

# CASENOTES

## CONSTITUTIONAL LAW—EQUAL PROTECTION FOURTEENTH AMENDMENT—STATE REQUIREMENT OF CITIZENSHIP TO BE PEACE OFFICER SUGARMAN EXCEPTION

### *Cabell v. Chavez-Salido*<sup>1</sup>

#### I. INTRODUCTION

Give me your tired, your poor,  
Your huddled masses yearning to breath free,  
The wretched refuse of your teeming shore;  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door.<sup>2</sup>

The United States is a nation of immigrants and their descendants. Their names and the names of their children and their children's children dot the history of the United States, for it was their labor and toil that built this country.<sup>3</sup>

Historically, the United States Supreme Court recognized that the protections of the fourteenth amendment extended to all persons within the territorial jurisdiction of the United States, including aliens.<sup>4</sup> The Court's

---

1. *Cabell v. Chavez-Salido*, 427 F. Supp. 158 (C.D. Cal. 1977), *aff'd*, 490 F. Supp. 984 (C.D. Cal. 1980), *rev'd*, 454 U.S. 432 (1982).

2. EMMA LAZARUS, *The Poems of Emma Lazarus* (1889), a poem affixed to the Statute of Liberty.

3. U.S. COMMISSION ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 1 (1980).

4. An alien is a foreign born person who has not qualified as a citizen of the country; but as an alien is a person within the meaning of the due process clause of the U.S. Const. to the same extent as a citizen. *Galvan v. Press*, 347 U.S. 522 (1954). See 8 U.S.C. § 1101(a)(3) (1976). The immigration laws distinguish between aliens admitted to the U.S. for a limited time—nonresident aliens—and those admitted for permanent residence. *Id.* at § 1101(a)(15). Unless otherwise specified, the discussion of aliens in this Note will refer to resident aliens. To become a permanent resident, an alien must obtain an immigrant visa by which he/she is "lawfully accorded the privilege of residing permanently in the U.S. as an immigrant in accordance with the immigration laws." *Id.* at § 1101(a)(20). A resident alien may live anywhere in the U.S. and engage in any activity permitted by law. *Id.* at § 1101(a)(15). After five years of residence in this country, most permanent aliens become eligible for citizenship. *Id.* at § 1427(a) For an alien whose spouse is already a U.S. citizen, the residency requirement is only three years. *Id.* at § 1430). Aliens are generally classified as either being "documented" or "undocumented". "A documented legally admitted alien is one who has documentation that he/she is legally in the U.S., or a person who is in the process of securing documentation from the U.S. Immigration Service, and the Service will state that the person is being processed and will be admitted with proper documentation." App. to Juris. Statement in NO. 80-7538, at 38. Undocumented aliens are often referred to as "illegal aliens" primarily due to their assumed unlawful immigration status in the U.S..

The term "illegal alien" should encompass only those individuals determined by the Immigration and Naturalization Service (INS) to have entered the U.S. illegally and presently under order of deportation. Conversely, an "undocumented alien" would include

decisions have established that classifications based on nationality or race are inherently suspect and subject to strict scrutiny.<sup>5</sup>

In recent years, the Court has employed the "political community" doctrine<sup>6</sup> to carve out exceptions to this strict scrutiny analysis, the effect of which is to denigrate the equal protection clause of the fourteenth amendment.<sup>7</sup> This note will examine this alarming trend, the Court's departure from the strict scrutiny standard of review for state statutory schemes which discriminate against aliens.

*Held:* a citizenship requirement is an appropriate limitation on those who exercise or symbolize the power of the political community.<sup>8</sup>

## II. BACKGROUND

### A. Equal Protection and Aliens

As early as 1886, the United States Supreme Court faced the question of whether the fourteenth amendment applied to aliens.<sup>9</sup> In *Yick Wo v. Hopkins*,<sup>10</sup> which has become the bulwark of constitutional protection for noncitizens,<sup>11</sup> a San Francisco ordinance required anyone operating a public laundry located in a wooden building to obtain a license from the city's Board of Supervisors. As a result, the two hundred license requests filed by Chinese aliens operating laundries were all denied.<sup>12</sup> The Court in *Yick Wo* recognized that the protections of the fourteenth amendment extended to all persons within the territorial jurisdiction of the United States,<sup>13</sup> including aliens permanently ineligible for citizenship.<sup>14</sup> The Court further held that the ordinance was arbitrary and discriminatory against one class and thus was unconstitutional as applied.<sup>15</sup>

In *Truax v. Raich*,<sup>16</sup> an Arizona statute prohibiting any employer of at least five people from having more than twenty per cent of his work force comprised of aliens was invalidated. William Truax employed nine workers, including seven aliens, one of which was the plaintiff, Mike Raich.

---

. . . all aliens not under order of deportation. This category would include, for example, aliens who do not have actual possession of proper entry papers due to loss or theft of their entry visa as well as aliens who are eligible for permanent residence status but have not applied for this status.

Letter from Mexican American Legal Defense and Educational Fund (MALDEF) to Hon. Evelle J. Younger, Attorney General of California (Sept. 5, 1978).

5. *Graham v. Richardson*, 403 U.S. 372 (1971).

6. See *Sugarman v. Dougall*, 413 U.S. 634 (1973).

7. "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the law." U.S. CONST. Amend. XIV, § 1.

8. *Chavez-Salido*, 454 U.S. at 446.

9. NOTE, *A New Direction in State Discrimination Against Aliens*, 8 CAP. U.L. REV. 169-82 (1978).

10. 118 U.S. 356 (1886).

11. HULL, *Resident Aliens and the Equal Protection Clause: The Burger Court's Retreat From Graham v. Richardson*, 47 BROOKLYN L. REV. 1 (1980).

12. *Yick Wo*, 118 U.S. at 374.

13. *Id.* at 369.

14. DeHaven, *Constitutional Law—Equal Protection—Aliens—State Restrictions on Employment*, 46 TENN. L. REV. 692, 694 (1979).

15. *Yick Wo*, 118 U.S. at 373.

16. *Truax v. Raich*, 239 U.S. 33 (1915).

Shortly after the statute was enacted, Raich was discharged.<sup>17</sup> In *Truax*, the state sought to justify this statute as an exercise of its power to make reasonable classifications in legislation to promote the health, safety, morals and welfare of those within its jurisdiction.<sup>18</sup> The Court relied on *Yick Wo* to invalidate the Arizona statute and expanded the protection of aliens to include the right to work for a living in the "common occupations of the community."<sup>19</sup> It concluded that without the ability to work, "the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words."<sup>20</sup>

While it struck down the Arizona statute as being unconstitutional, the *Truax* Court did recognize the state's power to limit to its citizens the enjoyment of the common property or resources of the people of the state.<sup>21</sup> The Court noted that it had previously upheld various state laws which restricted to citizens the privilege of planting oysters in the tidewater rivers of a state<sup>22</sup> and denied to aliens within a state the privilege of possessing a rifle and of shooting game within that state.<sup>23</sup> Since the state in this case sought only to protect citizens of the United States in their employment against non-citizens,<sup>24</sup> it failed to demonstrate a "special public interest" with respect to any particular business. Thus, the *Truax* Court intimated that in those cases where a "special public interest" can be shown, classifications against alienage will be justified.<sup>25</sup> Consequently, armed with the "special public interest" doctrine as expressed in *Truax*, states began to exclude aliens from a variety of activities and professions.<sup>26</sup>

Not until *Takahashi v. Fish and Game Commission*<sup>27</sup> did the Supreme Court alter its approach to statutes discriminating against aliens. The Court in *Takahashi* impliedly utilized the rational basis test—requiring states to show a rational basis or reasonable relationship to the proposed objective—in overturning a California statute which prohibited the issuance of fishing licenses to any person ineligible for citizenship.<sup>28</sup> California sought to up-

17. *Id.* at 36.

18. U.S. CONST. amend. X, reserves to the states powers not otherwise enumerated in the Const.. For cases upholding the state's right to exclude aliens from certain occupations based on the police, *See* *Ohio ex rel. Clarks v. Deckebach*, 274 U.S. 392, 397 (1927) (pool hall operation); *Tokaji v. State Bd. of Equalization*, 20 Cal. App. 2d. 612, 67 P.2d 1082 (Dist. Ct. App. 1937) (liquor license); *George B. Portland*, 114 Ore. 418, 235 P.681 (1925) (license to sell soft drinks).

19. *Truax*, 239 U.S. at 41. Though the Court did not define with precision what "common occupations of the community" were, it concerned itself with ordinary private enterprise, for which a state could have no legitimate reason for excluding aliens.

20. *Id.* at 41.

21. *Id.* at 39.

22. *McCready v. Virginia*, 94 U.S. 391, 396 (1876).

23. *Patson v. Pennsylvania*, 232 U.S. 138 (1914). *But see* *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) which rejects this contention, *infra*.

24. *Truax*, 239 U.S. at 39.

25. *See* cases cited in note 17 *supra*.

26. Having recognized the "special public interest" exception which allowed discrimination against aliens in areas of real property interests and protection of natural resources. *See supra* notes 17, 21, 23. This doctrine was further expanded by the Court in *People v. Crane*, 214 N.Y. 154, 108 N.E. 427 (1915), in which Judge Cardozo stated that "Whatever is a privilege rather than a right, may be made dependent upon citizenship." *Id.* at 164, 108 N.E. at 430. The U.S. Supreme Court affirmed Cardozo's conclusion in *Crane v. New York*, 239 U.S. 195 (1915). The doctrine was further applied by the Supreme Court in subsequent cases. *See supra* note 17.

27. *Takahashi*, 334 U.S. 410.

28. *Id.* at 421, *See also* *Employment Rights of Resident Aliens*, 19 ARIZ. L. REV. 409 (1977).

hold the challenged statute on the rationale that the provision fell within the "special public interest" doctrine.<sup>29</sup> Their contention was that "California owns the fish within three miles of its coast and as such had complete power to bar any or all aliens from fishing in the three-mile belt as a means of conserving the supply of fish."<sup>30</sup> The Court recognized that the statute was a direct outgrowth of the then prevalent anti-Japanese sentiment<sup>31</sup> and rejected the state's argument as being inadequate to justify the exclusion of all aliens.<sup>32</sup>

### B. *Strict Judicial Scrutiny of Alien Classifications*

In 1971, the Supreme Court recognized for the first time that aliens were a "discrete and insular" minority,<sup>33</sup> and as such, legislation discriminating against them should be examined with strict scrutiny.<sup>34</sup> The case of *Graham v. Richardson*<sup>35</sup> invalidated an Arizona statute denying welfare benefits to a resident alien.<sup>36</sup>

Relying on the fourteenth amendment's equal protection clause, the Court held that classifications based on alienage, like those based on race or national origin,<sup>37</sup> were inherently suspect and subject to close judicial scrutiny.<sup>38</sup> Again, the state sought to justify the statute solely on the basis of the state's "special public interest" in favoring its own citizens over aliens in the distribution of limited resources such as welfare benefits.<sup>39</sup> The Court rejected this argument as being inadequate<sup>40</sup> and thus held that the statute did not survive the strict scrutiny test.<sup>41</sup>

The Court subsequently used the strict scrutiny standard to strike down

29. See *supra* note 25.

30. *Takahashi*, 334 U.S. at 413.

31. See *id.* at 412 n.1, 422. Justice Murphy in his concurring opinion, described the California statute as being "the direct outgrowth of antagonism toward persons of Japanese ancestry" during World War II. See concurring opinion in *Oyama v. California*, 332 U.S. 633, 650, (1948) and dissenting opinion in *Korematsu v. United States*, 323 U.S. 214, 233 (1944).

32. *Id.* at 421.

33. *Carolene Products v. United States*, 304 U.S. 144 (1938). Justice Stone indicated that in the future "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Id.* at 152-53 n.4.

34. *Id.* The Court has traditionally used two tests in equal protection analysis for reviewing discriminatory state action. The first tier, commonly referred to at the "strict scrutiny" standard of review, is invoked when challenged state action involves a suspect class or impinges upon a constitutionally recognized fundamental right. It is the highest level of review and requires that the challenged state action be necessary to achieve a compelling state goal to survive the Court's scrutiny. The second tier is a more relaxed standard of review and requires mainly that the state action be rationally related to a legitimate state goal. See G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 670-84 (10th ed. 1980).

35. 403 U.S. 365 (1971).

36. *Id.* at 378.

37. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); see cases cited at note 30, *supra*.

38. *Graham*, 403 U.S. at 372.

39. *Id.* But see cases cited *supra* note 25.

40. *Id.* at 376.

41. *Id.* In *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). The Court first attempted to articulate fully the strict scrutiny test, whereby a state must prove a compelling state interest to override the exercise of a fundamental right or discrimination based on a suspect classification. See Maltz, *The Burger Court and Alienage Classifications*, 31 OKLA. L. REV. 671 (1978).

state laws excluding aliens from state civil service employment,<sup>42</sup> the practice of law,<sup>43</sup> work as a civil engineer,<sup>44</sup> and the reception of state educational benefits.<sup>45</sup> The doctrine which emerged through these cases required the state to demonstrate "that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose of the safeguarding of its interest,"<sup>46</sup> for the statute to survive the Court's scrutiny.

Although the *Graham* case started a liberal trend by requiring the Court to employ the strict scrutiny test to legislation discriminating against aliens, a case occurring two years later gave rise to an exception to this standard.

In *Sugarman v. Dougall*,<sup>47</sup> the Court struck down a New York statute restricting state civil service employment to citizens.<sup>48</sup> In this case, the state sought to defend the statute on the ground that it had a substantial interest in the loyalty and trustworthiness of its civil servants.<sup>49</sup>

The Court reaffirmed the "close judicial scrutiny" standard enunciated in *Graham* and rejected the state's argument.<sup>50</sup> Justice Blackmun, writing for the Court, asserted:

We recognize a state's interest in establishing its own form of government, and in limiting participation in that government to those who are within "the basic conception of a political community" . . . . But in seeking to achieve this substantial purpose, with discrimination against aliens, the means that state employs must be precisely drawn in light of the acknowledged purpose.<sup>51</sup>

Maintaining that New York's citizenship restriction was not precisely tailored to achieve its purpose,<sup>52</sup> the Court struck down the statute as unconstitutionally overbroad.<sup>53</sup>

Although it invalidated the New York statute, the Court, in *dictum*, articulated a "political community" exception which allowed the state to condition government employment upon citizenship in narrowly defined positions. These occupations would include "important nonelective, legislative, and judicial positions performing functions that go to the heart of representative government."<sup>54</sup> Accordingly, when dealing with state action that

42. *Sugarman*, 413 U.S. 634.

43. *In Re Griffiths*, 413 U.S. 717 (1973).

44. *Examining Bd. of Engineers v. Flores deOtero*, 426 U.S. 572 (1976).

45. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

46. *Griffiths*, 413 U.S. 717, 721-22 (1973).

47. 413 U.S. 634 (1973).

48. *Id.* at 647. N.Y. CIV. SER. LAW § 531(1) (McKinney 1973). Section 513 (1) provides that "no person shall be eligible for appointment for any position in the competitive civil service unless he is a citizen of the U.S."

49. *Id.* at 641. The state argued that citizenship was a relevant factor in determining the objectivity and good judgement in the performance of civil service employment. *Id.* In rejecting the argument the Court indicated that resident aliens present better risks than American citizens who only recently moved to New York. *Id.*

50. *Id.* at 642. In dissent, Justice Rehnquist objected strongly to the Court's decision. He maintained that the Court should inquire merely whether the restrictions on aliens were based on any rational purpose. *Id.* at 658.

51. *Id.* at 642, 643.

52. *Id.* at 643.

53. *Id.*

54. *Id.* at 647. In defining this concept, the *Sugarman* Court stated that it is entirely proper for a state to declare citizenship to be a requirement for employment, provided that this statutory

is rooted within a state's constitutional prerogatives, the Court would employ a less demanding standard of review. It did not, however, spell out that standard. It simply devised a two-pronged test to evaluate whether a particular function serves a political or economic goal. In order to prove the existence of a legitimate political good that test required: (1) the proposed classification to be narrowly and precisely drawn; (2) that such classification be sufficiently tailored to apply to persons in the "political community."<sup>55</sup>

In a companion case, *In Re Griffiths*,<sup>56</sup> the Court similarly concluded that a Connecticut statute barring aliens from practicing law was violative of the equal protection clause of the fourteenth amendment.<sup>57</sup> The Court agreed that the state had a "constitutionally permissible and substantial interest in determining the character and general fitness requisite for attorneys."<sup>58</sup> However, in applying the strict scrutiny standard, the Court determined that the state's citizenship requirement was unnecessary for the accomplishment of its purpose of the safeguarding of its interests.<sup>59</sup>

Significantly, the Court rejected the state's contention that the classification could be upheld because an attorney is an "officer of the court who acts by and with the authority of the state" and exercises "actual government authority."<sup>60</sup> The Court reasoned that an attorney is not an officer of the court within the ordinary meaning of the term,<sup>61</sup> and that practicing law does not "place one so close to the core of the political process as to make him a formulator of government policy."<sup>62</sup> Thus, *In Re Griffiths* further refined the dimensions of the "political community" from which aliens may be excluded as only those few positions that stem directly from the "heart of representative government."<sup>63</sup>

The *Graham*, *Sugarman*, and *In Re Griffiths* decisions established the Court's approach to alienage classifications by requiring a strict scrutiny analysis. In so doing, however, the Court created the "political community" exception which enabled it to circumvent its own rule.<sup>64</sup>

---

differentiation is limited to a suitable defined group of positions. (Quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)).

55. *Id.* at 648, 649.

56. 413 U.S. 717 (1973).

57. *Id.* at 729.

58. *Id.* at 725.

59. *Id.* at 725-27. Connecticut had already established individualized procedures for screening applicants for the bar, provided continuing post-admission review of lawyers and required a loyalty oath of all practicing attorneys. *See Id.*

60. *Id.* at 728, 729.

61. *Id.* at 729. Justice Powell, writing for the majority, stated:

Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. Moreover, by virtue of their professional aptitudes and natural interests, lawyers have been leaders in government throughout the history of our country . . . (But) the status of holding a license to practice law does not place one so close to the core of the political process as to make him a formulator of government policy.

62. *Id.* (Citing *Cammer v. United States*, 350 U.S. 399 (1956)).

63. Compare *Sugarman* and *Griffiths*. (*Sugarman* dealt with a classification which included all civil service positions while *Griffiths* was more precise in that it involved attorneys only).

64. *See* note 76, 77, *infra*, and accompanying text.

### C. *Expansion Of the Sugarman "Political Community" Exception*

In 1978, in *Foley v. Connelie*,<sup>65</sup> the Court for the first time recognized an occupation to be within the *Sugarman* "political community" exception to the strict scrutiny test, by upholding a New York statute prohibiting all aliens from serving as members of the state police force.<sup>66</sup>

Adopting the dictum of *Sugarman*, the Court found that state troopers are "important nonelective executive, legislative, and judicial positions held by officers who participate directly in the formation, execution, or review of broad public policy."<sup>67</sup> Therefore, the state need only show a reasonable relationship between the classification and the interest being protected.<sup>68</sup> Chief Justice Burger applied the rational basis, rather than strict scrutiny standard, to argue that while strict scrutiny of alienage cases, the Court had never intimated that alienage is a suspect classification in all contexts, nor that legislation discriminating against aliens is inherently unconstitutional.<sup>69</sup>

In reviewing the particular functions performed by the state trooper at issue in *Foley*, the Chief Justice commented that "police officers perform a basic governmental function for the benefit of the people at large. Police presence is pervasive in modern society, and while the police do not formulate policy, *per se*, . . . they are clothed with authority to exercise an almost infinite variety of discretionary powers."<sup>70</sup> The Court held, moreover, that the exercise of important public office is one of the privileges of citizenship. Finally, it is one where citizenship bears a rational relationship to the special demands of the particular position. Therefore, a state may, consonant with the Constitution, confine the performance of this important responsibility to citizens of the United States.<sup>71</sup>

In the following term, the Court in *Ambach v. Norwick*,<sup>72</sup> overturned a lower court decision invalidating a New York statute which prohibited from employment as elementary and secondary school teachers aliens eligible for United States citizenship, but who refused to seek naturalization.<sup>73</sup> The *Ambach* court relied heavily on the *Sugarman* and *Foley* exception to the strict scrutiny standard and required only that a citizenship requirement ap-

65. 435 U.S. 291 (1978).

66. N.Y. EXEC. LAW § 215(3)(McKinney 1972). Section 215, enacted in 1928, provides that "no person shall be appointed to the New York state police force unless he shall be a citizen of the United States." *Id.*

67. *See Sugarman*, 413 U.S. 634.

68. *Foley*, 435 U.S. at 296.

69. *Id.*

70. *Id.* at 297, 298. Chief Justice Burger, writing for the majority, gives examples of police discretion by citing *Pennsylvania v. Mimms*, 434 U.S. 109 (1977) (stopping vehicles on a highway without a warrant); *Terry v. Ohio*, 392 U.S. 1 (1968) (invasion of an individual's privacy in public places); *Miller v. United States*, 357 U.S. 301 (1958) (breaking down a door in order to execute a warrant).

71. *Id.* at 299-300. In his dissent, Justice Marshall pointed out that the duties of police officers although discretionary cannot be seen as the formulating of government policy as indicated in *Sugarman*. *Id.* 304. Additionally, he pointed out that in *Griffiths* the Court held that a state could not limit the practice of law to citizens even though it recognized the significant political and public role performed by attorneys, a role in his view, no less significant than that performed by police officers. *Id.* 306.

72. 441 U.S. 68 (1978).

73. N.Y. EDUC. LAW § 3001(3)(McKinney 1970) provides: "no person shall be employed or authorized to teach in the public schools of the state who is not a citizen."

plicable to teaching in public schools bear a rational relationship to a legitimate state interest.<sup>74</sup>

In this case, the Court reasoned that teachers play a critical role in developing students' attitudes toward government and understanding of the role of citizens in society.<sup>75</sup> Moreover, in the Court's opinion, teachers serve as role models for students, exerting a subtle but important influence over the perceptions and values of students, thus enabling them to shape student's attitudes toward government, the political process, and the social responsibilities of citizenship.<sup>76</sup> Therefore, in the opinion of the majority, teaching in public schools is a task which went to the heart of representative government and fell within the ambit of the "political community" principle.<sup>77</sup>

The *Foley* and *Ambach* decisions appear to suggest an expansion of the "political community" doctrine fashioned by the *Sugarman* court.<sup>78</sup>

### III. PRINCIPAL CASE

In the principal case, the issue before the Court was whether or not a statute requiring "peace officers"<sup>79</sup> to be United States citizens was unconstitutional both on its face and as applied.

Appellees, at the time the complaint was filed, were lawfully admitted permanent resident aliens<sup>80</sup> living in Los Angeles County, California. Each applied for appointment to the County Probation Department as a Deputy Probation Officer.<sup>81</sup> With respect to two of the three appellees, the parties stipulated that the failure to obtain the positions sought was the result of the statutory citizenship requirement.<sup>82</sup>

Having passed a required examination, appellees were placed on an eligibility list and were subsequently notified of job openings. However, be-

74. See *supra* notes 49-55 and accompanying text.

75. *Ambach*, 441 U.S. at 78.

76. *Id.* at 79, 80, See Note, *Constitutional Law: State Discrimination Against Resident Alien In Public Employment—What Standard of Review?* 10 STETSON L. REV. 171 (1980).

77. *Id.* at 74, citing *Sugarman*, 413 U.S. at 647.

78. The decision in *Foley* and *Ambach* created a great deal of controversy over whether the Court was departing from its prior applications of strict scrutiny in alienage cases. See, e.g., NOTE, *Foley v. Connelie: A New Direction in State Discrimination Against Aliens*, 8 CAP. U.L. REV. 169 (1978); NOTE, *New York Statute Requiring State Troopers to be Citizens Held Constitutional: Foley v. Connelie*, 11 CONN. L. REV. 75 (1978); NOTE, *Erosion of the Strict Scrutiny Standard as Applied to Resident Aliens: Foley v. Connelie*, 10 LAW AM. 1049 (1978); NOTE, *State Restrictions on Ability of Alien to Secure a Livelihood: What Standard of Review?*, 24 LOY. L. REV. 789 (1978); NOTE, *Constitutional Law—Equal Protection—Discrimination Against Aliens—Foley v. Connelie*, 24 N.Y.L.S. L. REV. 790 (1979); NOTE, *Are Aliens Still A Suspect Class After Norwick?*, 11 COLUM. HUMAN RIGHTS L. REV. 227 (1979); *Constitutional Law—Alien—State Statute Excluding Aliens Who Refuse to Declare Intent To Become United States Citizens From Teaching In Public Schools Does Not Violate The Equal Protection Clause of the Fourteenth Amendment*, 15 TEX. INT. L.J. 203 (1980); *Constitutionality of Legislative Restrictions on the Employment Rights of Legal Resident Aliens in New York State*, 7 SYRACUSE J. INT. L. & COM. 109 (1979).

79. CAL. GOV'T CODE § 1031(a) (West 1980), provides: "that public officers or employees having powers of peace officers; meet minimum standards . . . (a) Be a citizen of the United States."

80. See *supra* note 4.

81. CAL. PENAL CODE § 830.5 (West 1980), provides the duties of deputy probation officer which are the same as those of probation officers and both are considered peace officers.

82. The third appellee, Bohorquez, claimed only that he failed to appeal a test score that disqualified him, because he had been informed that without citizenship his appeal would be useless. As relief in this suit, he sought only an opportunity to take a new examination.

cause they were unable to show proof of citizenship, they were denied employment. Each appellee was at all times willing to take the loyalty oath prescribed in the California Constitution for all public employees.<sup>83</sup>

The appellees commenced this action in the United States District Court for the Central District of California. In this action, they challenged the constitutionality of section 1031(a) of the California Government Code under the equal protection clause of the fourteenth amendment and 42 U.S.C. §§ 1981<sup>84</sup> and 1983.<sup>85</sup>

A three judge court held that the statutory citizenship requirement was unconstitutional both on its face and as applied.<sup>86</sup> Restricting their decision to appellees' equal protection arguments, the court did not reach the questions raised under 42 U.S.C. §§ 1981 and 1983. On appeal to the United States Supreme Court in 1980, the case was vacated and remanded for further consideration in light of *Foley*.<sup>87</sup> On remand, the district court came to the conclusion, consistent with *Foley* and *Ambach*, that the California statutory scheme was unconstitutional both facially and as applied.<sup>88</sup>

On further appeal, the United States Supreme Court examined the appellant's argument that the statutory citizenship requirement was valid and reasoned that while a restriction on lawfully resident aliens that primarily affects economic interests is subject to strict judicial scrutiny, such scrutiny is out of place when the restriction serves a political function.<sup>89</sup>

Utilizing the two-prong test formulated in *Sugarman*, the Court proceeded first to examine the specificity of the classification, and second, whether such classification was sufficiently tailored to apply to persons in the "political community" or those "performing functions at the heart of representative government."<sup>90</sup> The Court concluded that the statutory scheme met both levels of examination and thus a strict scrutiny standard of review was inapplicable.<sup>91</sup>

83. CAL. CONST. art. XX, § 3 Oath of Office; Loyalty oath prescribed by California includes agreement to support and defend the Federal and State Constitutions.

84. 42 U.S.C. § 1981 (1981) CIVIL RIGHTS ACT; Equal Rights Under the Law

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licences, and exceptions of every kind, and to no other.

The appellees articulated a claim of unlawful discrimination on the basis of alienage. In addition, the complaint asserted that § 1031(a) unconstitutionally infringes upon appellees' right to travel upon Congress' power to regulate aliens. The latter claim invokes the Supremacy Clause of the Federal Constitution.

85. 42 U.S.C. § 1983 (1981) CIVIL RIGHTS ACT; Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

86. *Chavez-Salido v. Cabell*, 427 F. Supp. 158 (1977).

87. *Chavez-Salido v. Cabell*, 436 U.S. 901, 98 (1978).

88. *Chavez-Salido v. Cabell*, 490 F. Supp. 984 (1980).

89. See e.g., *Sugarman*, 413 U.S. 634; *Foley*, 435 U.S. 291; *Ambach*, 441 U.S. 68.

90. See *supra* notes 53-4 and accompanying text.

91. *Cabell v. Chavez-Salido*, No. 80-990, Slip op. at 9, 11 (C.D. Cal. 1980).

Appellees contended and the dissenting justices agreed, that the statute requiring "peace officers" to be citizens was over-inclusive because persons in the particular position in question—deputy parole officers—"cannot be considered members of the political community."<sup>92</sup>

In rejecting the appellees' contentions, the Court analogized the functions of California probation officers to the state troopers involved in *Foley*, and concluded that both of those functions sufficiently involved the authority of the government to exercise coercive force over the individual that they may be limited to citizens.<sup>93</sup>

Reversing the decision of the district court, the Supreme Court held that a citizenship requirement is an appropriate limitation on those who exercise or symbolize the power of the political community and as such does not violate the equal protection clause of the fourteenth amendment.<sup>94</sup>

#### IV. ANALYSIS

The Court's holding in *Cabell v. Chavez-Salido*, that a state may require its probation officers to be citizens, is a further widening of the "political community" exception and departure from strict scrutiny.<sup>95</sup>

Previous decisions have held that the provisions of the fourteenth amendment are applicable to resident aliens.<sup>96</sup> Moreover, numerous cases established that resident aliens constitute a "suspect class" and as such, legislation discriminating against them should be examined with strict scrutiny.<sup>97</sup> A case decided this term by the Supreme Court extended similar protections to the children of undocumented aliens.<sup>98</sup> Although *Plyler v. Doe*<sup>99</sup> held that children cannot be treated as a "suspect class,"<sup>100</sup> they are entitled to the benefits of the equal protection clause.<sup>101</sup> *Plyler* emphasizes the vacillation of the Court in these cases of alien discrimination.<sup>102</sup> Analysis will demonstrate that the underlying principle distinguishing these cases is the extent to which the state's goal is economic protectionism.

In the *Truax* case, the state sought only to protect citizens of the United States in their employment against noncitizens.<sup>103</sup> The *Truax* Court properly acknowledged and honored the right of a permanent resident alien to work for a living in the common occupations of the community.<sup>104</sup> The

92. *Id.* at 8 (Blackmun, J; dissenting).

93. *Id.* at 13.

94. *Id.*

95. See, e.g., *Foley*, 435 U.S. 291; *Ambach*, 441 U.S. 68. See note 77, *supra*.

96. See generally *Yick Wo*, 118 U.S. 356; *Truax*, 239 U.S. 33; *Takahashi*, 334 U.S. 410. See also *Graham*, 403 U.S. 372; *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In Re Griffiths*, 413 U.S. 717 (1973). But see, *Foley*, 435 U.S. 291; *Ambach*, 441 U.S. 68.

97. *Graham*, 403 U.S. 372. See notes 32-40, *supra*.

98. See *supra* note 4.

99. *Plyler v. Doe*, 102 S. Ct. 2382 (1982).

100. *Id.* at 11. The Court has determined that lawfully admitted aliens are a suspect class. *Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Examining Bd. of Eng'rs. v. Flores deOtero*, 426 U.S. 572 (1976); *Griffiths*, 413 U.S. 717; *Sugarman*, 413 U.S. 634. An analysis of these cases, however, indicates that suspect class was not extended to undocumented persons. The Court has yet to determine whether undocumented persons constitute a suspect class.

101. *Plyler*, 102 S. Ct. 2382.

102. See *Equal Protection For Undocumented Aliens*, 5 CHICANO L. REV. 29 (1982).

103. See notes 20-23, *supra*.

104. *Truax*, 239 U.S. 33. See *supra* note 19 and accompanying text.

Court concluded that the right to be:

(t)he very essence of the personal freedom and opportunity that it was the purpose of the fourteenth amendment to secure . . . If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.<sup>105</sup>

In *Sugarman*, the Court expressly refused to exempt public employment occupations from this general rule.<sup>106</sup> The *Sugarman* Court took the position that permanent resident aliens could not be barred as a class from the common public occupations of the community.<sup>107</sup>

The Court has consistently held that where a state chooses to discriminate against permanent resident aliens, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether the interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn."<sup>108</sup> Consequently, classifications discriminating against aliens "that do not withstand this stringent examination cannot stand."<sup>109</sup>

The *Chavez-Salido* opinion reasoned that although the *Truax*, *Takahashi* and *Graham* decisions struck down discriminatory classifications, those decisions primarily dealt with states attempting to retain economic benefits exclusively for its citizens.<sup>110</sup> Since the *Graham* case, the court has distinguished between the economic and political functions of the government.<sup>111</sup> It has held that citizenship can be a relevant factor in determining membership in the political community.<sup>112</sup> As a result, the Court has concluded that strict scrutiny is not applicable when the restriction primarily serves a political as opposed to an economic function.<sup>113</sup>

Relying on the *Sugarman* decision, the *Chavez-Salido* reasoned that the category of "peace officer" is within the basic conception of a "political community," and therefore the state's exclusion of aliens need not clear the high hurdle of strict scrutiny.<sup>114</sup>

In determining whether the particular restriction in question served a political or economic purpose, the Court applied the two-prong test fashioned by the *Sugarman* Court.<sup>115</sup> It examined first the specificity of the classification and concluded that the common denominator in all of the employment categories defined by California law to be "peace officers" was their law enforcement function. As such, the Court held the classification to

105. *Id.* at 39.

106. *Sugarman*, 413 U.S. 634.

107. *Chavez-Salido*, No. 80-990, slip op. at 3 (Blackmun, J., dissenting).

108. *Examining Bd.*, 426 U.S. at 605. See also *Nyquist*, 432 U.S. 1; *Griffiths*, 413 U.S. 717; *Graham*, 403 U.S. 365.

109. *Nyquist*, 432 U.S. 1.

110. *Chavez-Salido*, No. 80-990, Slip op. at 6.

111. See *Sugarman*, 413 U.S. 634 (civil service employment); *Griffiths*, 413 U.S. 717 (practicing law); *Foley*, 435 U.S. 291 (state troopers); *Ambach*, 441 U.S. 68 (public school teachers).

112. *Id.*

113. *Chavez-Salido*, No. 80-990, Slip op. at 6.

114. *Id.* See also *Sugarman*, 413 U.S. 634; *Foley*, 435 U.S. 291; *Ambach*, 441 U.S. 68. But cf. *Griffiths*, 413 U.S. 717; *Nyquist*, 432 U.S. 1.

115. *Sugarman*, 413 U.S. 634. See *supra* note 53. See, e.g., *Foley*, 435 U.S. 291; *Ambach*, 441 U.S. 68; *Examining Bd.*, 426 U.S. 572.

be sufficiently narrow to meet the first prong of the *Sugarman* exception.<sup>116</sup>

Second, since the general character of law enforcement functions involve the government's exercise of coercive police powers over members of the community, the category of "peace officer," in the Court's opinion,<sup>117</sup> was sufficiently tailored to apply to persons in the "political community" or those "performing functions at the heart of representative government."<sup>118</sup>

Having thus satisfied both *Sugarman* requirements, the Court concluded that it was unnecessary to adhere to the strict scrutiny analysis in *Chavez-Salido*.<sup>119</sup>

The Court rejected the idea that the citizenship requirement was invalid as applied to deputy probation officers by relying on the *Foley* rationale.<sup>120</sup> It compared the functions of probation officer to those of the state troopers in *Foley* and reasoned that there was sufficient similarity to regard probation officers as exercising coercive police powers. The Court also emphasized that in executing their responsibilities the probation officer has a great deal of discretion, similar to that of the police officers in *Foley* and the teachers in *Ambach*.<sup>121</sup> Moreover, from the perspective of the probationer, the probation officer—with his responsibilities coupled with his broad discretion—would symbolize the government's control over him.<sup>122</sup> The Court thus found that a lawfully admitted permanent resident alien is prohibited from serving as a deputy probation officer because that job "goes to the heart of representative government."<sup>123</sup>

An analysis of the majority's decision in *Chavez-Salido* suggests a further distortion of the *Sugarman* exception to deny aliens access to employment. As the dissent put it, "Today's decision rewrites the Court's precedents, ignores history and defies common sense and reinstates the parochialism in public employment."<sup>124</sup>

From the opinions of the Court, *Yick Wo* through *Ambach*, the following rules of law have emerged for evaluating the constitutionality of the California statute in question. First, the equal protection guarantee as embodied in the fourteenth amendment extends to permanent resident aliens.<sup>125</sup> Second, a state statute or regulation classifying citizens and non-citizens and attaching disabilities to noncitizenship involves a "suspect classification."<sup>126</sup> Third, any "suspect classification" is subject to strict judicial

116. *Chavez-Salido*, No 80-990, Slip op. at 10, 11. See also *Foley*, 435 U.S. 291. In examining the classification in *Sugarman*, the Court found it overly broad as it included all competitive civil service positions.

117. The Case was decided by a narrow 5-4 majority. The majority consisted of Chief Justice Burger and Justices, White, Powell, Rehnquist and O'Connor; dissenting were Justices Blackmun, Brennan, Marshall and Stevens.

118. *Chavez-Salido*, No. 80-990, Slip op. at 11.

119. *Id.* See also *Foley*, 435 U.S. 291 and *Ambach*, 441 U.S. 68.

120. *Id.* at 12. See *supra* note 77.

121. *Id.* at 12.

122. *Id.* at 14. Cf., *Griffiths*, 413 U.S. 717 (lawyers).

123. *Id.* at 8. Accord, *Foley*, 435 U.S. 291 (state troopers), *Ambach*, 441 U.S. 68 (public school teachers).

124. *Chavez-Salido*, No. 80-990, Slip op. at 2 (Blackmun, J. dissenting).

125. See *supra* note 95.

126. *Graham*, 403 U.S. 365.

scrutiny.<sup>127</sup> Fourth, when the restriction primarily serves a narrowly prescribed political function it need not clear the high hurdle of strict scrutiny.<sup>128</sup> Analysis demonstrates that the *Chavez-Salido* Court has misapplied the relevant law.

The Court relied on the *Sugarman* argument that "the power to define its political community is reserved to the states."<sup>129</sup> While observing that each state had the power to prescribe the qualifications of voters, elective officeholders, and holders of "important nonelective, executive, legislative and judicial positions . . . and officers who participated directly in the formulation, execution, or review of broad public policy," the Court emphasized that such a statute must be "narrowly confined."<sup>130</sup> However, a category encompassing more than 70 occupations, as did California's definition of a "peace officer," tortures the meaning of "narrowly confined."<sup>131</sup>

When the appellees first sought their jobs, the "peace officer" category included such positions as toll takers, cemetery sextons, fish and game wardens, racetrack investigators, county coroners, state supreme court and court of appeal bailiffs, messengers of the State Treasurer's office, and inspectors for the Board of Dental Examiners.<sup>132</sup> It is quite obvious from the extensive list within the "peace officer" category that the statute is much broader than the Court asserted and involves many positions with much less responsible duties than they suggested.<sup>133</sup> Instead of making distinctions among the various positions, the Court simply generalized to equate the category of "peace officer" with law enforcement.<sup>134</sup> Even today the California legislature has failed to substantiate any rational basis for such a divergent classification.<sup>135</sup>

Even if one assumes that the California statutory scheme was narrowly confined, it was not sufficiently tailored to apply to persons in the "political community" under the *Sugarman* exception.<sup>136</sup> Under *Sugarman*, states may reserve certain public offices for their citizens if those offices "perform functions that go to the heart of representative government."<sup>137</sup> Deputy probation officers in California perform a wide range of duties.<sup>138</sup> As impor-

127. See, e.g., *Korematsu*, 323 U.S. 214 (courts must subject legal restrictions curtailing the civil rights of a single group to the most rigid scrutiny).

128. See *supra* note 113.

129. See note 17, *supra*. See generally, *Sugarman*, 413 U.S. 634.

130. *Dougall*, 413 U.S. at 647.

131. At the time this action was commenced, CAL. PENAL CODE § 830 and various subsections thereunder provided a long list of occupations and positions classified as peace officers or having powers thereof. Deputy Probation Officer being one of them. *Chavez-Salido*, 427 F. Supp. at 169 n. 22.

132. *Id.*

133. *Chavez-Salido*, No. 80-990, Slip op. at 6 (Blackmun, J., dissenting).

134. *Id.* at 4. An Opinion by the California Attorney General regarding §1031(a)

It is our opinion that . . . this citizenship requirement can no longer validly be imposed . . . Prior to 1961, there was no general requirement of citizenship to be a peace officer. We are aware of no change that occurred that would justify the change at that date . . . We are of the opinion that the classification is not constitutionally permitted. There does not appear to be a compelling state interest . . . to justify classifying certain peace officers as to alienage.

Opinion No. 69-199, 53 Ops. Cal. Atty. Gen. 63, 67-68 (1970).

135. *Cabell*, 427 F. Supp. at 170.

136. See e.g., *Foley*, 435 U.S. 291; *Ambach*, 441 U.S. 68.

137. See *supra* note 53 and accompanying text.

138. See *supra* note 80.

tant as these duties are, deputy probation officers cannot be considered employees who participate "directly in the formulation, execution, or review of broad public policy."<sup>139</sup>

California probation officers' duties include preparation of pre-sentence investigations and recommendations as to sentence, supervision of probationers and investigation of probation violations.<sup>140</sup> Also included are a variety of duties in connection with juveniles and juvenile courts.<sup>141</sup> The Court sought to characterize those duties as an extension of the government's power to exercise coercive force over the individual.<sup>142</sup>

The probation officers' range of individuals over whom he may exercise his authority is extremely limited. Moreover, the procedures under which he may exercise that authority are carefully conditioned. Probation officers are not permitted to carry guns and they may arrest only those under their jurisdiction. Their arrest and detention authority is always subject to either brief periods of time or only for purposes of bringing the individual before the court for a determination of whether they should be held or released.<sup>143</sup> Justice Blackmun, dissenting in *Chavez-Salido*, opined:

While I do not denigrate these functions, neither can I equate them with the discretionary duties of policemen, judges and jurors. Unlike policemen probation officers are not clothed with authority to exercise an almost infinite variety of discretionary powers. Unlike jurors who deliver final verdicts and judges who impose final sentences the decisions of the probation officers are always advisory to and supervised by judicial officers.<sup>144</sup>

As in *Griffiths*, the duties of a deputy probation officer "hardly involve matters of state policy or acts of such high responsibility as to entrust them only to citizens."<sup>145</sup>

Even if one assumes that probation officers are clothed with some limited state authority, the state cannot presume that aliens as a class are less loyal to the state.<sup>146</sup> The decisions in *Griffiths*<sup>147</sup> and *Hampton v. Mow Sun Wong*<sup>148</sup> clearly indicate that one need not be a citizen in order to swear in good conscience to support the Constitution.<sup>149</sup> At the time the appellees applied for their job, they expressed their willingness to take such oaths.<sup>150</sup>

Rather than a concern that aliens should not hold governmental positions, California's exclusion of these appellees from the position of deputy probation officer appears to stem from state parochialism and hostility to-

139. *Chavez-Salido*, No. 80-990, Slip op. at 10, n.8 (Blackmun, J.; dissenting).

140. *Cabell*, 427 F. Supp. at 171.

141. *Id.*

142. *Chavez-Salido*, No. 80-990, Slip op. at 13.

143. *Id.* at 12 (Blackmun, J., dissenting).

144. *Id.* at 13.

145. *Griffiths*, 413 U.S. at 724. See also *Raffaelli v. Committee of Bar Examiners*, 7 Cal. 3d 288, 496 P.2d 1264 (1972); see also note 70, *supra*.

146. See generally *Sugarman*, 413 U.S. 634; *Griffiths*, 413 U.S. 717; *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976).

147. *Griffiths*, 413 U.S. 717.

148. 426 U.S. 88, (1976). This case involved a federal civil service regulation barring noncitizens, including resident aliens, from employment in the federal competitive civil service. The United States Supreme Court held the regulation as being unconstitutional as depriving such resident aliens of liberty without due process of law in violation of the fifth amendment.

149. *Chavez-Salido*, No. 80-990, Slip op. at 16 (Blackmun, H.; dissenting).

150. See *supra* note 82.

wards foreigners who have come lawfully to this country.<sup>151</sup>

Historically during times of economic stress, American treatment of aliens, documented and undocumented, has been cruel and unwarranted.<sup>152</sup> Because of their status as aliens in the United States, various immigrant groups were extremely vulnerable and politically powerless,<sup>153</sup> and thus were ideally suited for the role of scapegoat for America's economic and social woes.<sup>154</sup>

Examples of unfair treatment of aliens are numerous. The depression of the 1870's was blamed on Chinese aliens, whose high racial visibility, coupled with cultural dissimilarity and lack of political power, made them more than adequate scapegoats for the economic problems of the 1870's.<sup>155</sup> Spurred by the economic distress of the Great Depression, federal immigration officials expelled approximately 500,000 persons of Mexican descent,<sup>156</sup> in what was called the "repatriation" campaign.<sup>157</sup>

In the 1950's, Americans again were alarmed by the numbers of aliens from Mexico. As a result, "Operation Wetback" was launched to expell Mexicans from this country.<sup>158</sup> More than one million persons of Mexican descent were expelled from this country in 1954 at the height of this campaign.<sup>159</sup> Among those caught up in the expulsion drive were American citizens of Mexican descent who were forced to leave because they were denied a hearing to assert their Constitutional rights and to present evidence that would have prevented their deportation.<sup>160</sup>

Today, the United States government has once more created within our borders, detention camps,<sup>161</sup> a measure closely resembling the internment of Japanese-Americans during World War II.<sup>162</sup> The inhabitants of these camps are Haitians and Cubans.<sup>163</sup>

It has been said that history often repeats itself. Each time this country has gotten into an economic crisis, it has been the minorities and the politi-

151. *Chavez-Salido*, No. 80-990, Slip op. at 16 (Blackmun, J., dissenting).

152. U.S. COMM'N ON CIVIL RIGHTS, *THE TARNISHED GOLDEN DOOR* 1 (1980).

153. See generally *Yick Wo*, 118 U.S. 356; *Hirabayashi*, 320 U.S. 81; *Korematsu*, 323 U.S. 214; *Oyama*, 332 U.S. 633; *Takahashi*, 334 U.S. 410. See also *Brown v. Board of Education*, 347 U.S. 483 (1954); *Loving*, 388 U.S. 1.

154. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 151.

155. *Id.* at 8. See COOLIDGE, *CHINESE IMMIGRATION* 8 (1909).

156. GREBLER, MOORE, AND GUZMAN, *THE MEXICAN AMERICAN PEOPLE* 523-26 (1970).

157. To pacify public objection to the mass expulsions, this program was called repatriation. MOQUIN, *A DOCUMENTARY HISTORY OF THE MEXICAN AMERICANS* 294 (1971).

158. GREBLER, MOORE, AND GUZMAN, *THE MEXICAN AMERICAN PEOPLE* 521-22 (1970).

159. *Id.*

160. *Id.* See also *Hirabayashi*, 320 U.S. 81; *Korematsu*, 323 U.S. 214.

161. Dymally, *The Immigration Whitewash*, L.A. Times, Apr. 18, 1982 at 5 (Editorial). Mervyn M. Dymally, a Democrat and a native of Trinidad, represents the Compton-Hawthorne area of Los Angeles County in Congress, where he is Chairman of the Congressional Black Caucus Task Force on the Caribbean and a member of the House Committee on Foreign Affairs.

162. "On February 19, 1942 President Roosevelt signed Executive Order 9066 authorizing the mass round-up of 120,000 Japanese Americans from their homes on the West Coast. The evacuees—two thirds of them American citizens—were imprisoned in 10 concentration camps. The grounds for detention—"national security". And with the stroke of a pen, the rights guaranteed to them in the U.S. Constitution were unabashedly taken away." Editorial, 7 *BRIDGE, ASIAN AMERICAN PERSPECTIVES* 4 (1981-82). See also *Hirabayashi*, 320 U.S. 81; *Korematsu*, 323 U.S. 214.

163. Dymally, *The Immigration Whitewash*, *supra* note 160.

cally powerless that have had to shoulder the blame.<sup>164</sup> From *Yick Wo* to *Chavez-Salido*, the only difference is the brunt of attacks are now focused on Mexicans, Haitians and Cubans, rather than Chinese.

The Court's insensitivity to perceive this historical trend and to ignore judicial precedents led to its incorrect judicial interpretation. To hold otherwise would be a distortion of the *Sugarman* exception and further departure from close judicial scrutiny.

#### V. CONCLUSION

The decision in *Chavez-Salido* defies the Court's earlier holdings that the state may not exclude aliens from any "harmless and useful occupation" for which citizenship cannot rationally be required.<sup>165</sup>

Since aliens as a group constitute a suspect class, they should be excluded ordinarily from functions directly related to the political community only when the state is able to demonstrate a compelling need for such exclusion. The strict scrutiny standard is the rule, not the exception.

There are close to five million or so resident aliens living in this country.<sup>166</sup> These aliens are politically powerless, and as the history of statutory discrimination against them in this country will substantiate, they are easy targets for frequent discriminatory treatment. Consequently, they must be afforded the safeguards provided by the strict scrutiny test.<sup>167</sup> In *Chavez-Salido*, the highest court in all the land has failed in its duty to jealously guard the constitutional rights of the nation's inhabitants.

They came tired and poor, "yearning to breath free." They have been met with a show of callous insensitivity and mistreatment that should shatter the complacency of every American citizen committed to the ideals of freedom and democracy.<sup>168</sup>

RONALD LOW

---

164. Address by Congressman Gus Savage, Black Ministers' Crusade to Washington (June 8, 1982). Gus Savage represents the 2nd Congressional District of Illinois, the southeast portion of Chicago.

165. *Chavez-Salido*, No. 80-990, Slip op. 9 (Blackmun, J., dissenting).

166. Current estimate from U.S. Bureau of Census (June 1982).

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

168. Dymally, *The Immigration Whitewash*, *supra* note 160.