See In re* Griffiths, 413 U.S. 717 (1973). *See also supra* note 11.

126. 102 S. Ct. at 750 (Blackmun, J., dissenting).

127. 413 U.S. at 649 (Rehnquist, J., dissenting).

128. *Id.* at 650 (Rehnquist, J., dissenting).

129. *Id.* at 651 (Rehnquist, J., dissenting). *See also supra* note 102.

130. *Id.* at 652 (Rehnquist, J., dissenting). Justice Rehnquist contended that the language, as well as the history, of the fourteenth amendment gave no constitutional foundation to the majority's decision in *Sugarman. Id.* at 653 (Rehnquist, J., dissenting).

131. *Id.* at 658 (Rehnquist, J., dissenting).

132. *Id.* In *Sugarman,* an efficient government, managed by citizens familiar with the social and political institutions and mores of American society, was considered to be a rational justification for the use of the limiting classification. *Id.* at 661 (Rehnquist, J., dissenting). Justice Rehnquist, like the Court later in *Foley,* believed that unnaturalized aliens as a class, possibly from societies with values contradictory to those of our culture, could not be assumed to be sufficiently familiar with the processes of democracy to efficiently exercise

The danger in the Court's expansion of the *Sugarman* exception in *Chavez-Salido* is that the exception may swallow the rule,[133] as Justice Blackmun noted in dissent.[134] There is also the possibility that a rational justification may be found for almost any position that would bring it within the exception. Further, the upholding of restrictive classifications dilutes the validity of the concept that individual evaluation of job-related qualifications is constitutionally preferable to blanket exclusion of an entire class of persons,[135] and implies that citizenship, whether native or naturalized, should have its rewards. A third potential problem arises from the Court's acceptance of the employment of a rational basis test in these cases: the state is not required to show that the interest sought to be protected and the means used to protect it are in fact substantially related, nor that the stated interest is in reality the actual interest being protected.[136]

The central issue in all of these cases is, of course, the distinction between citizens and non-citizens. In allowing a state greater latitude in defining its political community, *Chavez-Salido* represents a further step in the clarification of that distinction. However, the Court has provided little assistance in predicting where the expansion of the *Sugarman* exception may be halted; the inclusion of probation officers within the exception neverthless indicates that the Court is prepared to restore, in employment cases, some benefit to the status of citizenship.

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the functions of government. *Id.* at 662 (Rehnquist, J., dissenting).

133. *See* Schwartz, *The Alien Meets Some Constitutional Hurdles in Employment, Education and Aid Programs*, 17 SAN DIEGO L. REV. 201, 219 (1980). *See also* Casad, *Alienage and Public Employment: The Need for an Intermediate Standard in Equal Protection*, 32 HASTINGS L.J. 163, 190 (1980).

134. 102 S. Ct. at 749 (Blackmun, J., dissenting).

135. *See In re* Griffiths, 413 U.S. 717 (1973).

136. The observations made by Justice Blackmun in his dissent in *Cabell* concerning the inconsistencies inherent in California's statutory scheme led him to voice the concern that the means employed by California to preserve its interests were too imprecise, and may be merely a veneer concealing a less worthy motivation. 102 S. Ct. at 749-51 (Blackmun, J., dissenting).