Alienage and Public Employment: The Need for an Intermediate Standard in Equal Protection

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Notes and Comments

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By Steven J. Casad*

The United States Supreme Court decisions in *Foley v. Connellie*¹ and *Ambach v. Norwich*² are the first in recent history³ to uphold state laws excluding lawfully admitted permanent resident aliens⁴ from certain occupations. These cases upheld New

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3. In the past, the United States Supreme Court has upheld state statutes prohibiting permanent resident aliens from owning land; see *Frick v. Webb*, 263 U.S. 326 (1923); *Webb v. O'Brien*, 263 U.S. 313 (1923); *Porterfield v. Webb*, 263 U.S. 225 (1923); *Terrace v. Thompson*, 263 U.S. 197 (1923); inheriting or devising real property, see *Blythe v. Hinckley*, 180 U.S. 333 (1901); *Hauenstein v. Lynham*, 100 U.S. 483 (1879); harvesting wildlife, see *Patson v. Pennsylvania*, 232 U.S. 138 (1914); operating a billiard parlor, see *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392 (1927); and working on public works projects, see *Crane v. New York*, 239 U.S. 195 (1915).
4. As used in this Note, the term lawfully admitted permanent resident alien (hereinafter referred to as “aliens”) refers to the “status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” 8 U.S.C. § 1101(a)(20) (1976). An alien is “any person not a citizen or national of the United States.” Id. § 1101(a)(3). A national of the United States is “a citizen of the United States or a person who, though not a citizen of the United States, owes permanent allegiance to the United States.” Id. § 1101(a)(22). Permanent means a “relationship of continuing or lasting nature, as distinguished from temporary, but a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with the law.” Id. § 1101(a)(31). Residence means “the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.” Id. § 1101(a)(33).

This Note is limited to a discussion of state regulation of “lawfully admitted permanent resident aliens.” It will not discuss those aliens who have entered the country without processing by the Immigration and Naturalization Service or who have entered legally, but have violated immigration laws since their entry, or federal regulation of lawfully admitted permanent resident aliens. For a discussion of those topics, see Comment, *The Legal Status*

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York statutes that required state police officers and public school-teachers, respectively, to be United States citizens. The Court’s rationale in each decision was that police officers and school-teachers occupy positions so essential to the “political community”, that those who exercise these functions must identify with the values of the community.

_Foley_ and _Ambach_ represent a departure from the alienage employment cases that established the right of aliens to work in the “common occupations of the community.” These cases held


5. The statute involved in _Foley_ was N.Y. Exec. Law § 215(3) (McKinney 1972) which reads: “No person shall be appointed to the New York state police force unless he shall be a citizen of the United States.” At issue in _Ambach_ was N.Y. Educ. Law § 3001(3) (McKinney 1970) which provides: “No person shall be employed or authorized to teach in the public schools of the state who is . . . 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, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment.”

Pursuant to this statute, New York’s Commissioner of Education promulgated the following regulations: “Citizenship. A teacher who is not a citizen of the United States or who has not declared an intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship or (2) is unable to declare intention of becoming a citizen for valid statutory reasons.” 8 N.Y.C.R.R. § 80.2(1) (1978).

6. The Court has recognized that each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, see _Boyd v. Nebraska ex rel. Thayer_, 143 U.S. 135, 161 (1892), because of the state’s obligation “to preserve the basic conception of a political community.” _Sugarman v. Dougall_, 413 U.S. 634, 647 (1973) (quoting _Dunn v. Blumstein_, 405 U.S. 330, 344 (1972)).


8. _Truax v. Raich_, 239 U.S. 33 (1915), struck down an Arizona statute that required private employers to employ a work force of at least 80% native-born citizens as a violation of equal protection. The Court found that “the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure.” _Id._ at 41.
alienage to be a suspect classification⁹ and applied the “strict scrutiny” test¹⁰ to strike down statutes barring aliens as a class from

9. Modern equal protection law recently has been in a state of flux. Under the traditional equal protection analysis, a court must defer to the judgment of the state legislature and uphold a statute so long as the means employed by the state in effectuating its purposes bears a rational relation to the state’s interest. Thus a statute “will not be set aside if any state of facts reasonably may be conceived to justify it.” McGowan v. Maryland, 366 U.S. 420, 426 (1961). See also Morey v. Doud, 354 U.S. 457, 463-64 (1957); Williamson v. Lee Optical, Inc., 348 U.S. 483, 487 (1955). The Court continues to apply the traditional rational basis test in areas of economic regulation and social welfare. See Dandridge v. Williams, 397 U.S. 471, 485 (1970). Outside the economic and social welfare area, however, the Court has recognized certain “suspect” classifications which trigger the “most rigid scrutiny.” Korematsu v. United States, 323 U.S. 214, 216 (1944).

Judicial recognition of suspect classifications originated in Justice Stone’s “footnote four” in United States v. Carolene Products Co., 304 U.S. 144 (1938), in which he asked “whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political minorities, and which may call for a correspondingly more searching judicial inquiry.” Id. at 152-53 n.4. Suspect classifications that now have been recognized include race, see Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954); national origin, see Oyama v. California, 332 U.S. 633, 644-46 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944); Hirabayashi v. United States, 320 U.S. 81, 100 (1943); and, most recently, alienage, see Graham v. Richardson, 403 U.S. 365, 372 (1971). To justify a suspect classification, the state must show an “overriding statutory purpose,” McLaughlin v. Florida, 379 U.S. at 192, and that the means the state employs to achieve its statutory goal are “precisely drawn in light of the acknowledged purpose.” Sugarman v. Dougall, 413 U.S. 634, 643 (1973).

As a result of the acknowledgement of certain classifications as suspect, equal protection analysis evolved into a two-tier approach with the traditional analysis being used in the economic and social welfare areas, and the strict scrutiny test being applied to suspect classifications. This approach created a division in equal protection analysis because suspect classifications were always struck down under the strict scrutiny test, while nonsuspect classifications were almost always upheld under the deferential rational basis standard. To narrow this division, several commentators have proposed intermediate standards of review between strict scrutiny and rational basis. See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1 (1972); Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications, 62 GEO. L.J. 1071 (1974). The United States Supreme Court has developed such an intermediate standard for classifications based on sex. Craig v. Boren, 429 U.S. 190, 197 (1976). See notes 203-10 & accompanying text infra. Under the Craig standard, classifications that distinguish groups on the basis of sex must “serve important governmental objectives and must be substantially related to achievement of those objectives.” 429 U.S. at 197. Although Craig appears to set up a third tier in equal protection analysis, four Justices express dissatisfaction both with a two-tier and a three-tier approach. Id. at 210-11 (Powell, J., concurring); id. at 211-14 (Stevens, J., concurring); id. at 215-17 (Burger, C.J., dissenting); id. at 217-28 (Rehnquist, J., dissenting). Justice Marshall has indicated that he would abandon the two-tier approach and substitute a sliding-scale approach. See note 202 infra.

10. The “strict scrutiny” test is the term commonly given to the standard of judicial review that is used when a statute creating constitutionally suspect classifications is challenged as a violation of the guarantee of equal protection. The Court has phrased the test in
engaging in certain occupations\textsuperscript{11} and from receiving government benefits\textsuperscript{12} as being in violation of the equal protection clause of the fourteenth amendment.\textsuperscript{13} In each case, the Court found the citizen-

various ways, requiring an “overriding,” McLaughlin v. Florida, 379 U.S. at 192, or “compelling,” Shapiro v. Thompson, 394 U.S. 618, 638 (1966), state interest, and means that are “precisely drawn,” Sugarman v. Dougall, 413 U.S. at 643, or “necessary . . . to the accomplishment” of the state’s interest, In re Griffiths, 413 U.S. at 721-22. In examining classifications based on alienage, the Court has stated: “[T]o justify use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.” In re Griffiths, 413 U.S. at 721-22 (footnotes omitted). Professor Nowak has interpreted the strict scrutiny test to mean “that the justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end . . . . The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a ‘compelling’ or ‘overriding’ end—one whose value is so great that it justifies the limitation of fundamental constitutional values. Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote that compelling interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee.” J. Nowak, R. Rotunda & J. Young, Constitutional Law 524 (1978) [hereinafter cited as Nowak]. The traditional analysis applied by the Court to a legislative classification challenged under the equal protection clause is the “rational basis test.” Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some group of citizens differently than others. The constitutional safeguard is offended only if the classification rests on the grounds wholly irrelevant to the achievement of the State’s objective. 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 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). Under modern equal protection analysis, the rational basis test is used for all nonsuspect and nongender classifications. See note 9 & accompanying text supra. See also notes 210-14 & accompanying text infra. See Nowak, supra at 524.

In the “common occupations” cases, the Court scrutinized statutory classifications to determine whether such classifications were “‘necessary . . . to the accomplishment’ of [the state’s] purpose,” In re Griffiths, 413 U.S. at 721-22 (quoting McLaughlin v. Florida, 379 U.S. 184, 186 (1964)), or “the narrowness of the limits within which the discrimination is defined.” Sugarman v. Dougall, 413 U.S. at 642. The standard of review employed in the common occupations cases thus required the statute to employ more precise means than would be necessary under the traditional rational basis test.


ship requirements that the states had imposed in order to preserve the occupation or benefit for official members of the community to be impermissible.\textsuperscript{14}

Although \textit{Foley} and \textit{Ambach} represent a departure from these "common occupations" cases, they are not without precedent. The Court in \textit{Sugarman v. Dougall}\textsuperscript{15} provided that a state may, "in an appropriately defined class of positions, require citizenship as a qualification for office."\textsuperscript{16} This requirement could apply 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 perform functions that go to the heart of representative government."\textsuperscript{17} In such situations, the Court's "scrutiny will not be so demanding . . . ."\textsuperscript{18} As is evident by the Court's language, \textit{Sugarman} set forth no firm guidelines as to the scope of the nonelective executive, legislative, or judicial positions within this exception. Nor did the Court define the standard of review to be applied in such cases.

This Note examines the equal protection issues raised by \textit{Foley} and \textit{Ambach}. It first explores the breadth of the \textit{Sugarman} exception\textsuperscript{19} and the standard of review contemplated for the exception cases. An analysis of the individual Justices' opinions will reveal that within the Court there are three views on each question, each of which represents a different balance of values, and accordingly a different outcome. Finally, the Note concludes by offering two suggestions. First, it suggests factors the Court might employ in determining whether the \textit{Sugarman} exception applies to a given case. Second, it advocates the adoption of an intermediate standard of review in exception cases that will allow the Court to give more consideration to the individualized determination value.\textsuperscript{20} Such a standard will achieve a just balance between com-

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\item \textsuperscript{14} Nyquist v. Mauclet, 432 U.S. at 10-12; Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. at 601; \textit{In re Griffiths}, 413 U.S. at 725; \textit{Sugarman v. Dougall}, 413 U.S. at 646; Graham v. Richardson, 413 U.S. at 374.
\item \textsuperscript{15} 413 U.S. 634 (1973).
\item \textsuperscript{16} Id. at 647.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. at 647.
\item \textsuperscript{19} The term "\textit{Sugarman} exception" will hereinafter be used to refer to dicta in \textit{Sugarman v. Dougall} that a classification based on citizenship might be subject to less rigorous judicial scrutiny for certain elective and nonelective executive, legislative, and judicial officers who execute broad public policy. See notes 15-18 & accompanying text supra.
\item \textsuperscript{20} The term "individualized determination value" will hereinafter be used to refer to
peting values involved in the exception cases.

The Pre-Foley Cases

The fountainhead of modern alienage cases is *Graham v. Richardson*, which struck down a statute imposing citizenship and residency requirements on the right to receive state welfare benefits. The *Graham* Court held that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny." The Court's holding

the rationale underlying the cases upholding the alien's right to work in the common occupations of the community. See note 8 & accompanying text supra. In these common occupations cases, the Court determined that wholesale exclusion of aliens from certain occupations and benefit programs on the basis of a presumed class characteristic was an undue burden on those aliens who were otherwise qualified for the positions or programs. The Court stated this idea in *In re Griffiths*: "Nor would the possibility that some resident aliens are unsuited to the practice of law be justification for a wholesale ban," 413 U.S. at 725, and concluded, "'[e]ven in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.'" *Id.* (quoting *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957)). Underlying these statements is the premise that an alien should not be excluded from an occupation or a benefit without an individual determination of his or her qualifications.

Statutes that create "irrebuttable presumptions," which categorize a group on the basis of a presumed universal characteristic, such as those involved in alienage classifications, have been disfavored by the Court in the past. In *Vlandis v. Kline*, 412 U.S. 441 (1973), the Court held that permanent irrebuttable presumptions are suspect unless it is demonstrated that the presumption accurately characterizes all members of the class or that there are no reasonable alternatives to the statute. *Id.* at 452. The Court's recent disfavor of the irrebuttable presumption analysis renders any continued reliance on such a standard questionable. See *Weinberger v. Salfi*, 422 U.S. 749, 771-73 (1975).

21. For cases prior to *Foley* which upheld restrictions on aliens in general, see note 3 supra.


23. *Graham* involved a combination of challenges to citizenship and durational residency requirements for welfare benefits in Arizona and Pennsylvania. The Arizona statute at issue was *Ariz. Rev. Stat. Ann.* § 46-233 (Supp. 1970) (since amended) which provided: "A. No person shall be entitled to general assistance who does not meet and maintain the following requirements: 1. Is a citizen of the United States, or has resided in the United States a total of fifteen years." Similar provisions in *Ariz. Rev. Stat. Ann.* § 46-252(2) (Supp. 1970) (since amended), which provided for old age assistance and assistance to the blind, respectively, were also challenged.

The Pennsylvania statute at issue was *Pa. Stat. Ann.* tit. 62, § 43(2) (Purdon 1968) (since amended) which stated: "Except as hereinafter otherwise provided . . . . needy persons of the classes defined in clauses (1) and (2) of this section shall be eligible for assistance. (1) Persons for whose assistance federal financial participation is available to the Commonwealth; (2) Other persons who are citizens of the United States . . . ."

24. 403 U.S. at 372 (footnotes omitted).
was based on its determination that aliens are a "'discrete and insular' minority"\textsuperscript{25} for whom heightened judicial solicitude is appropriate.\textsuperscript{26}

Following Graham, Sugarman \textit{v. Dougall}\textsuperscript{27} invalidated a New York statute barring all aliens from the state's competitive civil service.\textsuperscript{28} The Court found the statute overbroad because the state's interest in assuring that civil servants have an undivided allegiance to the state was not related to every civil service position\textsuperscript{29} and thus could not withstand strict judicial scrutiny. The major importance of Sugarman, however, was the exception it set forth to the rule of alienage as a suspect classification. The Court phrased the exception in the following language:

Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office . . . . "[E]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen" [based on the state's power] "to preserve the basic conception of the political community" . . . . [T]his power and responsibility . . . applies to . . . persons holding state elective or important nonelective executive, legislative, or 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 . . . . [O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives.\textsuperscript{30}

Although it is dicta, the Sugarman exception set the stage for modification of the Graham strict scrutiny rule by suggesting that a citizenship requirement could be valid\textsuperscript{31} for those occupations

\textsuperscript{25} Id: (quoting with approval United States \textit{v. Carolene Products Co.}, 304 U.S. 144, 152-53 n.4 (1938)). See note 9 supra.

\textsuperscript{26} A second basis for the Court's holding was the supremacy of federal immigration and naturalization laws. Any state restriction interfering with the federal determination that an alien who is admitted to permanent residence is fit to live in any of the nation's communities is invalid under the supremacy clause. 402 U.S. at 376-80.

\textsuperscript{27} 413 U.S. 634 (1973).

\textsuperscript{28} The statute at issue in Sugarman was N.Y. \textit{Civ. Serv. Law} § 53(1) (McKinney 1973) which stated: "Except as herein otherwise provided, no person shall be eligible for appointment for any position in the competitive class unless he is a citizen of the United States."

\textsuperscript{29} 413 U.S. at 642.


\textsuperscript{31} 413 U.S. at 648.
that form the "heart of representative government."  

In re Griffiths, decided the same day as Sugarman, invalidated a Connecticut rule of court limiting admission to the state bar to United States citizens under the strict scrutiny test. The Court found that the state's interest in assuring the qualifications of attorneys was legitimate, but that a citizenship requirement was not necessary to the promotion of this interest, stating the "possibility that some resident aliens are unsuited to the practice of law [would not] be a justification for a wholesale ban." The Court also rejected the state's argument that the citizenship requirement was necessary because an attorney is an "officer of the court" imbued with some aspects of governmental authority, such as the power to issue subpoenas. It stated that a lawyer's duties "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." The Court suggested several alternate ways in which the state could promote its interest in assuring the qualifications of its attorneys, such as an oath, investigation of the individual applicant's qualifications, and continuing scrutiny by the bar.

The pre-Foley cases thus developed the doctrine that state restrictions on aliens in private employment or government benefit programs will be suspect and subject to strict scrutiny in all cases except those within the Sugarman exception. An essential component of this strict scrutiny is the examination of the means chosen by the state to assure that the statute is precisely drawn to protect the state's interest. This serves a twofold purpose. First, it assures that the statute is tailored so as to exclude aliens from only those positions or benefits necessary to achieve the state's interest. Second, it assures that a determination is made as to whether a less

32. Id. at 647.
34. Conn. R. Cr. § 8(1) (1966) provided: "To entitle an applicant to admission to the bar ... he must satisfy the committee: First: That he is a citizen of the United States."
35. 413 U.S. at 725.
36. Id.
37. Id. at 723.
38. Id. at 724.
39. Id. at 725-27.
40. In subsequent cases, the Court used the Graham-Sugarman rationale to invalidate citizenship requirements for the engineering profession, Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976), and eligibility for financial assistance for higher education, Nyquist v. Mauclet, 432 U.S. 1 (1977).
discriminatory method will achieve the same goal. This approach serves notice to the states that only the most precisely tailored statute will survive an equal protection challenge, thus ensuring that an alien's qualifications for employment are based on his or her individual qualifications and not on characteristics that aliens as a class are presumed to have. As a result, an alien will have a better opportunity to protect his or her ability to work in the common occupations of the community.41

Foley and Ambach: Defining the Breadth of the Sugarman Exception

Foley v. Connelie

Foley v. Connelie42 was the first case to be decided on the basis of the Sugarman exception.43 Edmund Foley, a citizen of Ireland who had lived in the United States since 1973, applied for a position as a New York state trooper. The State Police Commissioner refused to allow Foley to take the qualification test because noncitizens were statutorily prohibited from becoming members of the state police force.44

Chief Justice Burger wrote the majority opinion in Foley, joined by Justices Stewart, White, Powell, and Rehnquist.45 The majority refused to apply the strict scrutiny standard,46 finding that its application in every case would "obliterate all the distinctions between citizens and aliens."47 Instead, the Court found the police function fell within the Sugarman exception because the police exercised discretionary power, the use of which “substantially

41. See Graham v. Richardson, 403 U.S. 365, 379 (1970); Truax v. Raich, 239 U.S. 33, 42 (1915).
43. See notes 30-31 & accompanying text supra.
44. The Commissioner's action was based on N.Y. EXEC. LAW § 215(3) (McKinney 1972) which prohibited noncitizens from being appointed to the state police force. See note 5 supra. Foley brought a class action in United States District Court seeking a declaration that the New York statute violated the equal protection clause of the fourteenth amendment. A three-judge district court granted summary judgment for the state. 419 F. Supp. 889 (S.D.N.Y. 1976). Foley appealed, and the Court noted probable jurisdiction. 430 U.S. 944 (1977).
45. Justice Blackmun also concurred in the result, although he did not join in the majority opinion. Thus, six Justices voted to uphold the statute.
46. See note 10 supra.
47. 435 U.S. at 295.
affects members of the political community.”48 However, the Court added a cautionary footnote stating that the classification of positions as those holding discretionary power to affect the community could not “sweep indiscriminately” . . . without regard to the differences in the positions involved.”49

Having found the police function to be within the Sugarman exception, the majority then purported to apply the rational basis standard of review.50 When the exception criteria are combined with the rational basis standard used by the Foley Court, however, a standard more stringent than a traditional rational basis test may in fact have been applied. Rather than merely looking at whether any state of facts could reasonably be conceived to warrant the classification, the Court appeared to seek greater justifications for the application of the rational basis test, finding that the police function “fulfills a most fundamental obligation of government to its constituency”51 and carries with it the power to “[affect] members of the public significantly and often in the most sensitive areas of daily life.”52 To the majority the police function was one in which “citizenship bears a rational relation to the special demands of the particular position.”53

A curious aspect of the Foley case is that Justice Blackmun concurs only in the result while stating that the “prior cases clearly establish the standards applied in this [case].”54 His concurring opinion essentially mirrors that of the majority, and the reason for his refusal to join the majority remains unclear. The most likely explanation is that he sees a narrower exception in the language of Sugarman than that which the majority defined through its criteria,55 but nevertheless finds the police function within his interpretation of the exception.

In his concurring opinion, Justice Stewart disagreed with Justice Blackmun, declaring that he viewed Foley as inconsistent with “the full sweep of the reasoning and authority of some of our past

48. Id. at 296.
49. Id. at 296-97 n.5 (citation omitted).
50. Id. at 300.
51. Id. at 297.
52. Id.
53. Id. at 300.
54. Id. at 301 (Blackmun, J., concurring).
55. See notes 48-49 & accompanying text supra. See also notes 136-51 & accompanying text infra.
Justice Stewart indicated that he was having reservations about the Graham strict scrutiny line of cases, stating: "It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join the opinion of the Court in this case." The dissenting opinions indicated no reservations about previous decisions. Justice Marshall reiterated his view that strict scrutiny should apply in all alienage cases. Justice Stevens stated that aliens as a class cannot be barred from professional employment on the basis of characteristics that aliens as a class are presumed to possess. He postulated that the apparent disqualifying characteristic in Foley was a foreign allegiance which raised doubts about an alien's loyalty and trustworthiness. Justice Stevens found the Court's position inconsistent with Griffiths, stating, "Unless the Court repudiates its holding in In re Griffiths . . . it must reject any conclusive presumption that aliens, as a class, are disloyal or untrustworthy."

The dissents also expressed a narrower view of the Sugarman exception than the majority and would have applied it only to those positions which formulate policy, not to those which merely implement policy. Justice Stevens further disagreed with the majority's interpretation of the "alien-citizen distinction," finding

56. 435 U.S. at 300 (Stewart, J., concurring). Justice Stewart's position may be shared silently by some of the other Justices. For instance, Justice White voted with the majority in the Graham strict scrutiny line of cases, but also sided with the majority in Foley and in Ambach. Thus, he too may have reservations about the previous alienage cases and, with the majority, may desire a broad Sugarman exception to counterbalance those cases.

57. Id.
58. Id. at 303 n.1 (Marshall, J., dissenting).
59. Id. at 307 (Stevens, J., dissenting).
60. Id. at 308.
61. Id. (citation omitted).
62. Id. at 304 (Marshall, J., dissenting); id. at 310 (Stevens, J., dissenting).
63. The most obvious and pervasive distinction between aliens and native-born and naturalized citizens is that the former has the right to vote and hold public office, a right that is denied to the latter group because of their alienage. In Foley, the Court noted that "[t]he act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others . . . . The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized a 'State's historical power to exclude aliens from participation in its democratic political institutions' . . . as part of the sovereign's obligation 'to preserve the basic conception of a political community.' " 435 U.S. at 295-96 (citations omitted). The individual members of the Court have differing opinions as to the significance of the distinction between aliens and citizens beyond this basic statement. For a discussion of these opinions, see notes 90-92,
the "privilege of participating in the formulation of broad public policy—a privilege largely denied to the institutions exercising the police function in our society [to be] the essence of individual citizenship."64 Thus, for Justice Stevens, citizenship, because it granted the right to vote, was a prerequisite to participation in the political community rather than a means of ensuring an applicant's employment qualifications.

**Ambach v. Norwick**

*Ambach v. Norwick*65 involved two resident aliens who were denied positions as public schoolteachers because of their alienage. Appellees Ambach and Dachinger were citizens of Great Britain and Finland, respectively. Both were married to United States citizens and had resided in this country for over ten years.66 The statute excluding them from teaching positions was somewhat different from the statute excluding aliens from state police positions in *Foley*.67 It granted certification to all teachers who were citizens, who had applied for citizenship, or who had filed an intention to apply for citizenship when they became eligible.68 Thus, only those persons who chose to remain aliens were excluded by the statute.69

The Court upheld the law by a five to four majority.70 Justice Powell wrote the majority opinion which was joined by Chief Justice Burger, and Justices Stewart, White, and Rehnquist. By placing greater emphasis on the alien-citizen distinction, the majority endorsed a broader interpretation of the *Sugarman* exception than they appeared to in *Foley*. The distinction between aliens and citizens was found to be "fundamental to the definition and government of the state"71 because citizenship represented an association...

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64. 435 U.S. at 310-11 (Stevens, J., dissenting).
66. Id. at 71.
67. See note 5 supra.
68. See note 5 supra.
70. With the exception of Justice Blackmun, who wrote the dissent, the Justices were aligned the same as in *Foley*. See text accompanying notes 44-47 supra.
71. 441 U.S. at 75.
with the polity that could not be equalled by any substituted form of allegiance.\textsuperscript{72} The special significance attached to citizenship allows the states a wide latitude in excluding noncitizens from government functions.\textsuperscript{73}

Whereas in Foley the Court looked to the discretionary powers involved in the occupation, and whether use of that power could substantially affect the lives of citizens\textsuperscript{74} in interpreting the scope of the Sugarman exception, the Court in Ambach emphasized the role of public schoolteachers in the political community and the discretion and responsibility teachers had in fulfilling that role.\textsuperscript{75} The Ambach majority also did not mention the caveat set forth in Foley: that the classification not sweep indiscriminately.\textsuperscript{76} It thus appears the Ambach majority broadened the criteria used to define the exception from positions with discretionary power that assert direct power over the populace to positions with discretionary power that have a somewhat less direct effect on the lives of citizens. Applying the rational basis test to these criteria, the Ambach Court found that the legislature, having in mind the importance of education, may determine eligibility requirements for teachers on the assumption that generally persons who are citizens, or who have not declined the opportunity to seek citizenship, are better qualified than those who choose to remain aliens.\textsuperscript{77}

Justice Blackmun dissented, joined by Justices Brennan, Marshall, and Stevens. Justice Blackmun refused to apply the Sugarman exception to public schoolteachers and argued that the Ambach case fell within the “common occupations” cases rather than the isolated decision in Foley.\textsuperscript{78} In criticizing the majority holding, Justice Blackmun noted in particular that the statute did not apply to private schools,\textsuperscript{79} that it was “neither narrowly confined nor precise in its application,”\textsuperscript{80} that there were better methods of choosing teachers apart from a citizenship requirement,\textsuperscript{81} and that the majority opinion was inconsistent with

\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} See note 48 & accompanying text supra.
\textsuperscript{75} 441 U.S. at 75.
\textsuperscript{76} See note 49 & accompanying text supra.
\textsuperscript{77} 441 U.S. at 80-81 & n.14.
\textsuperscript{78} Id. at 81 (Blackmun, J., dissenting).
\textsuperscript{79} Id. at 86.
\textsuperscript{80} Id. at 87 (quoting Sugarman v. Dougall, 413 U.S. 634, 643 (1973)).
\textsuperscript{81} Id.
Griffiths.⁸²

Ambach appears to shift the emphasis of the inquiry in Sugarman exception cases away from the nature of the discretionary power inherent in the position and towards whether the position serves an important governmental function. This broader inquiry allows the exception to include a position like teaching which may entail the use of power in such a way as to have an indirect, intangible, and lasting effect on the community: the power to shape the minds of children.⁸³

Ambach's broad interpretation of the Sugarman exception creates further confusion as to which occupations the exception encompasses. Similar confusion exists as to what standard of review the Court in fact applied in the exception cases.

The Breadth of the Sugarman Exception

An examination of the historical origin of the Sugarman exception reveals language in several pre-Foley cases⁸⁴ suggesting

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⁸² Id. at 88-89.
⁸³ Studies suggest that the school is the most important factor in the political socialization of individuals in our society. See R. Hess & J. Torney, The Development of Political Attitudes in Children 162-63 (1967). For a discussion of the role of a schoolteacher in influencing a child's attitudes toward the political community, see Note, Aliens' Right to Teach: Political Socialization and the Public Schools, 85 Yale L.J. 90, 99-105 (1975). "In exchanges with the student, a teacher inevitably conveys many of his or her own cultural attitudes, influencing political orientation well beyond the formal curriculum and any conscious effort to impart political information." Id. at 104.

Another study, however, has concluded that teachers tend only to advance and reinforce nonreflective attitudes of allegiance and responsibility toward government. Massialas, Some Propositions About the Role of the School in the Formation of Political Behavior and Political Attitudes of Students: Cross-National Perspectives, 19 Comp. Educ. Rev. 171 (1975). The same study found that students learned about concepts of loyalty in the education process, but did not learn the skills necessary to participate effectively in the political system. Id. at 171. Moreover, other studies found that formal civics courses have relatively little effect on a student's perception of politics or his or her participation in the political process. Denhardt, Civics Instruction—A Social Science Commentary, Improving College & University Teaching, at 245-46, Autumn 1975. Indeed, one study found that a civics curriculum had little effect on political opinions at the high school level. Langton & Jennings, Political Socialization and the High School Civics Curriculum in the United States, 62 Am. Pol. Sci. Rev. 852-67 (1968). It thus appears that although schoolteachers have an opportunity to impart their own political attitudes to students, most of this effort simply reinforces attitudes about loyalty to the government and is subject to dilution by other sources of political socialization. Further, the issue of whether a teacher can be denied employment on the basis of speech that he or she may impart to students raises substantial first amendment issues.

⁸⁴ See note 7 supra.
that the exception was intended to be narrow. 85 The Court, however, provided no guidelines in either Sugarman, Foley, or Ambach for the application of the exception. The Court’s failure to provide guidance is likely the result of the conflicting views within the Court on the breadth of the exception. Three different interpretations are reflected in the Foley majority, the Ambach majority, and the Foley dissents.

The Foley majority opinion extends the Sugarman exception to those positions that involve a direct assertion of power over the members of the political community. The Foley majority opinion thus implicitly adopted two criteria to determine whether a particular position is included within the exception: (1) the discretionary power involved in the position and (2) whether the execution of policy in that position could substantially affect members of the political community. 86 In addition, the Court stated it would look to see if the citizenship requirement “‘sweeps indiscriminately’ . . . without regard to the differences in the positions involved.” 87

Underlying the Foley majority opinion rests the concept of a political community 88 comprised of citizens or members defined by the alien-citizen distinction. 89 The Foley majority concluded that those positions asserting direct power over individuals in the political community should be staffed by members of that community. Citizens, as members of this political community, are presumed to be familiar with its traditions and values; 90 aliens, because they technically owe allegiance to another sovereign, are not. The Court thus reasoned the citizenship requirement ensures that the “choice . . . and right . . . of the people to be governed by their citizen

85. In Sugarman, for example, the Court intimated that citizenship could be a relevant qualification in “an appropriately defined class of positions,” 413 U.S. at 647, and that a “restriction on the employment of noncitizens, narrowly confined, could be employed in defining ‘political community.’” Id. at 649. Similar indications appeared in Griffiths where the Court established the proposition that not all those in a position to exercise some governmental power are within the exception. 413 U.S. at 728-29. With respect to the Sugarman exception the Court in Nyquist v. Mauclet, 432 U.S. 1 (1977), stated: “Sugarman makes quite clear, the Court had in mind a State’s historical and constitutional powers to define the qualifications of voters, or of ‘elective or important nonelective’ officials . . . Griffiths . . . reflects the narrowness of the exception.” Id. at 11.

87. 435 U.S. at 296-97 n.5. See note 49 & accompanying text supra.
88. Id. at 296. See Sugarman v. Dougall, 413 U.S. at 647 (quoting Dunn v. Blumstein, 405 U.S. 330, 344 (1972)).
89. See note 63 supra.
90. 435 U.S. at 299-300.
peers” is preserved.

The Foley majority found that the police function fit well into this interpretation of the Sugarman exception. The Court noted that the police had an “infinite variety of discretionary power,” including the powers of search, seizure, and arrest, the resort to lawful force, and the investigation of suspect conduct. The Court also found the execution of these powers affected “members of the public significantly, and often in the most sensitive areas of daily life.” Based on these findings and its interpretation of the scope of the Sugarman exception, the Court held the citizenship requirement for police officers to be sufficiently related to the state’s interest in maintaining a loyal police force to survive judicial scrutiny.

Justice Marshall, dissenting in Foley, interpreted the Sugarman exception to apply only to positions directly participating in the formulation and execution of broad public policy, and not to those positions merely implementing policy. The former group was defined as those who have the “responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature.” With this definition, Justice

91. Id. at 296.
92. Consistent with the view that aliens can be excluded from positions which assert direct power over members of the political community is Perkins v. Smith, 370 F. Supp. 134 (D. Md. 1974), aff’d, 426 U.S. 913 (1976), which upheld both Maryland and federal laws which excluded aliens from jury service. The three-judge federal district court found that both the state and federal governments had a “compelling interest” in “assuring that those who make the ultimate factual decisions on issues of personal liberty and property rights under our system of justice be either native born or naturalized citizens, because it may fairly be concluded that as a class they are more likely to make informed and just decisions in such matters than are noncitizens.” 370 F. Supp. at 136. The court held that jurors performed functions “that go to the heart of representative government.” Id. at 137, from which the states could conclude that native-born and naturalized citizens “would be [more] conversant with the social and political institutions of our society, the customs of the locality, the nuances of local tradition and language.” Id. at 138. “There is no corresponding basis for assuming that resident aliens, who owe allegiance not to any state or to the federal government, but are subjects of a foreign power, have so assimilated our societal and political mores that an equal reliance could be placed on their performing as well as citizens the duties of jurors in our judicial system.” Id. See also United States v. Gordon-Nikkar, 518 F.2d 972 (5th Cir. 1975) (upholding a federal statute excluding aliens from federal juries).
93. 435 U.S. at 297.
94. Id. at 293.
95. Id. at 297.
96. Id. at 300.
97. Id. at 304 (Marshall, J., dissenting). See also id. at 310 (Stevens, J., dissenting).
98. Id. at 304.
Marshall framed the issue in *Foley* to be whether "the job of state trooper [is] a position involving direct participation 'in the formulation, execution, or review of broad public policy?'" Concluding that the duties of a police officer consist of applying a limited array of previously formulated policy decisions, Justice Marshall found the employment of aliens in state trooper positions presented no danger to the political community.

The dissenters also had an entirely different interpretation of the alien-citizen distinction. Justice Stevens defined the "essence of individual citizenship" as the "privilege of participating in the formulation of broad public policy . . . ." Citizenship denoted an association with the political community which carried with it the right to participate in democratic decisionmaking by exercising the right to vote. Those who had this privilege were the true formulators of broad public policy. It was the exclusion of aliens from this function that was essential to the preservation of the political community.

Justice Stevens also questioned the purpose of the majority's interpretation of the exception. In his opinion, the majority did not identify the characteristic that justified exclusion of aliens from important governmental functions. He considered a "satisfactory answer to this question . . . essential to the validity of the rule." Justice Stevens postulated that the exception may be based on two premises: (1) that because aliens do not participate in democratic decisionmaking, they are not part of the political community, and (2) that because aliens owe allegiance to another nation, they

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99. *Id.* at 303 n.1.
100. *Id.* at 304-05 (Marshall, J., dissenting). See also *id.* at 310 (Stevens, J., dissenting).
101. *Id.* at 310-11 (Stevens, J., dissenting).
102. *Id.* at 311.
103. *Id.* at 311 n.4. See note 63 *supra*. Justice Marshall suggested that citizenship and the values it entailed were not necessary to the police function. He observed that New York law authorized any person to arrest another. 435 U.S. at 306. See N.Y. CRIM. PROC. LAW § 140.30 (McKinney 1979). Included within this power of arrest was the authorization to make a search incident to the arrest. *Id.* See United States v. Rosse, 418 F.2d 38, 39-40 (2d Cir. 1969); United States v. Viale, 312 F.2d 595, 600 (2d Cir. 1963) (upholding search incident to a citizen's arrest under New York law). Although the police function carried with it a direct power to affect the lives of citizens, Justice Marshall concluded that because this power was available to everyone in the community, restriction of its official exercise to citizens would serve no purpose. 435 U.S. at 306 (Marshall, J., dissenting).
104. *Id.* at 311-12 (Stevens, J., dissenting).
105. *Id.* at 308.
106. *Id.* at 312.
are untrustworthy and disloyal.\textsuperscript{107} He rejected the first rationale as being irrelevant to the \textit{Foley} case, based on his narrow view of the \textit{Sugarman} exception.\textsuperscript{108} He also rejected the second rationale noting that \textit{Griffiths} had rejected any "conclusive presumption that aliens, as a class, are disloyal or untrustworthy."\textsuperscript{109} Justice Stevens concluded: "If there is no group characteristic which explains the discrimination, one can only conclude that it is without any justification that has not already been rejected by the Court."\textsuperscript{110}

In Justice Stevens' opinion, any application of the \textit{Sugarman} exception must be based on an express characteristic, a valid, constitutionally permissible reason, which will justify the exclusion of aliens from important government functions. Vague references to the significance of citizenship will not suffice. In short, Justice Stevens appears to believe that the only permissible reason for disqualifying aliens from a particular occupation must be based on individual qualifications, in effect ruling out any permissible basis for the exclusion of aliens as a class. Justice Stevens thus appears to reject the \textit{Sugarman} exception and, like the \textit{Graham} strict scrutiny cases,\textsuperscript{111} focuses his dissent on the individualized determination value.\textsuperscript{112}

The \textit{Ambach} majority, by framing the issue differently, created a broader view of the \textit{Sugarman} exception than that expressed by the \textit{Foley} majority opinion. Rather than asking, as in \textit{Foley}, whether police officers were important nonelective officials who executed broad public policy,\textsuperscript{113} the majority inquired whether the teaching position was within the "governmental function" exception.\textsuperscript{114} This distinction is reflected in the factors the Court considered in \textit{Ambach} in determining whether the \textit{Sugarman} exception applied to public schoolteachers.

The Court looked to "the role of public education and to the degree of responsibility and discretion teachers possess in fulfilling that role."\textsuperscript{115} The Court followed this statement with a citational

\begin{enumerate}
\item \textit{Id.} at 308, 312.
\item \textit{Id.} at 312 \& n.5.
\item \textit{Id.} at 308.
\item \textit{Id.} at 312.
\item See notes 22-39 \& accompanying text \textit{supra}.
\item See notes 40-41 \& accompanying text \textit{supra}. See also note 20 \textit{supra}.
\item 441 U.S. at 75.
\item 435 U.S. at 296.
\item \textit{Id.}
\end{enumerate}
reference to Foley. However, the citation does not relate to the criteria used to define the exception in Foley, 116 but to the discussion in that case of the discretionary role of the police officer. 117 The Ambach majority thus adopted only one of the factors mentioned in Foley—whether the position entails discretionary power118—but made no mention of the second factor in Foley as to whether use of that discretionary power could have a substantial and immediate effect on the lives of citizens. 119 Nor did the Court mention the caveat in Foley that a citizenship requirement cannot "sweep indiscriminately without regard for the differences in positions involved." 120

Ambach represents a shift in the Court's inquiry from the nature of the power inherent in the position to the special importance of the function which encompasses the position, as that function relates to the political community. Thus, police officers and teachers both perform functions that are fundamental to the political community. By virtue of his or her position, a police officer can assert direct, tangible power that can have a substantial effect on the lives of citizens, such as the power to arrest. 121 Teachers, on the other hand, do not assert such direct power. Instead, they possess the ability to shape the minds of young children, a power that is better characterized as indirect and intangible. 122 The effect of this exercise of power may not be evident for years. Moreover, it will be the collective product of many different teachers, in addition to extrascholastic influences, that shape a child's values and opinions. By shifting the focus of the exception inquiry, the Ambach majority broadened the exception to allow the inclusion of those positions that probably would not have been included in the narrower interpretation of the exception set forth in Foley.

The greater emphasis that the Ambach majority placed on the

116. See notes 48-49, 86-87 & accompanying text supra.
117. The majority in Foley describes the police function as "a most fundamental obligation of government to its constituency," 435 U.S. at 297, and notes the discretionary power exercised by police officers and its effect on citizens' lives, i.e., the right to stop and frisk, see Terry v. Ohio, 392 U.S. 1 (1968); the ability to enter a building by force in the execution of a warrant, see Miller v. United States, 357 U.S. 301 (1958); and the power to stop vehicles on the highway, see Pennsylvania v. Mimms, 434 U.S. 106 (1977).
118. See notes 48, 86 & accompanying text supra.
119. See notes 48, 86 & accompanying text supra.
120. 435 U.S. at 296-97 n.5. See notes 49, 87 & accompanying text supra.
121. See notes 51-52, 94-95 & accompanying text supra.
122. See note 83 supra.
importance of the position to the political community is evidenced by the greater attention it gave to the concept of public employment. In its discussion of previous cases, the Court refers to the state "public interest doctrine."\(^{123}\) This doctrine was used in the early half of the century to exclude aliens from activities that pertained to "the regulation or distribution of the public domain, or of the common property or resources of the people of the State . . . ."\(^{124}\) The state public interest doctrine was seriously undermined in *Graham* which held that a state could not attempt to limit its welfare expenditures on the basis of that doctrine.\(^{125}\) The *Ambach* majority, however, noted that although the Court had "departed substantially" from the public interest doctrine, it had not "abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government."\(^{126}\) The public interest doctrine\(^{127}\) thus may be experiencing a limited revival in the context of the *Sugarman* exception.

There is, in the *Ambach* opinion, another reason to believe that this revival is occurring. It involves the nature of the statute upheld, which applied the citizenship requirement only to public, and not to private, schoolteachers.\(^{128}\) In finding the statute within the exception, the Court noted that the citizenship requirement was limited to a government function because it applied only to

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123. 441 U.S. at 72-74.
125. The Court stated that a "State has a valid interest in preserving the fiscal integrity of its programs . . . . But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens . . . ." *Graham v. Richardson*, 403 U.S. at 374-75, (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).
126. 441 U.S. at 73-74.
127. See notes 123-25 & accompanying text *supra*.
128. See note 5 *supra*. 
teachers employed by and acting as agents of the state.\textsuperscript{129} The Court rationalized that the state would not have a similar interest in private schoolchildren, stating: "[t]he State has a stronger interest in ensuring that the schools it most directly controls, and for which it bears the cost, are as effective as possible in teaching these courses."\textsuperscript{130} The *Ambach* majority thus allows the state to impose a citizenship requirement for a position in the public employ even though a similar requirement on an identical position in the private sector would be unconstitutional. In effect, this allows a state to impose a citizenship requirement on any public employment position as long as that position fulfills an important governmental function.

The underlying thesis for the *Ambach* majority’s broader view of the *Sugarman* exception is a more expansive interpretation of the meaning of citizenship. The Court found citizenship to be "fundamental to the definition and government of a state."\textsuperscript{131} It reiterated the view that citizenship demonstrated an association with the polity which exercises the powers of governance.\textsuperscript{132} The Court found that this form of association was important; "an oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents."\textsuperscript{133} The significance of citizenship gave the state wider latitude in limiting the participation of noncitizens in the exercise of governmental functions.\textsuperscript{134} This broader view of the alien-citizen distinction with its "no substitution" counterpart, allows the exception to encompass many more positions. It assumes no other method exists to ensure the requisite qualifications. It is also an implicit rejection of the principle that aliens be judged by their individual qualifications and not by characteristics that all aliens as a class are presumed to have.\textsuperscript{135}

Justice Blackmun, who had concurred in the result in *Foley*, refused to join the majority in *Ambach*, thus indicating that his interpretation of the breadth of the exception is closer to the view expressed in the *Foley* majority opinion. Justice Blackmun objected to the "government functions" inquiry posed by the major-

\begin{itemize}
  \item \textsuperscript{129} 441 U.S. at 76 n.6.
  \item \textsuperscript{130} Id. at 78 n.8.
  \item \textsuperscript{131} Id. at 75. See note 71 & accompanying text supra.
  \item \textsuperscript{132} 441 U.S. at 75. See *Foley* v. Connellie, 435 U.S. at 295.
  \item \textsuperscript{133} 441 U.S. at 75. See note 72 & accompanying text supra.
  \item \textsuperscript{134} 441 U.S. at 75. See note 73 & accompanying text supra.
  \item \textsuperscript{135} See notes 39, 105-10 & accompanying text supra.
\end{itemize}
ity, stating that the relevant inquiry in exception cases is whether the position involves an important nonelective official who executes broad public policy. He interprets this inquiry as the "touchstone" of Foley. Justice Blackmun also disagrees with the majority's characterization of the alien-citizen distinction as fundamental. Thus, he rejects the majority's absolutist view that commitment to the polity's values can be shown by no other method than citizenship. Indeed, most of Justice Blackmun's criticisms of the majority are directed toward the use of this definition of citizenship to impose such a broad view of the exception. There are two major aspects to these criticisms. First, he objects to the fact that the citizenship requirement is not applicable to private teachers. Noting that private schools accounted for eighteen percent of the school population, Justice Blackmun states: "[T]he education of those pupils seems not to be inculcated with something less than what is desirable for citizenship."

Thus Justice Blackmun rejects an interpretation of the Sugarman exception that would allow the citizenship requirement for a public but not a similar private position. Secondly, he objects to the idea that the value inherent in citizenship cannot be measured in other ways. "The State will know how to select its teachers responsibly, wholly apart from citizenship, and can do so selectively and intelligently." Justice Blackmun thus urges that selection of teachers can be made by a determination of the applicants individual qualifications rather than on the basis of characteristics that aliens, as a class, are presumed to have.

The three interpretations of the breadth of the Sugarman exception can be summarized through a hypothetical. Assume that State X has a statute requiring all state tax collectors to be citizens. Assume further that two positions are involved, that of the chief of revenue collection, who has the responsibility for setting tax policy and administrative guidelines, and that of an auditor, who is responsible for selecting returns to be audited in accordance with previously formulated guidelines. Under the Ambach majority

136. 441 U.S. at 82-83 (Blackmun, J., dissenting).
137. Id. at 82.
138. Id. at 85.
139. Id. at 87-88 & n.7.
140. Id. at 86.
141. Id.
142. Id. at 87.
opinion, the Court would inquire whether tax collection was an important governmental function.\footnote{143} It would look to the role of state tax collectors and the responsibility and discretion tax collectors possess in fulfilling that role.\footnote{144} Assuming that the Court would find tax collection an important governmental function and that both the chief of revenue collection and the auditor exercised discretion in their positions, the Court would find both positions within the exception. This inclusion would be justified by the Court's reasoning that a citizenship requirement is valid for such functions to ensure that the person who exercises governmental power as a tax collector identifies with the values of the political community. The citizenship requirement is necessary because there is no equivalent way to measure commitment to these values.\footnote{145}

Under the Foley majority opinion's analysis, the Court would inquire whether tax collectors are important nonelective officials who execute broad public policy.\footnote{146} It would look to the discretionary power involved in the position and whether the execution of policy in that position could substantially affect members of the political community,\footnote{147} as well as determining that the citizenship requirement did not sweep indiscriminately.\footnote{148} Under this analysis, the Court would undoubtedly find the chief of revenue collection within the exception because such a position falls within all three of the Foley criteria. However, the Court might find that the auditor does not fall within the exception because use of power in that position is limited to previously formulated guidelines and thus does not have a substantial effect on the populace.

Justice Marshall would find the chief of revenue collection within the exception because that position involves direct participation in the formulation and execution of broad public policy.\footnote{149} However, the auditor would be outside the exception because that position merely implements policy.\footnote{150} Justice Stevens would find both positions within the exception only if there was an express
individual characteristic which would justify the exclusion of a particular alien.\textsuperscript{151}

**The Proper Standard of Review for Sugarman Exception Cases**

The second issue raised by Foley and Ambach is what standard of review is proper in Sugarman exception cases. An examination of the historical origin of the exception shows that the Sugarman Court made only vague references to the proper standard.\textsuperscript{152} Perhaps a more significant factor in pre-Foley history was the resistance advanced by some Justices to the elevation of alienage to a suspect classification. Justice Rehnquist, joined by Chief Justice Burger, reasoned that all classifications based on alienage should be subject to the rational basis standard.\textsuperscript{153} However, as long as the classifications in the common occupations cases contained absolute exclusions of aliens, the majority of the Court was willing to apply the strict scrutiny standard.\textsuperscript{154}

The Court's consensus on the application of "strict scrutiny" to alienage classifications splintered in Nyquist v. Mauclet.\textsuperscript{155} A different type of statute presented itself in Nyquist. Like the statute in Ambach, it excluded from higher education financial aid benefits only those aliens who chose to retain their foreign citizenship.\textsuperscript{156} Justice Blackmun, writing for a five to four majority,\textsuperscript{157} ap-

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\textsuperscript{151} See notes 111-12 & accompanying text supra.

\textsuperscript{152} The Sugarman Court indicated that a lesser standard than strict scrutiny would apply. "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives." 413 U.S. at 648.

\textsuperscript{153} Id. at 658 (Rehnquist, J., dissenting); In re Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting).

\textsuperscript{154} In Graham v. Richardson, 403 U.S. 365 (1971), eight Justices voted to classify alienage as a suspect classification; Justice Harlan did not join in that part of the opinion, but concurred in the judgment. In Sugarman v. Dougall, 413 U.S. 634 (1973), the vote was 8-1, with Justice Rehnquist dissenting. In In re Griffiths, 413 U.S. 717 (1973), the vote was 7-2, with Chief Justice Burger and Justice Rehnquist dissenting. In Examining Bd. of Eng'rs v. Flores de Otero, 426 U.S. 572 (1976), the vote was 7-1, Justice Rehnquist dissenting and Justice Stevens taking no part in the case.

\textsuperscript{155} 432 U.S. 1 (1977).

\textsuperscript{156} N.Y. Educ. Law § 661(3)(McKinney Supp. 1976) provided: "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship. . . ."

\textsuperscript{157} The majority consisted of Justice Blackmun, joined by Justices Brennan, White,
plied strict scrutiny. The Court held that although the statute was not an absolute bar to aliens, this did not mean that it did not discriminate against a suspect class. Justice Powell, dissenting, viewed the discriminatory line as drawn between voluntary aliens and all others. Because the indicia of a suspect class were not present, he declined to apply strict scrutiny. Justice Rehnquist, also dissenting, found that the classification did not impinge on a “discrete and insular minority.” Because the aliens could remove the disability created by the statute, there was no need for strict scrutiny. Thus, four members of the Court are of the opinion that strict scrutiny should not apply to an alienage classification if the statute is not an absolute ban or if it is structured so that the alien suffers disability only if he or she retains his or her alienage. With a fifth vote, this interpretation could constitute another exception to the doctrine of alienage as a suspect classification. More importantly, however, it indicates a movement in the Court to limit the application of strict scrutiny in alienage cases.

With respect to the Sugarman exception, three views exist within the Court as to what standard of review should be applied. Each corresponds to one of the three interpretations of the scope of the Sugarman exception discussed earlier. The first of these views is expressed in the Foley majority opinion in which the Court held that “[t]he State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification.” At first glance,
the Court appears to apply the traditional rational basis test.\textsuperscript{166} However, the application of this test must be viewed in the context of the factors the Court used to determine whether the exception applied: whether the position involved discretionary decisionmaking and the exercise of power having a direct and substantial effect on the political community, and whether the statute swept indiscriminately "without regard to the position involved."\textsuperscript{167} When these factors are combined with the rational basis test, something more than the traditional test in fact is applied. In effect, these factors perform a narrowing function before any standard of review is applied by excluding those statutes which do not involve discretionary decisionmaking, a substantial affect on the community, or which are not related to the purpose of the statute. A traditional rational basis test\textsuperscript{168} would not include such a narrowing process. However, once the category of permissible statutes is narrowed, the rational basis test almost always will find that a citizenship requirement is a rational means of ensuring the "preservation of the political community."

This narrowing process was not adopted in the \textit{Ambach} majority opinion. Rather, the \textit{Ambach} Court stated that classifications within the \textit{Sugarman} exception "would not invite as demanding scrutiny . . . ."\textsuperscript{169} However, the Court’s purported rational basis test must again be viewed in the context of the Court’s criteria for defining the \textit{Sugarman} exception. Because its emphasis was simply whether the position entailed an important governmental function, the \textit{Ambach} majority defined the exception with less restrictive criteria than the \textit{Foley} Court and did not include the "substantial effect" factor and "relatedness" caveat of \textit{Foley}.\textsuperscript{170} As a result, the \textit{Sugarman} exception was expanded to include more statutes.

Under both \textit{Foley} and \textit{Ambach}, the Court appears to utilize this two-step approach. First, the determination is made as to

\textsuperscript{166} See note 18 \textit{supra.}
\textsuperscript{167} 435 U.S. at 296-97. See notes 48-49, 87-88 & accompanying text \textit{supra.}
\textsuperscript{168} The traditional rational basis test, see note 18 \textit{supra}, is not to be confused with a more demanding version of the rational basis test which the Court has used on occasion. See, e.g., Reed v. Reed, 404 U.S. 71 (1971), in which the Court announced that the classification in question "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." \textit{Id.} at 76 (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).
\textsuperscript{169} 441 U.S. at 74.
\textsuperscript{170} See notes 48-49, 86-87, 167 & accompanying text \textit{supra.}
whether the statute falls within the *Sugarman* exception. Following this determination, the Court determines which standard of review shall apply.\(^{171}\) The crucial question in determining the validity of the statute is therefore whether it is included within the exception. If the statute is included, it most likely will be upheld under the rational basis test. In this way, the *Ambach* case provides for a more relaxed test than *Foley*, although under the same standard of rational basis.

Justices Marshall and Stevens, in their respective *Foley* dissents,\(^{172}\) indicate they oppose both of these rational basis tests and reject the majority’s two-step approach. Justice Marshall views the proper standard of review for exception cases to be strict scrutiny.\(^{173}\) He stated in his Foley dissent: “*Sugarman* may thus be viewed as defining the circumstances under which laws excluding aliens from state jobs would further a compelling state interest, rather than as defining the circumstances under which lesser scrutiny is applicable.”\(^{174}\) He also stated that the *Sugarman* Court did not explain “why the level of scrutiny should vary with the nature of the job . . . .”\(^{175}\) Thus, Justice Marshall is opposed to the case by case approach developed by the majorities in *Ambach* and *Foley*.

The emphasis in Justice Stevens’ dissent is on the need for a statute that makes an individualized determination of an alien’s employment qualifications instead of prejudgment based on characteristics that aliens, as a class, are presumed to have.\(^{176}\) His concern appears to be that statutes like those upheld in *Foley* and *Ambach* are imprecise.\(^{177}\) Justice Stevens sees the need for statutes within the exception that are drawn precisely so as to exclude only those who individually do not meet the job qualifications. Like the requirement of a “compelling state interest,”\(^{178}\) this precision argument is one of the characteristics of the strict scrutiny test.\(^{179}\)

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171. See notes 49, 88, 167 & accompanying text supra.
172. Justice Brennan joined the dissents of both Justice Marshall and Justice Stevens.
174. Id. at 303 n.1.
175. Id.
176. Id. at 307 (Stevens, J., dissenting).
177. Id.
178. See note 10 supra.
179. See *Nowak*, supra note 10, at 524. “Even if the government can demonstrate [a compelling state interest] the Court will not uphold the classification unless the justices
Thus, under the standard Justices Marshall and Stevens would apply in the exception cases, the statute would have to further a compelling state interest and employ means which are precisely drawn to achieve the state’s interest.

Justice Blackmun adds further confusion by his dissent in *Ambach*, stating that strict scrutiny should apply in that case. His dissent argues that the statute should employ more precise means, and advocates better methods for the state to achieve its goal. This concern with precision becomes clear when it is recognized that Justice Blackmun is the only Justice who concurred in the *Foley* result, but who dissented in *Ambach*. Thus, he may be seen as the only Justice still willing to apply the “stricter” rational basis test applied in *Foley* to the exception cases.

The exception cases demonstrate the inherent clash between the citizenship value and the individualized determination value. Ideally, these conflicting values would be balanced so as to serve both values, providing aliens the greatest access possible to government jobs while at the same time reserving important policymaking positions to citizens. Under the present practice, however, this balance is heavily weighted toward the citizenship value.

There are two reasons for this uneven balance. The first is the present definition of the *Sugarman* exception set forth in the *Ambach* majority opinion. By placing its emphasis on what is an important governmental function rather than on whether the position is an important one for the formulation, execution, or review of broad public policy, the exception potentially can encompass almost any profession which exercises an important governmental function including those which have little relation to “preservation of the political community.” *Ambach* itself illustrates this problem.

have independently reached the conclusion that the classification is necessary to promote that compelling interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guaran-

In *Sugarman*, the Court stated the strict scrutiny test in the following manner: “We therefore look to the substantiality of the State’s interest in enforcing the statute in question, and to the narrowness of the limits within which the discrimination is confined.” 413 U.S. at 642. See also *In re Griffiths*, 413 U.S. at 722 (the state must show that “its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest”).

180. 441 U.S. at 84 (Blackmun, J., dissenting).
181. Id. at 87.
182. Id. at 87-88.
183. See notes 86-96, 114-35 & accompanying text *supra*. 
Under the Court's reasoning in *Ambach*, the citizenship requirement is applicable to all teachers because all teachers have "an obligation to promote civic virtues and understanding in their classes."184 Yet, as Justice Blackmun points out in his dissent, "[i]t seems constitutionally absurd, to say . . . a Frenchman may not teach French . . . ."185 Such a position seems a far cry from an important nonelective official who executes broad public policy.

Secondly, the application of the rational basis test in the exception cases promotes the dominance of the citizenship value over the individualized determination value. Under the traditional version of the rational basis test, a statute will be upheld if the Court can conceive of any rational relation between the means and the state's interest.186 The Court does not scrutinize the validity of a state's interest, but accepts the asserted state interest in deference to the state legislature.187 The danger in this is that the state can use the asserted interest as a front for an impermissible interest. This often has been done in the past with alienage classifications.188 Moreover, the test requires only that the means be rational, not the best or most precise.189 As a result, the Court does not scrutinize the means utilized to determine if less discriminatory alternatives are available.

The effect of the application of the rational basis test in *Sugarman* exception cases is most evident in *Foley* and *Ambach*.

184. 441 U.S. at 80.
185. Id. at 84 (Blackmun, J., dissenting).
186. See note 18 supra.
187. See Nowak, supra note 10, at 524. "The Court will not grant any significant review of legislative decisions to classify persons in terms of general economic legislation. In this area the judges have determined they have no unique function to perform; they have no institutional capability to assess the scope of legitimate governmental ends in these areas or the reasonableness of classifications that is in any way superior to that of the legislature. Thus if a classification is of this type the Court will ask only whether it is conceivable that the classification bears a rational relationship to an end of government which is not prohibited by the Constitution. So long as it is arguable that the other branch of government had such a basis for creating the classification the Court will not invalidate the law." Id.
188. See Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (state asserted conservation as interest in statute which barred aliens ineligible for citizenship from commercial fishing licenses; only Japanese resident aliens were ineligible for citizenship); Oyama v. California, 332 U.S. 633 (1948) (state argued that law which conclusively presumed that conveyance of agricultural land purchased by an ineligible alien father and recorded in his citizen son's name was not a gift but that land was held for father and thus provided for an escheat to the state, was necessary to avoid evasion of alien land law's prohibition of land ownership by ineligible aliens; again, only group of ineligible aliens were Japanese).
189. See notes 18, 187 supra.
In both cases, the Court accepted the state's asserted interest—assuring that those who exercise power in the political community are familiar with the community's values—as valid. It then found that a citizenship requirement is a rational means of furthering this interest because of the presumption that citizens share in the values of the political community and aliens do not. According to the Court, therefore, the exclusion of aliens from police and teaching positions did not violate the equal protection guarantee.

**Factors the Court Should Consider in Defining the Sugarman Exception**

In order to better balance the competing values involved in the Sugarman exception and to provide greater access to government jobs for aliens while at the same time reserving important policymaking positions for citizens, it is necessary to revise the factors that define the exception. Keeping in mind the original rationale given by the Sugarman Court for the exception—to preserve the basic conception of the political community—the Court should look closely at several factors so as to define the exception in a more precise manner.

First, the Court should look at whether the position serves a traditional state function at the "heart of representative democracy." Traditional functions of the state include police and fire service, schools, courts, legislatures, welfare systems, highway maintenance, and recreational facilities. However, not all these traditional functions are at the heart of representative democracy such that democratic theory would be impaired by having an alien eligible for such employment. For example, firefighters clearly perform a traditional state function, but not one at the heart of representative democracy, because a firefighter exercises no power over the political community. Under this analysis, firefighters would not be included within the exception. Conversely, the courts and the legislature are traditional functions at the heart of representative democracy and should be within the exception because of the

192. See note 30 & accompanying text supra.
193. See note 30 & accompanying text supra.
power they may exercise over the political community. Thus, by requiring the position to be both a traditional governmental function and at the heart of representative democracy, the exception would include only those positions where a citizenship requirement is necessary to ensure that the political community is governed by its members. 194

Second, the Court should look at the extent to which the power inherent in the position is capable of having a direct, immediate, tangible, and substantial effect on the lives of citizens. Within many traditional state functions at the heart of representative democracy are numerous positions with varying levels of power. The Court should use this factor to determine which positions within the traditional function are within the exception. Positions that include the power to deprive a person of liberty, property, or other rights, like the police power in Foley, would provide a strong argument for inclusion within the exception because the exercise of such power has a substantial effect on the members of the political community. A citizenship requirement for such positions would ensure that the powers of government are exercised by members of that political community. Positions that exercise indirect power, such as a teaching position, would present a weaker case as the effect of such power would be less substantial and immediate, resulting in less intrusion into the lives of citizens in the political community.

A further consideration in determining whether direct or indirect power is exercised is whether the position is one which actually creates policy as compared with one which merely implements policy. Positions of "responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature"195 should be within the exception. Such a position is one which participates in the "formulation, execution, or review of broad public policy."196 A more difficult question arises as to administrative positions. With regard to such positions, the Court should consider the amount of discretionary power involved in the position. If the administrative officer applies policy only within a narrowly defined range of choices and his or her decisions

194. See note 6 supra.
196. Sugarman v. Dougall, 413 U.S. at 647.
are reviewed by a superior, the position should be excluded from the exception because the administrator would lack discretionary power with which he or she could have a substantial effect on the lives of citizens.\textsuperscript{197} For example, under this analysis, a state tax auditor who selects returns for auditing under previously formulated administrative guidelines should not be within the exception.

Third, the Court should consider whether the state’s interest can be maintained by selection processes that provide that each person be judged on individual qualifications rather than presumed class characteristics. At the heart of this question is the true meaning of the alien-citizen distinction. The meaning of citizenship is difficult to isolate and is often clouded by intangible and the well intentioned emotion that surrounds the concept. Such factors, however, should not prevent the Court from considering whether citizenship is a viable means of ensuring commitment to the values of the political community. It is entirely possible that an alien is more knowledgeable of and committed to American values than an American citizen. Yet, because of the present state of the exception, the citizen and not the alien is eligible for employment. When used in this context, the citizenship requirement appears to be more of a reward mechanism for becoming a citizen rather than a measure of job qualifications. The Court should consider whether citizenship should be used by the states as a vehicle for obtaining employment or whether it should have a purer meaning.

**An Intermediate Standard of Review**

In addition to adopting a precise definition of the *Sugarman* exception, the adoption of an intermediate standard of review will allow a more even balancing of the competing values in *Sugarman* exception cases. This standard of review would provide two advantages. First, it would provide the Court a middle ground between the “fatal in fact”\textsuperscript{198} strict scrutiny test and the extremely deferential rational basis test, thus avoiding the harsh results of the two-tier approach where the state’s interest seldom meets strict scrutiny and virtually always is upheld under the rational basis test.

Second, the intermediate standard would better balance the

\textsuperscript{197} See notes 48, 86 & accompanying text supra.

\textsuperscript{198} Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972).
individualized determination and citizenship values by accepting the state's interest, yet requiring that the means have a substantial relation to the state's interest and not be overly inclusive. This balancing would be consistent with the rationale underlying the exception because the individualized determination value would give way only when necessary to preserve an important state interest. Three major intermediate standards of review have been proposed. These include Justice Marshall's "sliding scale" approach, Professor Gunther's "newer equal protection" test, and Professor Nowak's demonstrable basis standard.

199. See notes 200-02 & accompanying text infra.

200. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318-22 (1976) (Marshall, J., dissenting); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting). Justice Marshall's model does not involve rigid factors like the Gunther and Nowak models, but operates on a "sliding scale." Justice Marshall believes that the degree of scrutiny in equal protection cases should vary according to the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." San Antonio Sch. Dist. v. Rodriguez, 411 U.S. at 99 (Marshall, J., dissenting). To determine the degree of scrutiny in relation to these criteria the Court should look to three factors: (1) the character of the classification in question, (2) the relative importance to individuals in the class discriminated against of the government benefits they do not receive, and (3) the asserted state interests in support of the classification. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. at 318; San Antonio Sch. Dist. v. Rodriguez, 411 U.S. at 99; Richardson v. Belcher, 404 U.S. at 90; Dandridge v. Williams, 397 U.S. at 521. Under Justice Marshall's approach, a scale is set up with suspect classifications on one end receiving the highest scrutiny and economic classifications on the other receiving minimal scrutiny.

201. See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). The test under Professor Gunther's "newer equal protection" is that "legislative classifications must have a substantial relationship to legislative purposes . . . ." Id. at 20. Professor Gunther sees his model as "means-focused." Id. The Court would "assess the means in terms of legislative purposes that have a substantial basis in actuality, not merely in conjecture." Id. at 21. Once the state has established its actual purpose, the state would have to show that the means substantially fur thered that interest. The reasonableness of the means would be judged "on the basis of materials that are offered to the Court," not by hypothesizing. Id. Thus, the state must show its interest and its means have some substance in fact.

For alienage classifications, this model achieves a more even balance of the conflicting values. The state's interest in preserving the political community is accepted as long as the state shows that preservation is the actual interest. However, crucial to this balance is the fact that Professor Gunther's model will scrutinize the state's means to show that the means are actually related to the interest, thus ensuring greater consideration of the individualized determination value.

The United States Supreme Court adopted an intermediate standard of review for sex classifications in Craig v. Boren, holding that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Although the Craig Court did not provide a precise definition of this standard, its requirements and limits can be implied from its application in that case. It appears that under the standard, the Court will accept the state's asserted interest as long as it does not fall into a narrow category of impermissible purposes. However, the Court noted that certain purposes such as administrative convenience, or "archaic and overbroad" generalizations about the role of women that tended to keep them in the home and out of business affairs, could not support gender classifications. Thus, the Court will not accept merely any asserted state interest; the interest must serve an important governmental objective.

Similarly, under the Craig standard, the means employed by the state to effectuate its interests are scrutinized more carefully. In Craig, the Court found that the relationship between gender

scrutiny of the state's interest and means. Professor Nowak includes alienage within his concept of neutral classifications, id. at 1099, which he defines as those classifications that treat persons in a dissimilar manner on the basis of some inherent human characteristic or status. Id. at 1093-94. For statutes based on neutral classifications, Nowak would apply his demonstrable basis standard—the Court would validate the classification "only if it has a factually demonstrable rational relationship to a legitimate state end." Id. at 1094. This test involves two parts. First, it asks whether "there is any theoretically rational relation between the classification and a state interest capable of withstanding analysis." Id. at 1081. If such a relation could not be found, there would be no further inquiry. However, if such a relation exists, the Court must determine whether in fact the classification is arbitrary. Id. Professor Nowak states that the Court would "look to principles either express or implied in the Constitution for guidance in determining whether the State's interest is capable of withstanding analysis." Id. at 1095. Thus, one can assume that any purpose which is constitutionally permissible is capable of withstanding analysis. Once it shows that its interest is permissible, the state must then demonstrate that the means chosen is a rational way of advancing the state's interest. Id. at 1081. The state must show that the means chosen supports the interest so as to ensure that the classification is "not being used arbitrarily to burden persons having a common personal status." Id.

204. Id. at 197.
205. Craig dealt with an Oklahoma law which prohibited the sale of 3.2% beer to females under age 18 and males under age 21. See Okla. Stat. tit. 37, §§ 241, 245 (1958 & Supp. 1976). The Court accepted Oklahoma's asserted interest of traffic safety, based on statistics which showed that males had a higher incidence of alcohol-related accidents than females. 429 U.S. at 199.
206. 429 U.S. at 198.
207. Id. at 198-99.
and the state’s asserted interest in traffic safety was far too tenuous to satisfy the “requirement that gender-based difference be substantially related to the achievement of the statutory objective.” Thus the means must be more precisely tailored than under the traditional rational basis test.

The reasoning for adopting an intermediate standard of review for sex classifications is applicable to the adoption of a similar standard for the Sugarman exception. First, sex and alienage classifications have several similarities. Both classifications have a history of use for discriminatory purposes. Moreover, alienage, like sex, often bears no relation to the ability to perform and often relegates those within the classification to an inferior legal status without regard to individual capacity. Although the states have argued that the status of alienage carries with it a presumption that aliens are not as loyal or committed to the polity as citizens, no reason exists to believe this is universally true. An alien may be highly qualified, loyal to the polity, and committed to its values, and still prefer to retain foreign citizenship. Indeed, in many cases, an alien may have more knowledge of and commitment to these values than a citizen. However, under alienage classifications such

208. Id. at 204.
209. See note 18 supra.
210. Justice Brennan, in Frontiero v. Richardson, 411 U.S. 677 (1973), compared the legal position of 19th century women to that of blacks under the pre-Civil War slave codes. “Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.” Id. at 685. See Stanton v. Stanton, 421 U.S. 7, 16 (1975) (statute required parental support for females until age 18, but until age 21 for males based on notion that “girls tend generally to mature physically, emotionally, and mentally before boys” and “tend to marry earlier”) (quoting Stanton v. Stanton, 30 Utah 2d 315, 318, 517 P.2d 1010, 1012 (1974)); Muller v. Oregon, 208 U.S. 412, 421 (1908) (“[h]istory discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. . . . [S]he has been looked upon in courts as needing especial care that her rights may be preserved”); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1872) (“[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life”). See also L. Kanowitz, Sex Roles in Law and Society 42-74 (1973).
211. See Reed v. Reed, 404 U.S. 71 (1971) (statute gave automatic preference to men over women for appointment as administrator of estates); Hoyt v. Florida, 368 U.S. 57 (1961) (unanimous decision upholding law allowing state to limit women jurors to volunteers); Goesaert v. Cleary, 335 U.S. 464 (1948) (upholding prohibition on women bartenders). See also L. Kanowitz, Sex Roles in Law and Society 299-456 (1973).
212. See Appellee’s Motion to Affirm at 6, Foley v. Connellie, 435 U.S. 291 (1978); see also Foley v. Connellie, 435 U.S. 291, 302 (Blackmun, J., concurring).
as that in *Ambach*, it is impossible to show this individual capacity.

Another argument in favor of adopting an intermediate standard for *Sugarman* exception cases is that such a standard would make the exception cases more consistent with alienage cases involving private employment. Citizenship requirements in private employment and benefit programs outside the *Sugarman* exception continue to be suspect,213 justified only when the state shows that its interest is both constitutionally permissible and substantial and that its use of the classification is necessary to the accomplishment of its purpose.214 In contrast, the test presently used in exception cases requires only a rational relation between the state’s means and its interest.215 Thus, the standard of review varies from one extreme to the other solely on the basis of government employment even though in some cases, like *Ambach*, the same type of position is involved.

Adoption of the *Craig* intermediate standard of review in the *Sugarman* exception cases would close this gap by promoting a better balance between the competing citizenship and individualized determination values. The citizenship value would receive proper consideration because the Court would undoubtedly find “preservation of the political community” to be an important governmental objective.216 In addition, however, the individualized determination value would receive greater consideration because of the increased scrutiny of the state’s means involved in the *Craig* standard.217 The Court would be faced with the question of whether an absolute exclusion of aliens from important governmental positions is substantially related to the state’s interest in preserving the political community. More specifically, the Court would face the issue of whether a citizenship requirement ensures that those who fill these positions are loyal to the polity and committed to its values. Because the Court would give proper consideration to both values, there would be a better balancing of the right of aliens to work in the common occupations of the community

213. Neither *Foley* nor *Ambach* purported to overrule or limit the *Graham-Sugarman-Griffiths* line of cases. Both dealt only with the *Sugarman* exception. See *Foley v. Connellie*, 435 U.S. at 294-95; *Ambach v. Norwick*, 441 U.S. at 73-74.
215. See notes 18, 165, 169 & accompanying text *supra*.
216. See note 6 *supra*.
217. See notes 208-09 & accompanying text *supra*.
with the state’s interest to preserve its political community. The result, hopefully, will be that alienage classifications in exception cases will be tailored so as to exclude only those necessary to preserve the state’s interest.

**Conclusion**

The majority opinion in *Ambach* demonstrates that the Court is moving toward a relaxed view of the *Sugarman* exception. This trend is probably a result of the Court’s desire to move away from the concept of alienage as a suspect classification and the strict scrutiny test that concept entails. However, the effect of the Court’s relaxed view is that states will be able to exclude aliens from occupations in the public sector when such an exclusion on a similar position in the private sector would be constitutionally impermissible. The inevitable result is that aliens are judged on the basis of their status rather than on their individual characteristics. Unless the Court is willing to ignore totally the individualized determination value which underlies its pre-*Foley* alienage cases, it can avoid this result, and at the same time maintain the state’s right to preserve its political community, by the formulation of a sharper definition of the factors that define the *Sugarman* exception and by application of an intermediate standard of review which provides an impartial analysis of the conflicting values underlying the exception. Such a standard would recognize the importance of the state’s interest and at the same time require the statute to be tailored so as to exclude only those necessary to preserve the state’s political community. In this way the Court can achieve a better balance between the right of aliens to work in the common occupations of the community and the state’s right to define its own political community.