Antitrust - Nonprofit Professional Association Liable for Treble Damages Under the Sherman Act for the Antitrust Violations of its Agents Acting Within the Scope of Their Apparent Authority Case Notes

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CASE NOTES


The American Society of Mechanical Engineers (ASME) is a nonprofit technical and scientific society with more than 90,000 members, drawn from all fields of mechanical engineering. The Society publishes a mechanical engineering magazine and conducts educational and research programs. In addition to its other functions, ASME promulgates approximately 400 codes and standards related to mechanical engineering. These codes have a powerful economic influence, even though they are only advisory in nature. Many of these codes are incorporated by reference into federal, state, and local laws and regulations. Although ASME employs a full-time staff, much of its work is done by volunteers from industry and government. These volunteers participate as individuals, not as representatives of their employers, and assist in drafting, revising, and interpreting ASME's codes.

Included among the various standards and codes established by ASME is its boiler and pressure vessel code. The

©1983 by Elizabeth Smith.
2. Id. at 1938.
3. Id.
4. If a "product cannot satisfy the applicable ASME code, it is at a great disadvantage in the marketplace." Id.
5. As an example, the court of appeals cited 12 N.Y. C Ø 7 R. & Res. §§ 4-1.9, 4-1.10 (1979). Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 121 n.1 (2d Cir. 1980).
6. Id. at 121.
7. Id.
8. 102 S. Ct. at 1938.
code relevant to this case is paragraph HG-605 of section IV of the Boiler and Pressure Vessel Code, which contains a provision setting a standard for low-water fuel cutoffs. Low-water fuel cutoffs are a safety feature that shuts off the supply of fuel in a boiler if the water level falls below a certain point, thus preventing a possible explosion.

For several decades, the market for low-water fuel cutoffs was dominated by McDonnell & Miller, Inc. (M&M). However, in the mid-1960's, M&M's market position was challenged when Hydrolevel Corporation began marketing its own version of the low-water fuel cutoff. The relevant distinction between the safety devices was that Hydrolevel's fuel cutoff included a time delay, while M&M's did not.

In 1971, Brooklyn Union Gas Company, which had purchased M&M's fuel cutoff for several years, decided to switch to Hydrolevel's cutoff. This was a matter of concern to those who ran M&M.

John James, a vice-president of M&M, was also vice-chairman of the ASME subcommittee that drafted, revised, and interpreted section IV of the Boiler and Pressure Vessel Code. "After Hydrolevel [secured] the Brooklyn Union Gas account, James and other M&M officials met with T. R. Har-

9. Section IV of The Boiler and Pressure Vessel Code sets forth standards for boilers. Each boiler "shall have an automatic low-water fuel cutoff so located as to automatically cut off the fuel supply when the surface of the water falls to the lowest visible part of the water gauge glass." Id. at 1939 (quoting HG-605 of § IV of the ASME Boiler and Pressure Vessel Code).

10. 102 S. Ct. at 1939.
11. Id.
12. Id.
13. Id.

M&M's fuel cutoff is a floating bulb that falls with the boiler's water level. When the level reaches the critical point, the bulb causes a switch to cut off the boiler's fuel supply. Hydrolevel's product, in contrast, was an immovable probe inserted in the side of the boiler; when the water level dropped below the probe, the fuel supply was interrupted. Because water in a boiler surges and bubbles, the level intermittently would seem to fall slightly below the probe even though the overall level remained safe. To prevent premature fuel cutoff because of these intermittent fluctuations, Hydrolevel's probe included a time delay that allowed the boiler to operate for a brief period after the water level dropped beneath the probe.

Id. at 1939 n.1.

14. Id. at 1939.
15. Id.
The participants at this meeting decided to send an inquiry from M&M to ASME's Boiler and Pressure Vessel committee asking whether a fuel cutoff with a time delay, such as Hydrolevel's, would satisfy the requirements of paragraph HG-605 of section IV.17

Following ASME's standard procedure, the letter of inquiry was referred to Hardin, as chairman of the Boiler and Pressure Vessel subcommittee.18 Thus, the response to the inquiry was prepared by Hardin, who in actuality co-authored the letter which initiated the inquiry/response process.19 Predictably, Hardin's response interpreted paragraph HG-605 as condemning fuel cutoffs such as those marketed by Hydrolevel, which incorporated a time-delay.20 Subsequently, the secretary of the Boiler and Pressure Vessel Committee signed and mailed the response prepared by Hardin without checking its accuracy.21 It later became evident that Hardin had misrepresented the intent of paragraph HG-605 in his response.22

Thereafter, M&M utilized this interpretation of section IV to discourage customers from buying Hydrolevel's product.23 Several months after the ASME subcommittee issued its response, Hydrolevel learned of the subcommittee's action through a former customer.24 Recognizing that the interpretation of the code was misleading, Hydrolevel sought a correc-

16. Id. "Hardin was an Executive Vice President of Hartford Steam Boiler Inspection and Insurance Company. A controlling interest in Hartford was owned by International Telephone and Telegraph Co. which acquired M&M within the year." Id. at 1939.
17. Id. at 1939.
18. Id. "Under the procedures of the Boiler and Pressure Vessel Committee, the subcommittee chairman—Hardin—could draft a response to a public inquiry without referring it to the entire subcommittee if he treated it as an 'unofficial communication.'" Id. at 1939-40.
19. Id. at 1940.
20. Id.
21. Id.
22. Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs, 635 F.2d 118, 122 (2d Cir. 1980). The court of appeals observed that "[i]f the low-water cutoff is positioned sufficiently above the lowest permissible water level, a cutoff with a time delay could assure, even allowing for the delay, that the fuel supply would stop by the time the water fell to the lowest visible part of the water gauge glass." Id.
23. 102 S. Ct. at 1940. "[M&M] instructed its salesmen to [inform] potential customers that Hydrolevel's fuel cutoff failed to satisfy ASME's code." Id.
24. Id.
tion from ASME.25

Two years later, the Wall Street Journal printed an article describing the market resistance which Hydrolevel was experiencing while attempting to sell a fuel cutoff which the market still believed did not meet the standards of the code.26 The article suggested that a "marketing ploy" by M&M had created that belief in the marketplace.27 ASME's Professional Practice Committee conducted an investigation in response to this article, but concluded that all of its officials had acted properly.28 Subsequently, while testifying before a U.S. Senate Subcommittee, James revealed his part in drafting the original letter of inquiry.29 A few months later, Hydrolevel filed suit in federal district court against ASME, alleging that its actions had violated sections 1 and 2 of the Sherman Act.30

The trial court instructed the jury "that ASME could be held liable only if it had ratified its agents' actions or if [those] agents had acted in pursuit of ASME's interests."31 The jury returned a verdict for Hydrolevel.32 The court of appeals affirmed the finding of liability, but held that the jury instructions given by the district court were incorrect. The appellate court concluded that ASME could be held liable if its agents had acted within the scope of their apparent authority.33 In an opinion by Justice Blackmun, the Supreme Court affirmed the court of appeal's finding, and held that ASME was liable under the antitrust laws for the antitrust violations

25. Id.
26. Id. at 1941.
27. 635 F.2d at 123.
28. 102 S. Ct. at 1941.
29. Id.
30. Id. Section 1 of the Sherman Act specifies that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." Section 2 of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states . . . shall be guilty of a felony . . . ." 15 U.S.C. §§ 1, 2 (1976). Hydrolevel alleged that ASME had violated §§ 1 and 2 of the Sherman Act in conspiring "with others to restrain trade unreasonably in the low-water [fuel] cutoff market by disparaging Hydrolevel's cutoff through a misrepresentation of the Boiler and Pressure Vessel Code." 635 F.2d at 124.
31. 102 S. Ct. at 1941. The trial court denied Hydrolevel's request for jury instructions that stated that ASME could be held liable for its agents' conduct if those agents acted within the scope of their apparent authority. Id.
32. Id.
33. Id.
of its agents acting with apparent authority.\textsuperscript{34}

The Court began its analysis by noting that under general agency rules, a principal is liable for the acts of its agents performed with apparent authority.\textsuperscript{35} Next, the Court stated that holding a nonprofit organization liable under a theory of apparent authority was consistent with the congressional intent behind the antitrust laws, that is, to encourage competition.\textsuperscript{36} The Court noted that "[w]hen [ASME] cloaks its subcommittee officials with authority of its reputation, [it] permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace."\textsuperscript{37}

The Court stated that deterrence was an additional reason for imposing civil liability on the organization itself, as well as on the agents who were acting with apparent authority.\textsuperscript{38} The Court noted that imposing liability on ASME's agents themselves would act as a partial deterrent against restraints on competition, because of the risk of personal civil liability.\textsuperscript{39} If ASME were also civilly liable for the antitrust violations of its agents who acted with apparent authority, it would be much more likely that similar antitrust violations would not occur in the future.\textsuperscript{40}

34. \textit{Id}. at 1942. The Supreme Court granted certiorari because of the important issue concerning the interpretation of the antitrust laws. \textit{Id}.

35. \textit{Id}. The Court explained that the apparent authority doctrine was premised on the theory that the fraud was facilitated by the agent's position. Because of the agent's position, the agent seemed to have been acting in the ordinary course of the business entrusted to him. The agent's statements were given weight by virtue of the principal's reputation—in this case, the weight of ASME's expertise in boiler safety. \textit{Id}.

36. \textit{Id}. at 1944.

37. \textit{Id}. The Court pointed to the facts of this case to illustrate the power of ASME's agents to restrain competition and engage in anticompetitive activity. Although M&M received a mere "unofficial" response to its inquiry about the time delay feature, "the force of ASME's reputation is so great that M&M was able to use that one 'unofficial' response to injure seriously the business of a competitor." \textit{Id}.

38. \textit{Id}. at 1945.

39. \textit{Id}.

40. The Court stated: 

Only ASME can take systematic steps to make improper conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus, a rule that imposes liability on the standard-setting organization—which is best suited to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.
The Court illustrated the wisdom of the apparent authority rule by comparing it to the two alternative approaches advocated by ASME.\textsuperscript{41} First, ASME argued that "it should not be held liable unless it ratified the actions of its agents."\textsuperscript{42} The Court rejected this argument, noting that requiring ratification would actually have anticompetitive effects; ASME could avoid liability by simply remaining ignorant of its agents' activities.\textsuperscript{43}

Second, ASME argued that it would only be held liable for its agents' actions if the agents acted with an intent to benefit ASME.\textsuperscript{44} The Court noted that intent to benefit ASME was irrelevant, because its agents' conduct could have anticompetitive effects without benefitting ASME.\textsuperscript{45}

Finally, the Court rejected two additional arguments advanced by ASME in its attempt to avoid antitrust liability. First, ASME labeled treble damages for antitrust violations as punitive. ASME argued that under traditional agency law, the courts did not use apparent authority to impose punitive damages upon a principal for the acts of its agents.\textsuperscript{46} The Court rejected this argument, noting that while antitrust treble damages were designed in part to punish past antitrust violations, they were also designed to deter future antitrust violations.\textsuperscript{47}

In addition, ASME argued that because of its status as a nonprofit organization, it should not bear the risk of loss for antitrust violations committed by its agents acting with apparent authority.\textsuperscript{48} Rejecting this argument, the Court emphasized that the weight of precedent supported a finding that nonprofit organizations could be held liable under the anti-

\textsuperscript{Id. at 1945-46.}  
\textsuperscript{41. Id. at 1946.}  
\textsuperscript{42. Id.}  
\textsuperscript{43. Id.}  
\textsuperscript{44. Id.}  
\textsuperscript{45. Id.}  
\textsuperscript{46. Id. at 1946-47.}  
\textsuperscript{47. The Court cited Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977) in noting that "[t]reble damages 'make the remedy meaningful by counterbalancing' the difficulty of maintaining a private suit under the antitrust laws." 102 S. Ct. at 1947 (quoting 429 U.S. at 486 n.10).}  
\textsuperscript{48. 102 S. Ct. at 1947.}
trust laws. The Court concluded by noting that its decision "will help to ensure that standard-setting organizations will act with care when they permit their agents to speak for them."

Emphasizing that the apparent authority theory has long been the settled rule in the federal system, the Court relied on Gleason v. Seaboard Air Line Co. That case held that a principal is liable when the agent commits fraud while acting within the scope of the agent's apparent authority, even though there is no intention to benefit the principal. The Court noted that "[i]n a wide variety of areas, the federal courts, like this Court in Gleason, have imposed liability upon principals for the misdeeds of agents acting with apparent authority."

The Court then examined the extent to which antitrust liability had been imposed in the past for acts analogous to tort violations, such as those at issue in ASME. The Court observed that "in the past, the Court has refused to permit broad common law defenses to constrict the antitrust private right of action."

The Court concluded that the apparent authority rule

50. 102 S. Ct. at 1948.
51. 278 U.S. 349 (1929).
52. 102 S. Ct. at 1943. "In Gleason, a railroad's employee sought to enrich himself by defrauding a customer of the railroad through a forged bill of lading . . . . Noting that 'there was . . . no want of authority in the agent,' . . . the Court in Gleason held [the] railroad liable, despite the agent's desire to benefit only himself." Id. The Gleason Court emphasized that "few doctrines of law are more firmly established . . . than that of the liability of the principal without fault of his own." 278 U.S. 349, 356.
53. 102 S. Ct. at 1943. The Court explained that although it looked to the general principles of common law for guidance in deciding the scope of the antitrust cause of action, its decisions were determined by the congressional intent that led to the enactment of the antitrust laws—a desire to enhance competition. The Court pointed out that in this case, general agency principles would lead to a finding of liability if the violation were a mere tort. By imposing liability on ASME in accord with those common law principles, the Court was honoring the congressional intent behind those antitrust statutes. Id. at 1943-44 n.6.
54. Id. at 1944. To illustrate, the Court quoted Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134 (1968): "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter antitrust violations." The Court concluded that they could "honor the statutory purpose behind the antitrust laws best by interpreting the antitrust private cause of action to be at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far." 102 S. Ct. 1944.
was consistent with the congressional intent that the antitrust laws were to be broad in scope. The Court noted that Congress extended antitrust liability to "every person," and defined "person" to include corporations and associations. The Court acknowledged that in recent years only one circuit court had directly decided whether a principal could be held liable for antitrust damages based on an apparent authority theory. The Court rejected ASME's argument that the Court had foreclosed imposition of civil antitrust liability based on apparent authority in prior cases.

Addressing ASME's argument that punitive damages had never been imposed on a principal for the acts of its agents under a theory of apparent authority, the Court noted that a majority of courts had imposed punitive damages on corporations because of their agents' acts in the absence of approval or ratification. The Court relied on Radiant Burners, Inc. v. Peoples Gas Light and Coke Co. and found that nonprofit organizations could be held liable under the antitrust laws. Radiant Burners illustrated the scope of antitrust liability under agency principles prior to this case. The Court in Radiant Burners applied the principles of apparent authority in determining liability for antitrust damages. The Court's decision in Radiant Burners was consistent with the broad scope of antitrust liability that Congress intended.

55. 102 S. Ct. at 1946 n.11.
56. Id. (citing 15 U.S.C. §§ 1, 2, 7 (1976)).
57. 102 S. Ct. at 1944 n.7. The Court noted that [the dissent cites several cases, stating that they appear to reject antitrust liability based on an apparent authority. United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1090 (5th Cir.), cert. denied, 437 U.S. 903 (1978); United States v. Hilton Hotels Corp., 467 F.2d 1000, 1004-07 (9th Cir. 1972) cert. denied sub. nom. Western Int'l Hotels Co. v. United States, 409 U.S. 1125 (1973); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204 (3d Cir. 1970), cert. denied, 401 U.S. 948 (1971). A fair reading of those cases, however, reveals that they did not discuss the merits of an apparent authority theory of antitrust liability. 102 S. Ct. at 1946 n.11.
58. 102 S. Ct. at 1946 n.12. The Court noted in particular United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922) and Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925). The Court maintained that those cases were not controlling, observing that the United Mine Workers Court expressly pointed out that that case did not involve a question of an appearance of authority on which some third person acted. 102 S. Ct. at 1946 n.12.
60. 364 U.S. 656 (1961). In Radiant Burners, the Court held that the complaint of a gas burner manufacturer alleging that a nonprofit association and its members had conspired to restrain interstate commerce in the manufacture, sale, and use of gas burners by reason of the association's unreasonable failure to approve the manufacturer's burners, resulting in refusal of association's utility members to supply gas for use in those burners, was sufficient to state a claim for treble damages. Id.
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ant Burners imposed antitrust liability on the principal organization for the ratified acts of its agents.\textsuperscript{61}

Disagreeing with the ASME majority's extension of the antitrust liability of a principal beyond that prescribed by Radiant Burners and its predecessors, Justice Powell dissented, joined by Justices White and Rehnquist. Justice Powell stated that the Court's expansive rule of antitrust liability was inconsistent with the weight of precedent and congressional intent.\textsuperscript{62} The dissent's major criticism of the Court's decision was the lack of authority to support the holding that the apparent authority theory was applicable in an antitrust case.\textsuperscript{63}

The dissent stated that the Court ignored prior decisions which suggested that in dealing with professional associations the antitrust laws should not be applied precisely as they are when commercial enterprises are involved.\textsuperscript{64} The dissent also noted that in the past, the Court had been hesitant to impose treble damage liability on a membership organization in the absence of clear evidence showing ratification or authorization.\textsuperscript{65} The dissent observed that "[e]ven in the context of commercial enterprises, the courts of appeals that have considered the matter appear to have rejected antitrust liability upon mere apparent authority."\textsuperscript{66}

The dissent next disputed the Court's conclusion that the

\begin{itemize}
  \item \textsuperscript{61} Id.
  \item \textsuperscript{62} 102 S. Ct. at 1949.
  \item \textsuperscript{63} Id. at 1950. "In a word," the dissent stated, "the Court makes new law, largely ignoring existing precedent." Id.
  \item \textsuperscript{64} The dissent cited in support Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), in which the Court recognized that "[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically apply to the professions antitrust concepts that originated in other areas." 102 S. Ct. at 1949-50 (citing Goldfarb, 421 U.S. at 788-89 n.17). The dissent argued that "[i]n view of this recognition, one would not have expected the Court to take the occasion of this case to promulgate an expansive rule of antitrust liability not heretofore applied by it to a commercial enterprise much less to a nonprofit organization." 102 S. Ct. at 1950.
  \item \textsuperscript{65} The dissent cited United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1921) and Coronado Coal Co. v. United Mine Workers, 268 U.S. 295 (1925). Elaborating in a footnote, the dissent disagreed with the Court's interpretation of United Mine Workers, arguing that in those cases, the Court rejected antitrust liability on a theory of apparent authority. 102 S. Ct. at 1950 n.5.
  \item \textsuperscript{66} 102 S. Ct. at 1950. As an example, the dissent cited United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), wherein the Court of Appeals for the Ninth Circuit ruled out liability on apparent authority by requiring that the agent hold a "purpose to benefit the corporation." 102 S. Ct. at 1950 n.6 (citing Hilton Hotels, 467 F.2d at 1006 n.4).
\end{itemize}
apparent authority theory was consistent with the congres-
sional intent behind the antitrust laws. In particular, the dis-
sent maintained that the legislative history in fact cautioned against adopting a new rule of agency law that exposed non-
profit organizations to potentially destructive treble damage liability.67

The dissent also pointed out that section 1 of the Sher-
man Act required a contract, combination, or conspiracy in restraint of trade.68 The dissent asserted that since neither a contract nor a combination was present in ASME, by implication, the Court imposed antitrust liability on ASME on the dubious notion that ASME somehow “conspired” with M&M.69

The dissent’s final criticism concerned the policy implica-
tions behind holding a nonprofit, industry standard-setting organization like ASME liable under the antitrust laws. The dissent pointed out that the Court’s policy discussion did not take into account the potential cost involved. Justice Powell expressed concern that the decision jeopardizes a significant consumer benefit—ASME’s boiler safety information.70

The Court’s decision to expand the current scope of anti-
trust liability under agency principles is novel. As the dissent correctly pointed out, there is no authority for imposing liabil-
ity for apparent authority in an antitrust case. Prior to this case, the Court would impose antitrust liability on a principal only when it had ratified the agent’s acts or when the agent had acted with an intent to benefit the principal.71 Subse-
quently to this case, principals are now liable for their agents’

67. 102 S. Ct. at 1952. The dissent relied on statements made by Senator Sher-
man in defending his bill during Senate debate: “The bill as reported contains three or four simple propositions which relate only to contracts, combinations, and agree-
ments made with a view and designed to carry out a certain purpose . . . . It does not interfere in the slightest degree with voluntary associations . . . to advance the inter-
ests of a particular trade or occupation . . . . They are not business combinations.” Id. (quoting 21 Cong. Rec. 2562 (1890)). See also 21 Cong. Rec. 2658 (1890).
68. 102 S. Ct. at 1956.
69. Id.
70. Id. at 1956-57. The dissent reasoned that this “information can be expen-
sive if consumers are forced to gain it only by their own experience or by creation of another bureaucracy.” Id. at 1957.
71. As the dissent observed: “[A] trade union . . . might be held liable . . . but certainly it must be clearly shown in order to impose such a liability on an association of 450,000 men that what was done was done by their agents in accordance with their fundamental agreement of association.” 102 S. Ct. at 1950 n.5 (quoting Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 304 (1925)).
antitrust violations if those agents act with an appearance of authority.

The Court recognized that trade associations exert tremendous economic influence on the industry they represent. As the Court itself pointed out, the policy behind extending antitrust liability to the principal is to provide an additional mechanism for deterring antitrust violations. The Court has created a powerful incentive for nonprofit organizations to institute procedures to review the conduct of their agents. It is likely that a number of professional organizations, such as the American Medical Association and the American Bar Association, will institute procedures to more carefully review their members' actions.

A question remains as to how far the Court's rationale will be extended. As the dissent pointed out, the Court emphasized that ASME is a standard-setting organization, yet did not limit its rationale to those particular organizations. Reading the Court's decision broadly, it can be interpreted as extending liability to all types of nonprofit organizations, including professional, charitable, educational, and religious groups. The only indication to date of the scope of the Court's holding is the recent decision in NAACP v. Claiborne Hardware Co. In that case, the Court stated that the National Association for the Advancement of Colored People, like any other organization, could be held responsible for the nationwide acts of its agents that were undertaken within the scope of their actual or apparent authority.

The Court's ASME decision is one of the most important of the term. The Court applied the apparent authority theory of antitrust liability to professional associations for the first time, thereby providing a new mechanism to regulate such organizations' activities. This case held that a nonprofit standard-setting association is liable for the antitrust violations of its agents acting within the scope of their apparent authority.

72. 102 S. Ct. at 1945.
73. Id.
74. 102 S. Ct. 3409 (1982).
75. Id. at 3435. In NAACP v. Claiborne Hardware Co., the organization was sued by white merchants for injunctive relief and damages suffered as a result of an NAACP boycott. The Court cited ASME in discussing the apparent authority theory, but refused to impose liability on the NAACP, claiming that there was no finding that the agent in question had actual or apparent authority from the NAACP to commit acts of violence. Id.
It also established that the apparent authority theory is consistent with the congressional intent behind the antitrust laws to encourage competitions.\textsuperscript{76}

The ramifications of ASME's expansion of antitrust liability are not entirely clear. The Court has yet to address the question of whether this new theory of antitrust liability will affect the factors that are applied to determine whether an agent has acted within the scope of his apparent authority.

\textit{Elizabeth Smith}

\textsuperscript{76} A final element of the Court's holding is that treble damages are not punitive, since they were designed in part to deter future antitrust violations. 102 S. Ct. at 1947.

Defendant, Paul Ferber, a Manhattan adult bookstore owner, sold to New York undercover agents two films depicting young boys masturbating. Ferber was subsequently indicted for violating two New York Penal Laws: section 263.10, prohibiting the promotion of an obscene sexual performance by a child, and section 263.15, prohibiting the promotion of a performance, not necessarily obscene, of a child engaged in a sexual act.

Prior to trial, Ferber moved to have the charges dismissed, on the grounds that the statute was unconstitutional. The motion was denied. Ferber was acquitted of violating New York Penal Law section 263.10 after the jury found the films pornographic but not obscene. The jury found the defendant guilty, however, of violating the broader anti-child pornography statute of section 263.15.

The Appellate Division of the New York Supreme Court affirmed the conviction without a written opinion. The New York Court of Appeals reversed, finding section 263.15 both overinclusive and underinclusive and thus violative of the
free speech protections provided for in the first amendment.\textsuperscript{8} The court of appeals found the statute overinclusive because it prohibited the promotion of medical or educational materials depicting children performing sexual acts which are protected by the first amendment\textsuperscript{9} as well as the promotion of commercial child pornography. In addition, the statute not only affected children of the state of New York, but also out-of-state and foreign children by potentially prohibiting films made outside of New York. Thus, the court of appeals held that the New York State Legislature exceeded its power by failing to pursue only the protection of New York children.\textsuperscript{10}

The court of appeals found that the means used to pursue the protection of youthful performers in film was not expansive enough and therefore the statute was found underinclusive.\textsuperscript{11} The court of appeals reasoned that for the legislature to properly pursue the ends sought, the legislature should have also prohibited the promotion of films which exposed a child actor to dangers other than sexual abuse, such as a film which employed a child in a dangerous stunt.\textsuperscript{12}

The United States Supreme Court reversed the New York Court of Appeals and upheld the conviction of the defendant, holding that the statute did not violate the first amendment.\textsuperscript{13} The Court found that the statute was neither overbroad nor underinclusive and that child pornography, obscene or not, was not entitled to first amendment protection.\textsuperscript{14} Consequently, the United States Supreme Court granted greater latitude to the states in formulating regulations concerning child pornography.

\textsuperscript{8} The first amendment states, in pertinent part: "Congress shall make no law \ldots\ abridging the freedom of Speech. \ldots." U.S. Const. amend. I.

\textsuperscript{9} 52 N.Y.2d at 676, 422 N.E.2d at 525.

\textsuperscript{10} The New York Court of Appeals indicated that only the protection of the children of New York was a legitimate state interest. "To the extent the statute would purport to regulate the sexual performances of children throughout the world, there is some question as to whether that goal, however commendable, necessarily comes within the police powers of the State of New York." Id. at 677, 422 N.E.2d at 526.

\textsuperscript{11} Id.

\textsuperscript{12} Id.


\textsuperscript{14} Id. at 3348-50, 3358, 3360, 3363.
The Supreme Court found five reasons for granting greater latitude to the states in barring the promotion of child pornography. First, the Supreme Court recognized that a state has a compelling interest in protecting the physical and mental health of a child. The Court deferred to the legislative finding that child pornography harms a child's physical, emotional, and mental health. The detrimental effects resulting from the use of children in pornography cited by the Court included: 1) the children's failure to develop healthy affectionate relationships in later life, 2) the development of sexual dysfunctions in these children, 3) the creation of a tendency in these children to become sexual abusers as adults, 4) the sexual molestation inflicted on these children by their adult employers, and 5) the invasion of the children's privacy. Thus, the Court concluded that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." Secondly, the Supreme Court found that the state could control the distribution of child pornography, because such distribution contributes to the sexual abuse of a child in at least two ways. First, the materials produced leave a permanent record of the child's participation in sexual activity. Consequently, a child may be hounded for life with a pictorial record of his misdeed. Second, the distribution of child pornography provides a conduit for the marketing of a product that involves the sexual abuse of a child. Therefore, the Court concluded that "drying up" the market, by "imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product" was the most effective means of preventing the abuse of children through child pornography.

15. The Court cited past decisions upholding the validity of laws aimed at the protection of children, despite potential infringements on constitutional rights. For example, in Prince v. Massachusetts, 321 U.S. 158, 168 (1943), the Court validated a Massachusetts statute prohibiting the use of children in disseminating literature on the street, despite possible infringements of First Amendment rights. In Ginsberg v. New York, 390 U.S. 629 (1968), the Supreme Court upheld a New York law protecting children from exposure to nonobscene literature. See 102 S. Ct. at 3354-55.

16. 102 S. Ct. at 3354.
17. 102 S. Ct. at 3355 nn.9-10.
18. Id. at 3355.
19. Id. at 3355-56.
20. Id.
21. Id. at 3356.
The Supreme Court further rejected the defendant's argument that the distribution of only obscene material, as defined in *Miller v. California*, should be prohibited, in order to achieve the legislative purpose of protecting child actors from sexual abuse and still remain within the realm of constitutionality. The *Miller* Court determined that a film was obscene and thus without first amendment protection if the work appealed to the prurient interest of an average person applying contemporary community standards, the work was patently offensive, and the work lacked serious literary, artistic, political, or scientific value. The Court found that the legislative purpose would not be satisfied by applying the statute only to films which met the *Miller* test for obscenity, because a film not found to be obscene may have nevertheless sexually abused a child actor in its production.

The third justification advanced by the Court was that state regulation of child pornography dissemination would be an effective method of eliminating the "economic motive" for the illegal activity of child pornography production. Additionally, the Court found little if any social value in child pornography. Finally, the Court found that holding child pornography to be an expression outside the first amendment was consistent with the past decisions.

The Supreme Court, however, found that there were limits as to what constitutes a valid statute proscribing child pornography. First, the statute must adequately describe the conduct prohibited, and whether the conduct to be proscribed is the production, processing, or distribution of the prohibited

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23. *Id.* at 24.
24. The Supreme Court held that application of the *Miller* test failed to pursue the state's interest in protecting a child from sexual abuse, because a work may not appeal to the "prurient interest" nor be "patently offensive" and still physically or psychologically harm the child in the production of the work. The Court also argued that even serious literary, artistic, and political works may nevertheless involve sexual abuse of the child. 102 S. Ct. at 3356-57.
25. *Id.* at 3357.
26. The Court considered it unlikely that literary, scientific, or artistic works would involve depictions of children performing sexual acts. The Court proposed that should there be any value in depicting children engaged in sexual activity, then the alternative of using "a person over the statutory age who perhaps looked younger" could be pursued. *Id.* at 3357.
27. *See infra* notes 39-41 and accompanying text.
material. Furthermore, the statute must adequately define the types of sexual acts which, if depicted in the offensive material, would place the material under the sanctions imposed by the statute. Section 263.15 was found to meet these requirements.

The Court overruled the New York Court of Appeals' finding that the statute was underinclusive by prohibiting only material which exposed children to the dangers of sexual abuse, but not other kinds of films which exposed children to other dangers. Since child pornography is an unprotected form of expression, the Court held that there was nothing underinclusive about prohibiting only that form of offensive expression.

The Supreme Court also addressed the New York Court of Appeals' argument that section 263.15 was overinclusive because it potentially banned the distribution of out-of-state and foreign films utilizing children in sexual performances. The Supreme Court pointed out that it is often impossible to determine where a particular pornographic film was produced, while the goal of ending any economic incentives in the production of child pornography can best be met by drying up the entire market. Accordingly, the Supreme Court held that a state could prohibit the promotion of out-of-state as well as foreign child pornography.

28. 102 S. Ct. at 3358.
29. Id. at 3358.
30. Section 263.15 met the limits set by the Supreme Court as a valid statute, because it properly defined the conduct proscribed as the direction, production, or promotion of "any play, motion picture, photograph or dance . . . or other visual representation . . . ." N.Y. PENAL LAW § 263.4 (McKinney 1980). The second limit imposed by the Supreme Court was also met, because the statute properly described the sexual conduct to be forbidden as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse or lewd exhibition of the genitals." N.Y. PENAL LAW § 263.3 (McKinney 1980). See 102 S. Ct. at 3358.
31. The New York Court of Appeals relied on Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), in holding that § 263.15 was underinclusive by not banning other films which exposed children to other dangers. In Erznoznik, the Supreme Court invalidated a law which banned films showing nudity to prevent distraction of nearby traffic, but failed to ban other types of films which posed similar hazards to traffic. The Supreme Court in Ferber distinguished Erznoznik in that nudity may have been a protected form of expression, child pornography is not. 102 S. Ct. at 3359 n.18.
32. See supra note 10 and accompanying text.
33. 102 S. Ct. at 3359 n.19.
34. Id. at 3350, 3359.
Although the New York Court of Appeals held the statute was overbroad in that it proscribed the distribution of material depicting children engaged in sexual acts which possessed literary, scientific, or educational merit, the Supreme Court did not find it to be overbroad. While the defendant did not claim that the subject matter leading to his conviction possessed literary, scientific, or educational merit, the Supreme Court nevertheless allowed him to attack the constitutionality of the statute on this potential overbreadth. The Court thereby reaffirmed the first amendment overbreadth doctrine, an exception to the general principle that a defendant normally cannot attack a statute because in other situations it may be unconstitutionally applied.

The Court reaffirmed its decision in *Broadrick v. Oklahoma,* by holding that a statute must be "substantially" overbroad to be invalid under the first amendment overbreadth doctrine. The Supreme Court held in *Ferber* that no substantial overbreadth existed. The legitimate applications of the statute greatly outweigh those few situations in which the statute may be unconstitutionally applied, and whatever overbreadth existed would be cured on a case-by-case basis.

The *New York v. Ferber* decision has extended the category of forms of expression not protected by the first amendment. The Supreme Court has held that fraudulent, libelous, or slanderous publications of non-political officers or candidates are not protected under the first amendment. In *Miller v. California,* the Supreme Court held that obscene films, books, or pictures are also without first amendment pro-

36. *See supra* notes 32-34 and accompanying text.
39. 102 S. Ct. at 3362. See 413 U.S. at 610.
40. 102 S. Ct. at 3363.
41. "[W]e seriously doubt . . . that [the] arguably impermissible applications of the statute," such as the prosecution of publishers of medical textbooks portraying children engaged in sexual activity, "amount to more than a tiny fraction of the materials within the statute's reach." 102 S. Ct. at 3363.
43. 413 U.S. at 15.
tection. Ferber has inserted the depiction of children engaged in sexual activity, whether obscene or not into the category of unprotected speech.

This decision now possibly validates similar statutes in nineteen other states which also make the distribution or production of material depicting children engaged in sexual acts, whether obscene or not, an illegal activity. While California only proscribes the distribution of obscene material depicting children engaged in sexual acts, a recently enacted California statute makes it illegal to process a film or videotape, obscene or not, which portrays a child under fourteen years of age engaged in specified sexual conduct. This statute probably meets the limits outlined by the Supreme Court for a constitutionally permissible statute by specifying the type of conduct proscribed, as well as the type of sexual acts which, if depicted being performed by a child, places the material under the statute’s sanctions.


46. Cal. Penal Code § 311.3 (West Supp. 1982) provides that a person is guilty of sexually exploiting a child under fourteen years old when he or she processes a film, photograph, or videotape of the child engaged in a sexual act. Punishment is by a fine up to $2,000 or by imprisonment for no more than one year.

47. Section 311.3 of the California Penal Code would probably satisfy the limits set forth by the Supreme Court for a valid statute, because it adequately defines the sexual conduct not to be portrayed by children as follows: “[S]exual intercourse, including genital-genital, oral-genital, anal-genital, or oral-oral, whether between persons of the same or opposite sex or between humans and animals; penetration of the vagina or rectum by any object; masturbation . . . ; sadomasochistic abuse . . . ; exhibition of the genitals . . . for the purpose of sexual stimulations of the viewer; defecation or urination . . . .” Cal. Penal Code § 311.3 (West Supp. 1982). The California statute also adequately defines the conduct to be prohibited as the knowing developing, duplicating, printing, exchanging, of any such film, photograph, videotape, negative, or slide. Id.
The issue of whether serious art, literary, or educational materials which depict children engaged in sexual activity can constitutionally be proscribed remains unsettled. In *Miller v. California*, the Supreme Court held that a work of serious artistic, scientific, or literary substance may partially fall under the *Miller* standard of obscenity, but such material remains protected by the first amendment. In fact, the obscenity standard in *Miller* explicitly excludes such socially acceptable forms of expression from the very definition of obscenity.

In spite of *Miller*, four Supreme Court Justices, Burger, Powell, Rehnquist, and White, all of whom joined the majorities in both *Miller* and *Ferber*, did not explicitly include such socially desirable material within first amendment protection when the material contains depictions of children engaged in sexual acts. Because of this either purposeful or nonpurposeful exclusion of socially desirable material from specific protection under the first amendment, both Justice Brennan and Justice Stevens stated in their concurring opinions that they definitely would not leave such material out of the realm of first amendment protection.

In his concurring opinion, Justice Brennan, with whom Justice Marshall joined, argued that the application of section 263.15 of the New York Penal Law to materials with "serious literary, artistic, scientific or medical value," which nevertheless depicted children engaged in sexual acts, "would violate the First Amendment." Justice Brennan pointed out that serious contributions to art, literature, or science possess much more than the slight social value to be found in mere pornography. Justice Brennan also argued that the harms inflicted on a child in the production of pornography would not neces-

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48. It is interesting to note that the scope of CAL. PENAL CODE § 311.3 excludes "legitimate medical, scientific, or educational activities" from its sanctions, probably to avoid possible overbreadth by prohibiting potentially constitutionally protected materials.

49. 413 U.S. at 15.

50. See supra note 23 and accompanying text.

51. Hinting that works of serious art, literature, or science may not be protected under the first amendment, the Court wrote that such material "may nevertheless embody the hardest core of child pornography." The Court also quoted New York Assemblyperson Lasher stating that a child may be sexually abused in the production of such materials. 102 S. Ct. at 3357.

52. Id. at 3365-66.

53. Id. at 3365 (Brennan, J., concurring).

54. Id. at 3365.
sarily be inflicted upon a child in the production of serious art or scientific material.\textsuperscript{56}

Justice Stevens went even further by arguing that not only may serious art, literature, or educational materials portraying children in sexual activities remain protected materials, but so may the pornographic film at issue here depending upon its use.\textsuperscript{56} Justice Stevens advocated a case-by-case approach to determine if the subject material merits first amendment protection. A court, according to Justice Stevens, would look to the "content and context" of the offending material to determine if it warrants first amendment protection.\textsuperscript{57}

In her concurring opinion, Justice O'Connor did not indicate whether she would confer first amendment protection to serious art, literature, or educational works if it contained depictions of children engaged in sexual activity. While Justice O'Connor joined in Justice White's majority opinion, she also stated in her concurring opinion that the statute may indeed be overbroad by banning depictions of serious, socially desirable works, but she stressed that the Court's decision in \textit{Ferber} conceded only that such potential overbreadth was not substantial enough to warrant invalidating the statute on its face.\textsuperscript{56} Justice O'Connor leaves open the issue of whether socially desirable material containing children engaged in sexual activity is protected under the first amendment.\textsuperscript{59}

In conclusion, \textit{New York v. Ferber} held that a state possesses great latitude in pursuing its compelling interest of protecting its children from abuse and thus can proscribe child pornography. The Supreme Court considered that child pornography possesses little if any social value, and therefore is not a form of expression protected by the first amendment.

\textsuperscript{55} Id.
\textsuperscript{56} Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavior problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection.
\textsuperscript{57} Id. at 3366 (Stevens, J., concurring).
\textsuperscript{58} Id. at 3364 (O'Connor, J., concurring).
\textsuperscript{59} See supra text accompanying notes 15-27.
Further, the Court held that a statute prohibiting child pornography is neither underinclusive for banning only pornographic films as opposed to other types of films which may endanger children in other ways, nor overbroad if it potentially bans material considered to possess artistic, literary, educational, or scientific value.\textsuperscript{60} The prohibition of out-of-state and foreign child pornography will also not render such a statute overinclusive.\textsuperscript{61} Finally, such a statute remains valid so long as it stays within the twin limits of adequately defining the conduct to be forbidden and adequately describing the sexual acts which, if depicted as performed by children, would place the material under its sanctions.\textsuperscript{62} What remains to be answered is the extent to which a state may regulate socially desirable material without violating first amendment constitutional protections.

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\textsuperscript{60} See supra text accompanying notes 31 & 35-37.
\textsuperscript{61} See supra text accompanying notes 32-34.
\textsuperscript{62} See supra text accompanying note 30.

Respondent A. Ernest Fitzgerald was dismissed in January 1970 from his job as a management analyst with the Department of the Air Force. The reasons given for his dismissal were a departmental reorganization and a reduction in work force. Believing that his dismissal was an unlawful retaliation for his testimony before a Congressional subcommittee, Fitzgerald exhausted his administrative remedies to no avail. He subsequently filed suit in the United States District Court for the District of Columbia, naming as defendants a number of government officials including President Richard M. Nixon and White House aides Bryce Harlow and Alexander Butterfield.

Denying defendants’ motion for summary judgment, the district court ruled that Fitzgerald had stated three triable causes of action under 5 U.S.C. section 7211, 4 18 U.S.C. sec-

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2. In late 1968, Fitzgerald had testified before a Congressional subcommittee that cost-overruns on the C-5A transport plane were expected to reach approximately two billion dollars. Id. at 2694 (citing Economics of Military Procurement: Hearings Before the Subcommittee on Economy in Government of the Joint Economic Comm., 90th Cong., 2d Sess. 199-201 (1968-69)).
3. Fitzgerald complained to the Civil Service Commission which ruled that his dismissal had not been in compliance with Civil Service regulations and recommended reinstatement. The Commission, however, did not agree that Fitzgerald’s dismissal had been retaliatory in nature. Id. at 2696.
5. Section 7211 provides: "The right of employees, individually or collectively, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." 5 U.S.C. § 7211 (Supp. IV 1980).
tion 1505, and the first amendment to the Constitution. In addition, the court ruled that Nixon was not entitled to claim absolute immunity. The court of appeals dismissed summarily a collateral appeal regarding the immunity issue.

On appeal to the United States Supreme Court, the Court held: (1) Nixon, as a former President of the United States, is entitled to absolute immunity from damages liability for acts committed within his official duties, and (2) this immunity extends to all acts within the "outer perimeter" of his duties of office.

The Court began by discussing the doctrine of immunity as applied to government officials. Historically, government officials engaged in official duties have enjoyed some form of immunity from civil liability suits. In *Spalding v. Vilas*, the Court held that in a suit for damages against the Postmaster General for acts falling within the ambit of his authority, the "interests of the people" necessitated a grant of absolute immunity. The justification for granting this absolute immunity was that the "proper and effective administration of public affairs" would be crippled if executive officials were restrained in their duties by fear of possible damages liability.

The Court next examined the scope of immunity available to state legislators and observed that following the passage of 42 U.S.C. section 1983, the immunity traditionally afforded state legislators at common law remained unchanged. State executive officials who are sued for constitutional rights

6. Section 1505 generally makes it a crime, punishable by not more than $5,000 or imprisonment for not more than 5 years, or both, to obstruct Congressional testimony. 18 U.S.C. § 1505 (1976).
7. "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances." U.S. Const. amend. I.
9. 102 S. Ct. at 2897.
10. 102 S. Ct. at 2701, 2705.
12. Id. at 498.
13. 102 S. Ct. at 2699 (quoting Spalding v. Vilas, 161 U.S. 483, 498 (1896)).
15. 102 S. Ct. at 2699 (citing Tenny v. Brandhove, 341 U.S. 367, 376 (1951)).
violations under section 1983, however, are entitled to only a qualified immunity.\textsuperscript{16} The Court found that state executive officials possessed a "good faith" immunity when charged with section 1983 violations. Referring to its decision in Scheuer v. Rhodes, the Court remarked:

Balancing the purposes of § 1983 against the imperatives of public policy, the Court held that "in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based."\textsuperscript{17}

Subsequent cases, the Court points out, have construed Scheuer to mean that most executive officers have an immunity defense qualified by the nature and range of their official duties, while officials with especially sensitive duties such as judges and prosecutors, require a grant of absolute immunity.\textsuperscript{18}

Following its discussion of cases in which violations of section 1983 were alleged, the Court then went on to consider cases in which direct constitutional violations were alleged. In Butz v. Economou,\textsuperscript{19} the applicability of absolute immunity for federal executive officials sued for constitutional violations was rejected because it would be inconsistent to give qualified immunity to state executive officials but to grant absolute immunity to federal officials. Hence, for purposes of immunity law, there should be no distinction between suits brought under section 1983 against state officials and suits alleging constitutional violations brought against federal officials. But, the Court noted, absolute immunity may be appropriate in certain cases for officials whose functions are analogous to

\textsuperscript{16} With respect to the basis of qualified immunity, the Court has stated: "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

\textsuperscript{17} 102 S. Ct. at 2700 (quoting Scheuer v. Rhodes, 416 U.S. 232, 247 (1974)).


\textsuperscript{19} 438 U.S. 478 (1978).
judges and prosecutors.\textsuperscript{20}

The Court then changed its focus from considerations of precedent to the approach it would take in the instant case. Recognizing that immunity law has been shaped by the Constitution, federal statutes, history, and common law, the Court noted that because of the unique constitutional status of the President, policies and principles inapplicable to other government officials must be considered.\textsuperscript{21} A President should not be subjected to private lawsuits because his decisions concern matters likely to be controversial and it is in the public interest to provide him “the maximum ability to deal fearlessly and impartially with” the duties of his office.\textsuperscript{22}

The Court then briefly discussed how it has historically looked to the justifying purpose of the immunity when deciding the scope of immunity for a particular official. In so doing, the Court has usually extended an official’s absolute immunity to acts in the performance of particular functions of his office.\textsuperscript{23}

In the present case, the Court chose not to take this functional approach\textsuperscript{24} and instead held that the President has absolute immunity “from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”\textsuperscript{25} The Court feared that a functional approach would require determining which of the President’s many functions is involved in a particular action and thus lead to highly intrusive inquiries into the motives of the President. “Adoption of this construction thus would deprive absolute immunity of its intended effect.”\textsuperscript{26}

The Court noted that while its holding may appear to place the President “above the law,”\textsuperscript{27} the nation is not with-
out remedies for Presidential misconduct:

There remains the constitutional remedy of impeachment . . . . [T]he President is subjected to constant scrutiny by the press. Vigilant oversight by Congress may also serve to deter Presidential abuses of office, as well as to make credible the threat of impeachment. Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.28

Several questions remain unanswered following the view the Court has adopted in *Nixon v. Fitzgerald*. First and foremost is exactly how courts are to define this "outer perimeter" of Presidential responsibility. Although the Court acknowledges there are problems in the functional approach caused by the difficulties inherent in determining which function is involved in a particular action,29 the same difficulties are present if one attempts to determine whether a particular action is within the "outer perimeter" of a President's official responsibility. The Court's silence on the definition of the "outer perimeter" will inevitably result in more "intrusive inquiries," thereby defeating one of the Court's primary goals in *Fitzgerald*.

An additional question which merits attention is the viability of the checks on Presidential misconduct which the Court views as sufficient. Impeachment, for example, is available only for "treason, bribery, or other high crimes and misde-

28. *Id.* at 2706 (footnotes omitted).
29. *Id.* at 2705. But compare the fears the Court had in *Butz* and why adoption of a functional approach would tend to minimize those fears:

The extension of absolute immunity from damages liability to all federal executive officials would seriously erode the protection provided by basic constitutional guarantees. The broad authority possessed by these officials enables them to direct their subordinates to undertake a wide range of projects—including some which may infringe such important personal interests such as liberty, property, and free speech. It makes little sense to hold that a Government agent is liable for warrantless and forcible entry into a citizen's house . . . but that an official of higher rank who actually orders such a burglary is immune simply because of his greater authority. Indeed, the greater power of such officials affords a greater potential for . . . lawless conduct . . . . In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.

meanors." In cases such as Mr. Fitzgerald's, one would be hard-pressed to believe that Congress would institute impeachment proceedings as a remedy for Presidential misconduct.

Short of impeachment, Congress can apparently effectuate no legislation to curb potential abuses of power. The Court, in a footnote, remarks: "[O]ur holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress. We decide only this constitutional issue, which is necessary to disposition of the case before us." But because the Court grounds its decision in the Constitution, it appears unlikely that legislative action can contravene such a result. Because the Court wishes to avoid intrusive inquiries into Presidential motives, the question remains unanswered what, if any, checks the judiciary may have on Presidential abuse of power. Self-imposed restraints to which the Court refers may be the only checks that remain in existence after Fitzgerald and their efficacy is in doubt.

In Nixon v. Fitzgerald, the Court held that a President is entitled to absolute immunity from damages liability for acts within the "outer perimeter" of his official responsibility. Problems may arise when courts are to determine in a particular case where the "outer perimeter" of Presidential responsibility lies. The viability of checks including impeachment for Presidential abuse of power is questionable in cases where claims such as Mr. Fitzgerald's are presented.

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31. 102 S. Ct. at 2701 n.27.
32. In this respect, Chief Justice Burger in his concurrence and Justice White in his dissent are in agreement. Id. at 2709 n.7 (Burger, C.J. concurring) and 2712-13 n.4 (White, J., dissenting).
33. See supra text accompanying note 27.

Plaintiff Chavez-Salido, born in Mexico, had been a permanent legal resident of the United States since 1955. He received his formal education in California, including a Bachelor of Arts degree in Mexican-American Studies from California State University at Long Beach. In March 1975, Chavez-Salido applied for the position of Deputy Probation Officer II with the County of Los Angeles. This position required a minimum passing score of 70 on an oral examination. Chavez-Salido scored a 95 on the exam, and was placed on an eligibility list. Shortly thereafter, he was notified that an opening existed, but that he would be required to show proof of citizenship in order to secure the position. Although his citizenship application was pending, Chavez-Salido was denied employment. The denial was made pursuant to California Government Code section 1031(a), which requires peace officers to be citizens, and section 830.5 of the California Penal Code.

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1. CAL. GOV'T CODE § 1031(a) (West 1980). That section provides that a peace officer must be at least 18 years old, fingerprinted, of good moral character, a high school graduate (or the equivalent thereof), physically and mentally healthy, and a citizen of the United States. Originally, only four positions were granted peace officer status: sheriff, policeman, marshall and constable. See Hetherington v. California State Personnel Bd., 82 Cal. App. 3d 582, 597, 147 Cal. Rptr. 300, 309 (1978). Subsequently, the California legislature embarked on a piecemeal approach in adding to the list. In 1961 section 1031 was passed requiring mandatory citizenship for those the legislature had deemed to be peace officers. See Chavez-Salido v. Cabell, 490 F. Supp. 984, 986 (1980).

2. CAL. PENAL CODE § 830.5 (West 1970 & Supp. 1982). Various subsections under California Penal Code section 830 provide a long list of positions classified as peace officers or having the powers thereof. See Chavez-Salido v. Cabell, 427 F. Supp. 158, 169-70 n.22 (1977). These positions range from important law enforcement personnel, such as sheriffs and members of the National Guard, to positions having menial duties such as inspectors of the Bureau of Furniture and Bedding Inspection, sealers of the Department of Weights and Measures, and messengers of the State Treasurer's Office.
which categorizes probation officers as peace officers.

Chavez-Salido was later offered and accepted the position of Deputy Probation Officer Trainee, which did not require citizenship status. In March 1975 his citizenship petition was granted, but by that time his name had been removed from the eligibility list for the Officer II position. He was later promoted to Deputy Probation Officer I, a job of lesser status than the Officer II position but which also required a showing of citizenship.

Plaintiff Ybarra, born in Spain, had been a permanent resident alien since 1972. He completed undergraduate work in Spain, received a Masters of Arts in African Studies from the University of California at Los Angeles, and was pursuing another graduate degree in sociology at California State University at Long Beach. He had not applied for citizenship. Ybarra initially applied for all three probation officer positions, and scored 70 on the competency exam. Although a job opening existed in the Deputy I category, he was denied employment solely on the basis of the statutory citizenship requirement.

Plaintiff Bohorquez, a permanent resident alien since 1961, was born in Columbia. He earned a Bachelor of Arts in Latin American Studies from the University of California at Los Angeles. Bohorquez was told during his examination for the probation officer positions, that he could not secure either the Deputy I or Deputy II position because he lacked proof of citizenship. He subsequently received notice that he failed the exam, and did not appeal the result after being told by County employees that because he was not a citizen, his appeal would be useless.

Plaintiffs filed suit seeking declaratory judgment that California Government Code section 1031(a) was unconstitutional, and seeking injunctive relief, money damages, and attorneys fees. Plaintiff Chavez-Salido sought an order requiring his appointment to the Deputy II position and damages in the form of back pay. Plaintiff Ybarra sought to be appointed to the Deputy I position and retroactive pay, and Plaintiff Bohorquez sought the opportunity to retake the examination.

Plaintiffs challenged section 1031(a) under the equal protection clause of the fourteenth amendment and sections 1981
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and 1983 of the Civil Rights Act,\(^3\) claiming unlawful discrimination based on alienage.\(^4\)

The District Court for the Central District of California decided in 1977 that the statutory citizenship requirement was unconstitutional on equal protection grounds, both on its face and as applied.\(^5\) On direct appeal, the Supreme Court vacated and remanded the decision for further consideration in light of two of the Court's recent decisions: *Foley v. Connellie*,\(^6\) decided in 1978, which upheld a New York law excluding aliens from the position of State Police Trooper, and its 1979 decision, *Ambach v. Norwich*,\(^7\) which upheld the constitutionality of a New York law barring noncitizens from teaching in the public schools. On remand, the district court followed its original decision that section 1031(a) was unconstitutional, finding that the intervening Supreme Court decisions did not undermine the requirement that citizenship could only be imposed by means of a statute that was narrowly drawn.\(^8\) On direct appeal, the Supreme Court reversed, holding that alien classifications "need not be precise; there need only be a substantial fit."\(^9\)

The majority opinion clearly articulated two sub-classes and a two-tiered standard of review which will be applied to alien classifications. The Court held that statutes primarily affecting aliens' economic interests were subject to heightened judicial review, but in cases where a statute's restrictions

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4. Additionally, the complaint charged that section 1031(a) unconstitutionally infringed on the plaintiffs' right to travel and upon congressional power to regulate aliens. Chavez-Salido v. Cabell, 427 F. Supp. 158, 161 (1977).

5. *Id.* at 171-72.


serve a state’s interest in establishing its own form of government, a lesser standard of review will be applied. Thus, in reaffirming that a rational relationship standard was adhered to in Foley and Ambach and will be appropriate in the future, the Court reaffirmed and clarified that alienage classifications will receive strict review when regulations attempt to retain certain economic benefits for citizens only.

In articulating the lesser standard of review to be applied where a statute serves a political function, the majority expanded on the Court’s notions developed in Sugarman v. Dougall. In Sugarman, the Court invalidated a blanket disqualification of aliens for state civil service employment. The majority interpreted Sugarman as requiring a two step analysis to be used to determine whether a particular restriction on legal resident aliens would be valid. First, the specificity of the classification would be analyzed, with a focus on whether or not it was over or underinclusive. Second, the Court would examine the nature of the position for which it was asserted that a citizenship requirement was necessary. Citing Sugarman, the majority noted that a restriction was valid only if it was tailored to “persons holding state elective, legislative and judicial positions” that “[went] to the heart of the representative government.”

Applying the lesser standard of review, the majority concluded that the citizenship requirement of California Government Code section 1031(a) was not overinclusive. The Court rejected plaintiffs’ assertion that the requirement was overly broad because it encompassed seventy positions that had been classified as peace officers, a number of which could not be regarded as members of the “political community.” Thus, in applying the Sugarman standard, the Court applied a mere rational relationship level of review. It gave a strong pre-

10. Id. at 739.
12. Id. at 646.
13. 102 S. Ct. at 740.
14. Id.
15. Id.
16. Id. (quoting Sugarman v. Dougall, 413 U.S. at 647).
17. 102 S. Ct. at 741-42.
18. Id. at 740-41. See supra text accompanying note 2.
19. The theory of rationality governs the relationship of the governmental means to the governmental ends. The test assumes that statutes have a legitimate
summation of validity to the statute by admitting that the review entailed only a "casual reading" of the Code. The majority found that the district court was incorrect in assuming that if the statute was overinclusive at all it could not stand.

The Court reasoned that the statute was sufficiently tailored to withstand the lesser standard of review articulated in Sugarman, in that the "questionable classifications were relatively few in number," and that the unifying character of all categories of peace officers was their law enforcement function.

The majority further rejected plaintiffs' argument that section 1031(a) was underinclusive because it failed to include all positions that performed peace officer functions and that it failed to include other positions in the judiciary that performed functions similar to those of a probation officer. Even though the majority stated that underinclusiveness would be part of the criteria of the rational relationship review, it treated such an argument summarily. The majority noted that unlike Sugarman, which dealt with a broad statutory disqualification, section 1031(a) dealt with the limited category of peace officer. Underinclusiveness, therefore, was

public purpose that carries with it a strong presumption of validity. The means employed by the state must only be rationally related to the presumed legitimate public purpose. The Burger Court has invalidated more statutes under the rational relationship standard than preceding Courts, but in these cases, the means adopted by the state appear to be capricious. See, e.g., Weinberger v. Weisenfeld, 420 U.S. 636 (1975) (social security benefits denied to widowers); Eisenstadt v. Baird, 405 U.S. 438 (1972) (criminal sanctions for distributing contraceptives to unmarried persons); Stanley v. Illinois, 405 U.S. 645 (1972) (upon the death of the mother, children of unwed fathers became wards of the state); Reed v. Reed, 404 U.S. 71 (1971) (male relatives of deceased automatically selected for estate administration).

20. 102 S. Ct. at 741.
21. Id.
22. 102 S. Ct. at 742 n.10. After this litigation began, the California legislature twice amended sections of the Penal Code adding a substantial number of other positions and deleting a few others from that list. Notably deleted were toll service employees, inspectors with the Bureau of Livestock, and cemetery sextons. See Chavez-Salido v. Cabell, 490 F. Supp. 984, 986-87 n.6 (1980).
23. 102 S. Ct. at 741.
24. Id. at 742-43 n.12. In support of their underinclusive argument, the plaintiffs noted that California gives to arrest to a number of public employees who are not peace officers, but does not require such employees to be citizens. Cal. Penal Code § 830.7 (West 1970 & Supp. 1982) (describing persons who are not peace officers but have the power to arrest). It was also argued that any private person, including permanent resident aliens, have the power to arrest. Cal. Penal Code § 837 (West 1970 & Supp. 1982).
25. 102 S. Ct. at 742 n.12. The majority treated this argument in a footnote.
relevant only in terms of that specific category. The majority concluded that because there were only two categories of positions that possessed the unifying feature of the arrest power that had not been included in the peace officer category, the statute was not underinclusive.\(^26\)

The second step of the review process deemed by the majority to be required by *Sugarman* focused on the nature of the position in question. Following *Sugarman*, the Court noted that a valid citizenship requirement could be applied only to "persons holding state elective or important non-elective legislative and judicial positions" involving functions such as "participat[ion] directly in the formulation, operation or review of broad public policy."\(^27\)

The majority held that "*Foley* and *Ambach* did not describe the outer limits of permissible citizenship requirements."\(^28\) It further held that peace officers in general and deputy probation officers in particular fell within the group of public service positions which state and local governments could reserve for citizens.\(^29\) The majority reasoned that certain functions of peace officers and probation officers supported the finding that a citizenship requirement was valid. First, a peace officer "[partook] of the sovereign's power to exercise coercive force over the individual."\(^30\) Second, probation officers in particular had "discretion that must be exercised in the instance without direct supervision."\(^31\) Finally, a probation officer acted as "an extension of the judiciary's authority to set conditions of probation, and the executive's authority to coerce obedience to those conditions."\(^32\)

Although the Court did not indicate a determinative method of weighing and balancing these factors, in its analysis the majority places the greatest emphasis on probation officers' enforcement function. The Court found that California granted probation officers the power to arrest and release

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26. *Id.* The majority cited CAL. PENAL CODE § 803.7 (West 1970 & Supp. 1982) which gives the arrest power to non-peace officers such as security officers at institutions of higher education and certain individuals designated by a cemetery authority.
27. 102 S. Ct. at 740 (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).
28. 102 S. Ct. at 742.
29. *Id.* at 743.
30. *Id.*
31. *Id.*
32. *Id.*
those over whom they had jurisdiction. Further, the majority noted that probation officers exercised the State’s coercive force by having the power to determine whether to institute judicial proceedings against a minor and whether to release or detain offenders.

The majority placed further emphasis on the “importance of the governmental function as a factor giving substance to the concept of democratic self-government.” As an extension of the judiciary’s authority, the Court reasoned that probation officers symbolized the community’s control over those who violate the social order.

The significance of *Cabell v. Chavez-Salido* is best understood through an examination of prior Supreme Court rulings on alienage classifications. In *Graham v. Richardson*, the Burger Court explicitly stated that “classifications based on alienage, like those based on nationality or race are inherently suspect and subject to judicial scrutiny.” Subsequently, in a line of decisions, the Court struck down statutory discrimination against aliens by demanding strict scrutiny of the purported justification. It progressively reaffirmed judicial acknowledgement that alienage would be treated as a suspect classification. The Court formed no clear test for determining whether a class is suspect, but certain factors emerged from the decisions. These factors include historical disad-

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33. *Id.* (citing CAL. PENAL CODE §§ 830.5, 836 (West 1970 & Supp. 1982); §§ 1203.2, 1203.1(a) (West 1982)).
34. 102 S. Ct. 743 (citing CAL. WEL. & INST. CODE §§ 628, 653-54 (West 1972 & Supp. 1982)).
35. 102 S. Ct. at 740 n.7.
36. 403 U.S. 365 (1971). In *Graham*, the Court invalidated a state’s denial of welfare benefits to resident aliens. *Graham* signaled heightened judicial scrutiny by placing alien classifications within the review required where governmental action “is tainted by prejudice against discrete and insular minorities.” United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). The strict scrutiny test that has evolved from Carolene Products acknowledges that enactments that might suggest prejudice against selected discrete and insular minorities must be demonstrated to be necessary and precisely drawn to effectuate a compelling state interest. *See In re Griffiths*, 413 U.S. 717, 721-22 (1973).
37. 403 U.S. at 372.
38. *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1 (1977) (New York statute excluding aliens that had not applied for citizenship from receiving state educational aid held unconstitutional); Examining Bd. of Eng’rs v. Flores de Otero, 426 U.S. 572 (1976) (Puerto Rican statute banning aliens from practice of engineering held unconstitutional); *In re Griffiths*, 413 U.S. 717 (1973) (state’s exclusion of aliens from admission to the practice of law held unconstitutional).
vantage, relative lack of political representation, highly visible characteristics, and immutable characteristics. The fact that aliens are eligible for citizenship status supports an argument against suspect classification because their distinguishing characteristic is not immutable. Aliens, however, are politically powerless since they do not have the right to vote. Additionally, aliens have suffered economic and political discrimination of various kinds.

In Sugarman v. Dougall the Court carved out an exception to its blanket declaration in Graham that "scrutiny will not be so demanding where the state interest comes in." Sugarman limited the state interest to that authority's constitutional responsibility for establishing its own government. This responsibility includes setting citizenship requirements for an appropriately designated class of public office holder. The Sugarman holding appeared to require a mere rationality standard of review where political interests were involved. The majority, however, appeared to reinstate strict scrutiny when it declared that the restriction must be "narrowly confined." This choice of words by the Sugarman majority suggested the adoption of the "precisely drawn" means aspect of the strict scrutiny test.

The district court followed this language in its 1977 decision in Chavez-Salido and determined that California Government Code section 1031(a) and its mandatory citizenship requirements was overly broad. In the later cases of Foley v. Connelie and Ambach v. Norwich, however, the Supreme Court attempted to interpret the Sugarman exception as requiring a rational relationship standard. When Chavez-Salido was remanded following Foley and Ambach, the district court

41. 413 U.S. at 648.
42. Id. at 649.
43. Throughout the Sugarman decision, Justice Blackmun writing for the majority, uses the words narrow and precise interchangeably. E.g., id. at 643. This indiscriminate use of equal protection language evidences the Court's indecisiveness on classification issues that lead to confusion, as demonstrated by the Cabell case.
46. 441 U.S. 68 (1979).
found those cases to nonetheless require a narrowly drawn statute. The district court found that in Foley, the Supreme Court had reaffirmed the validity of strict scrutiny when it stated that "a state may not accomplish its goals by a citizenship restriction that sweeps indiscriminately." Further, the district court in Chavez-Salido found the statute in Foley requiring citizenship to be narrowly drawn in that it applied only to State Police Troopers of the New York State Police. Additionally, the district court found the statute in Ambach to be narrowly drawn because it applied only to persons employed to teach in New York public schools. In Chavez-Salido, however, the Supreme Court put an end to the debate surrounding the Sugarman dictum, Foley, and Ambach by applying the rational relationship standard of review to a broad-based statute.

In a terse dissent, Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, criticized the majority view because it "re[wrote] the Court's precedents, ignore[d] history, defie[d] common sense, and reinstate[d] the deadening mantle of state parochialism in public employment."

The dissent argued that Sugarman and its progeny required a strict standard of review for all alien classifications in which the means adopted by the state must be precisely drawn. The proper review initially required the state to demonstrate that it had historically reserved a particular position for its citizens as a matter of its "constitutional prerogative." The dissent was deeply troubled by the majority's superficial treatment of the history and purpose of section 1031(a).

The dissent found the statute to be underinclusive in two ways. First the dissent pointed out that the statute failed to include many judicial officers that perform duties similar to

48. Id. (quoting Foley v. Connellie, 435 U.S. at 296 n.5).
49. 490 F. Supp. at 986.
50. Id.
51. 102 S. Ct. at 743.
52. Id. at 744 (Blackmun, J., dissenting).
53. Id. at 745 (Blackmun, J., dissenting).
54. Id. at 749 (Blackmun, J., dissenting) (quoting Sugarman v. Dougall, 413 U.S. 634, 648 (1973)).
55. 102 S. Ct. at 746 (Blackmun, J., dissenting).
those performed by probation officers. In support of that argument the absurdity of mandating a citizenship requirement for probation officers was put into context of the judicial machine: "A criminal defendant in California may be represented at trial and on appeal by an alien attorney, have his case tried before an alien judge and appealed to an alien justice and then have his probation supervised by a county probation department headed by an alien."  

Secondly, the dissent argued that the statute failed to include all positions that perform peace officer functions: "The Court's hollow assertion that the legislature has reserved its sovereign coercive power for its citizens ignores the reality that the state has already bestowed some of these powers on private persons including aliens."  

Additionally, the dissent argued that the statute was fatally overinclusive; it barred aliens from a number of public positions where the state's proffered justification had little, if any, relevance. The dissent agreed with the lower court which found the statute to bar aliens from positions which could not "be considered members of the political community no matter how liberally that category [was] viewed."  

The dissent was further concerned that Foley and Ambach required a stronger determination to be made as to the amount of control and authority exercised by the position in question. Foley held that policemen must be citizens because they were clothed with what the majority there described as "plenary discretionary powers." Furthermore, Foley determined that police exercised a "pervasive presence in modern society." They also act "without prior judicial authority," which demands "very high degrees of judgment and discretion, the abuse or misuse of which may have a serious impact on individuals." As viewed by the dissent, probation officers did not perform anywhere near the duties required for

56. Id. at 747.
57. Id. at 750 (Blackmun, J., dissenting).
58. Id. at 749 (Blackmun, J., dissenting).
59. Id. at 747.
60. Id. at 747 (Blackmun, J., dissenting) (quoting Chavez-Salido v. Cabell, 490 F. Supp. 984, 987 (1980)).
61. 102 S. Ct. at 748 n.8 (Blackmun, J., dissenting).
63. Id.
64. 435 U.S. at 297-99.
a determination that their position "[went] to the heart of the representative government." A probation officer’s duties, the dissent reasoned, primarily involved investigation, recommendation, and advising the judiciary. All of these functions were performed within the ambit of narrowly proscribed statutory limitations. The dissent argued that to deem such functions as necessitating a citizenship requirement supported the prediction that judicial employees such as prison guards, bailiffs, and court clerks could be required by the Court in future cases to be citizens.

*Chavez-Salido* departed from past cases that dealt with alienage classifications used in state and local law. The majority attempted to end the debate surrounding the *Sugarman* dictum that certain narrowly confined alienage classifications would be deemed valid if they effectuated a substantial interest. The majority clarified and affirmed its prior holdings in *Foley* and *Ambach* by adhering to a minimum rationality standard of review for state action that discriminates against aliens where the goal is to preserve the political community.

However, the Court failed to closely examine the content and history of section 1031(a) and take those considerations into account. In sustaining a broad based statutory citizenship requirement, the Court actually set the level of review apart from *Foley* and *Ambach* which also purported to have applied a lesser measure of scrutiny.

Additionally, when the Court stated that *Foley* and *Ambach* did not set the outer limits of permissible citizenship requirements, and classified probation officers with police officers and teachers, it dramatically expanded the validity of discrimination in public employment. A probation officer’s functions differ significantly from those of a State Trooper or a school teacher. An examination of these positions reveals the approach the Court may have been taking to the new “outer limits” of citizenship requirements. One common function of teachers and State Troopers is that they deal with a

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65. 102 S. Ct. at 748 (quoting *Sugarman* v. *Dougall*, 413 U.S. at 647).
66. 102 S. Ct. at 750.
68. 102 S. Ct. at 750 (Blackmun, J., dissenting).
large section of the community. This element is lacking in the probation officer's position; the Court thus has narrowed the scope of required public contact. Furthermore, the nature and scope of required supervisory powers has been narrowed, given that the average offender receives between seven to nine minutes of consultation per week with a probation officer. The level of policy making power required of the position was further lowered by Chavez-Salido. As the dissent pointed out and the regulatory codes require, a probation officer's decisions are neither original nor final.

The sole characteristic that appears as a constant in the Court's decisions is the high level of coercive force exercised by the position in question. In Chavez-Salido the Court expanded on the unarticulated notion developed in Foley that any control by aliens over citizens is repugnant to citizens.

In summary, the Court has left open the possibility of expanding the categories of government jobs that may validly require citizenship status. It further leaves unanswered what the nature of the heightened review will be in cases that discriminate against aliens in the distribution of economic benefits. The majority fails to describe what this review will entail, but cites Graham as suggesting that aliens will retain their suspect class status for this purpose and for this purpose alone.

It is questionable how the subdivision of the suspect class standard of review will affect future decisions in alien and equal protection cases. The Court's retreat from the Graham pronouncement that aliens are a suspect class demonstrates a lack of judicial discipline to firmly establish and adhere to equal protection standards of review. The Court is now locked into a two-tiered level of analysis in which alienage classifications are deemed suspect, but not suspect enough to receive strict scrutiny at all times.

Lori A. Walth

69. Id. at 750 n.9 (Blackmun, J., dissenting) (citing the Federal Judicial Center, Probation Time Study 3 (February 26, 1973)).