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## COMMENTS

### ALIENS: THE UNCONSTITUTIONAL CLASSIFICATION FOR ADMISSION TO THE BAR

J. RAND CLIFFE

*And if a stranger sojourn with thee in your land, ye shall not vex him. But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself.*

*Leviticus 19:33,34*

It has long been presumed that citizenship is a natural prerequisite for admission to the bar.<sup>1</sup> The presumption is indefensible in light of case development defining the right of the state to limit bar admissions and discriminate against aliens. The reasons propounded for excluding aliens as a class from entrance to the legal profession are anachronisms of a period of race prejudice which also must fall when confronted with these cases and the equal protection clause.

#### STATE REGULATION OF BAR ADMISSIONS

By far the majority of jurisdictions agree that the judiciary makes the ultimate determination of admission standards and admissibility of the individual applicant.<sup>2</sup> Because admission to the bar is a judicial, not a ministerial function,<sup>3</sup> these states view the power of the judiciary to set admission standards as inherent.<sup>4</sup> Many of the states recognize the right of the legislature to set some minimum standards in the interest of public welfare, but these are not binding upon the judiciary.<sup>5</sup> Therefore, the courts may alter the rules for admission *without* the consent of the legislature and without even finding that the legislative requirement is substantively unconstitutional.<sup>6</sup> Thus, when one speaks of state regulation of admission standards, state judicial regulation is meant, for the judiciary has the power whether it uses it or not.

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<sup>1</sup> *Templar v. Michigan State Bd. of Examiners of Barbers*, 90 N.W. 1058, 1059 (Mich. 1902); W. GELLHORN, *INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINT* 126 (1956); 1 R.C.L. *Aliens* § 11 (1929): "The right of the state to deny to aliens the right to practice law is undoubted."

<sup>2</sup> *Application of Houston*, 378 P.2d 644, 645 (Alas. 1963).

<sup>3</sup> *Brydonjack v. State Bar*, 281 P. 1018, 1020 (Cal. 1929).

<sup>4</sup> *In re Lavine*, 41 P.2d 161 (Cal. 1935); *Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n*, 312 P.2d 998 (Colo. 1957); *Herberger v. Clark*, 169 A.2d 652, 658 (Conn. 1961).

<sup>5</sup> *Application of Park*, 484 P.2d 690, 692 (Alas. 1971); *Herberger v. Clark*, 169 A.2d 652, 656 (Conn. 1961).

<sup>6</sup> *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378, 18 L. Ed. 366, 370 (1867); *In re Chidoo Li*, 488 P.2d 259 (Wash. 1971).

The power of the state to restrict bar admissions is derived from its police power to regulate in the interest of the public's health, safety or welfare.<sup>7</sup> The generally recognized interest behind admission standards is the "protection of the public from incompetent and dishonest practitioners."<sup>8</sup> To this end the state may set whatever standards will ensure that licensed lawyers are competent, but is limited by the requirements that the qualifications are rationally related to the fitness to practice law.<sup>9</sup> Standards may not be overly inclusive; any standard which excludes some unfit applicants but in so doing "also bars, arbitrarily and capriciously, applicants who are eminently qualified for admission"<sup>10</sup> will be held violative of the equal protection clause.

That the provisions of the equal protection clause apply to aliens has been settled since *Yick Wo v. Hopkins*.<sup>11</sup> The promise offered by *Yick Wo* was often illusory however. States have systematically excluded aliens from working at various occupations.<sup>12</sup> Where the occupations were those frequently associated with criminal activity, the courts upheld the discrimination "on the ground that aliens as a class do not have the necessary character qualifications."<sup>13</sup> Where the occupation

<sup>7</sup> *Grievance Comm. of State Bar v. Dean*, 190 S.W.2d 126 (Tex. Civ. App.—Austin 1945, no writ).

<sup>8</sup> *State ex rel. Boynton v. Perkins*, 28 P.2d 765, 769 (Kan. 1939).

<sup>9</sup> *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed.2d 796, 801 (1957).

<sup>10</sup> *Keenan v. Board of Bar Examiners*, 317 F. Supp. 1350, 1360 (E.D.N.C. 1970).

<sup>11</sup> 118 U.S. 356, 369, 6 S. Ct. 1064, 1070, 30 L. Ed. 220, 226 (1886):

The Fourteenth Amendment . . . is not confined to citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of *nationality* . . . . (Emphasis added.)

<sup>12</sup> For the following, one of the states or the District of Columbia requires *citizenships*: Boxing promoter, electrolysis, embalmer and funeral director apprentice, explosives dealer, fish breeder (domestic), gas fitter, investigator, junkdealer, manicurist, pedicurist, masseur, masseuse, outfitter for hunting or fishing, naturopathist, pilot (aviation), poison dealer, policeman (special), poultry inspector, refrigerated truck operator, watchman, guard or patrolman, wrestling. M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 211 (1946).

Exclusions such as the above have received judicial endorsement in the following cases: *United States ex rel. Clarke v. Dekebach*, 274 U.S. 392, 47 S. Ct. 630, 71 L. Ed. 1115 (1927) (poolroom operator); *Asakura v. Seattle*, 265 U.S. 332, 44 S. Ct. 515, 68 L. Ed. 1041 (1924) (pawnbroker); *In re Naka's License*, 9 Alas. 1 (Dist. Ct. 1934) and *Tragreser v. Gray*, 20 A. 905 (Md. Ct. App. 1890) (retail liquor sales); *Commonwealth v. Hana*, 81 N.E. 149 (Mass. 1907) and *State v. Montgomery*, 47 A. 165 (Me. 1900) (hawkers and peddlers); *Wright v. May*, 149 N.W. 9 (Minn. 1914) (auctioneer); *Miller v. City of Niagra Falls*, 202 N.Y.S. 549 (App. Div. 1924) (soft drink sales); *Gizzarelli v. Presbrey*, 117 A. 359 (R.I. 1922) (motorbus operator). Perhaps the height of ridiculousness was reached by the state statute that forbade to aliens the right to own dogs! See *In re Dogs Owned by Aliens*, 28 Pa. Dist. 270 (1918) citing Pa. Pub. L. 644, Act of June 1, 1915. See also *Commonwealth v. Preozki*, 28 Pa. Dist. 352 (1918).

<sup>13</sup> Legislation, *Constitutionality of Legislation Discriminating Against the Alien in His Right to Work*, 83 PA. L. REV. 74, 79 (1934). This same author's statistics demonstrate that such an argument could equally support domestic race restrictions also. *Id.* at 79 n.28. The same argument appears to have been extended to occupations potentially harmful to the public. In *Gizzarelli v. Presbrey*, 117 A. 359 (R.I. 1922), the Rhode Island Supreme Court upheld alien exclusion from the occupation of motorbus operator, stating:

required some degree of specialized training, the only logic for exclusion appears to have been that aliens as a class are incapable of advanced learning.<sup>14</sup> These exclusionary statutes were the product of a xenophobic era in which aliens were denied the right to hunt,<sup>15</sup> fish,<sup>16</sup> work for the state,<sup>17</sup> own land,<sup>18</sup> and draw welfare.<sup>19</sup> This era hopefully ended with the 1952 act<sup>20</sup> which ended the United States policy of denying to aliens, upon the basis of race, the right to become a citizen through naturalization.<sup>21</sup> During this period, *Truax v. Raich*<sup>22</sup> stood as the only Supreme Court case limiting the power of the state to exclude aliens from benefits available to citizens. In *Truax* the court stated that the police power of the state "does not go so far as to make it possible for the state to deny lawful inhabitants, because of . . . nationality, the ordinary means of earning a livelihood."<sup>23</sup> *Truax*, however, was not interpreted as extending to the professions.<sup>24</sup>

For the alien, as for the Negro, the full extent of the equal protection clause did not blossom until very late. In 1946 the Supreme Court, in *Takahasi v. Fish & Game Commission*,<sup>25</sup> held constitutionally infirm a California statute denying aliens equal commercial fishing privileges

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"[A]s aliens as a class are naturally less interested in the state, safety of citizens and the public welfare than citizens of the state, to allow them to operate motorbuses would . . . tend to increase the danger to passengers and to the public using the highways." *Id.* at 360.

<sup>14</sup> See *Sashihara v. State Bd. of Pharmacy*, 46 P.2d 804, 806 (Cal. Dist. Ct. App. 1935).

<sup>15</sup> *Patson v. Pennsylvania*, 232 U.S. 138, 34 S. Ct. 281, 58 L. Ed. 539 (1914).

<sup>16</sup> *McCready v. Virginia*, 94 U.S. 391, 24 L. Ed. 248 (1877).

<sup>17</sup> *Heim v. McCall*, 239 U.S. 175, 36 S. Ct. 78, 60 L. Ed. 206 (1915); *Crane v. New York*, 239 U.S. 195, 36 S. Ct. 85, 60 L. Ed. 218 (1915).

<sup>18</sup> *Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255 (1923).

<sup>19</sup> *People v. Crane*, 108 N.E. 427, 429 (N.Y.), *aff'd*, 239 U.S. 195, 36 S. Ct. 85, 60 L. Ed. 218 (1915), *citing* N.Y. Laws ch. 57 § 17 (1909).

<sup>20</sup> Immigration and Naturalization Act, 8 U.S.C. § 1422 (1970): "The right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race . . . ."

<sup>21</sup> The practice of denying to aliens, upon the basis of race, the right to become a citizen is one peculiar to the United States. There was no such precedent in common law. I W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*374. Yet, from their incipency the naturalization laws of the United States denied "white" slaves and all "non-white" aliens the right to attain citizenship. Act of March 26, 1790, ch. 3, 1 Stat. 103. Following the passage of the fourteenth amendment, "aliens of African nativity and . . . persons of African descent" were extended naturalization privileges, leaving only Asiatic aliens excluded. Act of July 14, 1870, ch. 254, § 7, 16 Stat. 254. Asiatics were not excluded expressly, but by implication, since all "non-whites" not of African descent or nativity were excluded. During this period, race exclusion occurred on a case-by-case basis as the following nationalities were held to come under this exclusion category: Japanese, Chinese, Hindus, Afghans, Burmese, Hawaiians, Koreans, and Filipinos. M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 96 (1946). The situation was such that in 1944, Earl G. Harrison, United States Commissioner of Immigration and Naturalization, resigned, stating that the only other country in the world which denied naturalization on the basis of race was Nazi Germany. *Id.* at 80.

<sup>22</sup> 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915).

<sup>23</sup> *Id.* at 41, 36 S. Ct. at 10, 60 L. Ed. at 135 (1915). "The right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure."

<sup>24</sup> See *Fellman, The Alien's Right to Work*, 22 MINN. L. REV. 137 (1938).

<sup>25</sup> 334 U.S. 410, 68 S. Ct. 1138, 92 L. Ed. 1478 (1948).

with citizens. The Court noted that the "power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."<sup>26</sup> The Court's later decisions "established that classifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny."<sup>27</sup> This more recent line of authority has removed the validity of the arguments which once denied to the alien many of the rights of a citizen, including the right to work at a chosen occupation.

*In re Day*<sup>28</sup> is regarded as the leading case in the field of bar admission standards. In *Day* the court stated that any classification made a requisite for the practice of law "must have some reference to learning, character, or ability to engage in such practice."<sup>29</sup> The Supreme Court stated the applicable test in *Schwartz v. Board of Bar Examiners*.

A State can require high standards of qualification such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualifications must have a rational connection with the applicant's fitness or capacity to practice law.<sup>30</sup>

The Court has also stated that an entire class, such as Negroes, can obviously not be excluded,<sup>31</sup> even though statistics might show that the excluded class has a higher crime rate,<sup>32</sup> that applicants cannot be excluded for lack of character or loyalty to the United States government without substantive proof of bad character or disloyalty,<sup>33</sup> and that the State may not wholly exclude from admission to the bar members of any organization, even the Communist party.<sup>34</sup>

Recently a new development has occurred which should encourage the states to review their alien exclusion laws without awaiting test cases. For some time state courts have asserted the view that because admission to a state bar is particularly within the realm of state regulation, the lower federal courts are without subject matter jurisdiction, or will abstain in suits challenging their validity.<sup>35</sup> This view was dissipated, however, when four federal district courts within twelve months heard suits challenging state bar admission residency requirements,

<sup>26</sup> *Id.* at 420, 68 S. Ct. at 1143, 92 L. Ed. at 1488 (1948).

<sup>27</sup> *Graham v. Richardson*, 403 U.S. 365, 372, 91 S. Ct. 1848, 1852, 29 L. Ed.2d 534, 541 (1971).

<sup>28</sup> 54 N.E. 646 (Ill. 1899).

<sup>29</sup> *Id.* at 647.

<sup>30</sup> 353 U.S. 232, 239, 77 S. Ct. 752, 756, 1 L. Ed.2d 796, 801 (1957).

<sup>31</sup> *Id.* at 239, 77 S. Ct. at 756, 1 L. Ed.2d at 802 (1957).

<sup>32</sup> See, e.g., *Legislation, Constitutionality of Legislation Discriminating Against the Alien in His Right to Work*, 83 Pa. L. Rev. 74, 88 n.28 (1934).

<sup>33</sup> *Baird v. State Bar*, 401 U.S. 1, 91 S. Ct. 702, 27 L. Ed.2d 639 (1971); *Application of Stolar*, 401 U.S. 23, 91 S. Ct. 713, 27 L. Ed.2d 657 (1971).

<sup>34</sup> *Baird v. State Bar*, 401 U.S. 1, 6, 91 S. Ct. 702, 706, 27 L. Ed.2d 639, 646 (1971).

<sup>35</sup> See, e.g., *Starr v. State Bd. of Law Examiners*, 159 F.2d 305, 306 (7th Cir. 1947); *In re Russell*, 236 So. 2d 767, 768 (Fla. 1970).

rejecting the states' pleas for abstention.<sup>36</sup> Each of the courts held the residency requirements, which theretofore had been labelled as "universally accepted" as alien exclusion,<sup>37</sup> violated the equal protection clause.<sup>38</sup>

It should be noted that in spite of language by some courts to the contrary, alien exclusion from the bar was not unanimously accepted in the United States until recently.<sup>39</sup> In 1873 the Supreme Court noted that "many prominent and distinguished lawyers have been admitted to practice, both in the State and Federal Courts, who were not citizens of the United States . . ."<sup>40</sup> By 1971, however, forty-six states had citizenship requirements.<sup>41</sup>

Of the many cases denying aliens admission to the bar, *Ex parte Thompson*<sup>42</sup> and *Agg Large v. State Bar*<sup>43</sup> stand out as by far the most important. *Thompson* was decided in 1824, 44 years before the fourteenth amendment became effective. The court quite correctly stated that the bar applicant had "no right to the law or privileges of any particular place."<sup>44</sup> By so finding the court could have easily dismissed the alien applicant without further discussion, but it proceeded to give two reasons for excluding aliens from the bar. The court stated that the alien might be seized in time of war to the detriment of his clients and that the alien lacks an appreciation for American institutions which is vital to an attorney.<sup>45</sup> The final argument for exclusion appears to render moot any of these other reasons, for the court stated that the admission of aliens to the bar would debase the practice of law!

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<sup>36</sup> Potts v. Honorable Justices of the Supreme Court, 332 F. Supp. 1392 (D. Hawaii 1971); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

<sup>37</sup> Note, *Residence Requirements for Initial Admission to the Bar; A Compromise Proposal For Change*, 56 CORNELL L. REV. 831 (1971). All states but Florida, Illinois, Louisiana, and Ohio have them, though some have now been held unconstitutional.

<sup>38</sup> Potts v. Honorable Justices of the Supreme Court, 332 F. Supp. 1392 (D. Hawaii 1971); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Keenan v. Board of Bar Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970). *But see* Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972).

<sup>39</sup> *See, e.g.*, Howden v. State Bar, 283 P. 820 (Cal. 1929); *In re Emmett*, 2 Cai. R. 386 (N.Y. 1805). *See also In re O'Sullivan*, 267 F. 230 (D. Mont. 1920).

<sup>40</sup> Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139, 21 L. Ed. 442, 455 (1873).

<sup>41</sup> V-1971 MARTINDALE-HUBBELL LAW DICTIONARY *passim* (104 ed. 1971). Some of the states require citizenship indirectly by requiring that bar applicants be eligible voters. *E.g.*, IND. SUP. CR. R. §-2 (1967) and IND. CONST. art. 2, § 2.

Only three states affirmatively allowed aliens to be admitted: Georgia, Oregon and Tennessee. GA. CODE ANN. § 9-104 (1936); ORE. REV. STAT. § 9.230 (1969); TENN. CODE ANN. § 29-104 (Supp. 1971). The Oregon rule permits admission of an alien declarant conditional upon his becoming a citizen within six months after he is eligible. North Dakota had no requirement of citizenship, N.D. STAT. ANN. § 27-11-03 (Supp. 1971), but this cannot necessarily be interpreted as an acquiescence to admission of aliens.

<sup>42</sup> 10 N.C. 355 (1824).

<sup>43</sup> 23 P.2d 288 (Cal. 1933).

<sup>44</sup> *Ex parte Thompson*, 10 N.C. 355, 362 (1824).

<sup>45</sup> *Id.* at 362, 363.

*Thompson* must be regarded with interest, but because it preceded the equal protection clause, it is only of historical significance. *Agg Large v. State Bar*, however, was decided in 1933 and was the only instance before 1972 where alien exclusion from the bar was challenged as a violation of the equal protection clause. Without noting that *Thompson* preceded the fourteenth amendment, the court in *Agg Large* held the exclusion of aliens from the bar does not violate the equal protection clause of the federal Constitution and cited *Thompson* with approval. Besides *Thompson*, the *Agg Large* court summarized cases from other jurisdictions to add that the practice of law is a privilege and not a right and that because an attorney is an officer of the court, he should be a citizen.<sup>46</sup>

To the reasons for exclusion mentioned in *Thompson* and *Agg Large*, other courts have added the argument that an alien cannot take the necessary oath of allegiance required of an attorney while he remains the citizen of a foreign state.<sup>47</sup> There are, then, five basic arguments purporting to provide the reasonable grounds for alien exclusion from the bar. Although these were effectively rejected by one author as early as 1946,<sup>48</sup> the courts have failed to re-evaluate their stand in light of developing case law. An analysis of the reasons for exclusion will reveal the need to abrogate the rule barring aliens from becoming attorneys.

AN ALIEN CANNOT HAVE THE DESIRED APPRECIATION FOR  
AMERICAN POLITICAL INSTITUTIONS OR LOCAL LEGAL CUSTOMS

Whether this is a valid requirement is subject to much doubt. The federal district courts have approached unanimity in finding that there is "no rational relationship between 'fitness or capacity to practice law' and the knowledge of 'local custom.'"<sup>49</sup> The United States Supreme Court has stated that a state is prohibited "from excluding a person from a profession . . . solely because he is a member of a particular political organization or because he holds certain beliefs."<sup>50</sup> Thus the bar examiners could not exclude one who has knowledge of American political institutions but opposes them.

Even were this held a valid prerequisite for bar membership, an overly inclusive classification results from presuming an alien incapable of meeting the test. The Canadian or British national certainly has

<sup>46</sup> 23 P.2d 288, 289 (Cal. 1933).

<sup>47</sup> E.g., *In re Admission to the Bar*, 84 N.W. 611, 612 (Neb. 1900).

<sup>48</sup> M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 188 (1946). See also Note, *Refugees and the Professions*, 53 HARV. L. REV. 112, 115 (1939).

<sup>49</sup> *Keenan v. Board of Law Examiners*, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970).

<sup>50</sup> *Baird v. State Bar*, 401 U.S. 1, 6, 91 S. Ct. 702, 706, 27 L. Ed.2d 639, 646 (1971); *Application of Stolar*, 401 U.S. 23, 28, 91 S. Ct. 713, 716, 27 L. Ed.2d 657, 663 (1971).

some idea of how a common law jury system works,<sup>51</sup> as does the alien licensed to practice in one state who migrates to another.<sup>52</sup> Often the alien will be one who has spent the majority of his years growing up and being educated in the United States.<sup>53</sup> In such instances, he will not be the uneducated foreigner "cherishing alien prejudices" envisioned in *Thompson*.<sup>54</sup> de Tocqueville was an alien, yet was his knowledge of American political institutions any the worse?

IN TIME OF WAR THE ALIEN'S POSSIBLE INTERNMENT  
WOULD JEOPARDIZE HIS CLIENT'S INTERESTS

This argument only slightly merits refutation. A repetition of the World War II wholesale seizure of an alien nationality is highly unlikely. Even then, however, Italian and German nationals were not interned. Because of the total unlikelihood of interning British, Canadian or Mexican nationals, exclusion on this ground also suffers from being overly inclusive.

Speculation on the likelihood of war with whatever country or internment of whatever nationality is unnecessary. One author has logically pointed out that the contingency of war and internment is less catastrophic to a client and far less likely than the death or severe sickness of his attorney.<sup>55</sup> In either case, he loses his legal representative, but at least with internment the attorney may have enough notice to settle his pending legal problems in an orderly manner.

THE PRACTICE OF LAW IS A PRIVILEGE AND NOT A RIGHT  
AND MAY THEREFORE BE BURDENED UNCONDITIONALLY

In several early cases, courts held that there is no Constitutional right to practice law.<sup>56</sup> This was the primary reason espoused for denying admission to otherwise qualified Negroes<sup>57</sup> and women.<sup>58</sup> The success of the state courts in denying these classes admission and deny-

<sup>51</sup> See generally *In re Ashford*, 4 Hawaii 614 (1883) and *In re O'Neill*, 90 N.Y. 584 (1882) for examples of exclusions of British and Canadian citizens.

<sup>52</sup> See, *In re Ashford*, 4 Hawaii 614 (1883). Petitioner was a graduate of an American law school and licensed to practice in two states, yet was denied admission to the Hawaiian bar because he was not a citizen. Accord, *In re Hong Yen Chang*, 24 P. 156 (Cal. 1890).

<sup>53</sup> See, e.g., *Application of Park*, 484 P.2d 690 (Alas. 1971); *In re Chi-Dooh Li*, 488 P.2d 259 (Wash. 1971).

<sup>54</sup> 10 N.C. 355, 363 (1824).

<sup>55</sup> M. KONVITZ, *THE ALIEN AND THE ASIATIC IN AMERICAN LAW* 188 (1946), cited with approval in *Application of Park*, 484 P.2d 691, 694 (Alas. 1971).

<sup>56</sup> E.g., *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139, 21 L. Ed. 442, 446 (1873) and *In re Taylor*, 48 Md. 28 (1877); accord, *In re Russell*, 236 So. 2d 767, 768 (Fla. 1970); *Application of Avery*, 352 P.2d 607, 609 (Hawaii 1959); *Baker v. Varsar*, 82 S.E.2d 90, 95 (N.C. 1954).

<sup>57</sup> *In re Taylor*, 48 Md. 28 (1877).

<sup>58</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 21 L. Ed. 442 (1873); *In re Maddox*, 50 A. 487 (Md. Ct. App. 1901).



ing to aliens various rights in which the state had some special interest led to the formulation of the special public interest doctrine. In *Crane v. New York*<sup>59</sup> the Supreme Court affirmed the decision of Justice Cardozo which upheld a New York statute excluding aliens from public works on the basis that:

[1] Whatever is a privilege rather than a right may be made dependent upon citizenship. . . .

[2] In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike. . . .

[3] As it may discriminate between citizens and aliens in [welfare] relief, so may it discriminate in employment. . . .<sup>60</sup>

Later Cardozo was to describe the practice of law as "a privilege burdened with conditions."<sup>61</sup>

No reason for excluding aliens is more solidly refuted than this. As early as 1867 the Supreme Court rejected the argument that as a privilege the right to practice law could be burdened with arbitrary restrictions.<sup>62</sup> In *Schwabe* the Court stated that it does not matter whether the right or privilege label is used, "the practice of law is not a matter of State's grace."<sup>63</sup> Further, in *Cohen v. Hurley*<sup>64</sup> the Court added that a "State may not arbitrarily refuse a person permission to practice law . . . ."

The demise of the right-privilege dichotomy has been gradual but it now appears complete.<sup>65</sup> In *Graham v. Richardson*<sup>66</sup> the Supreme Court held unconstitutional a Pennsylvania statute denying welfare benefits to non-citizens and cited the *Crane* case as the primary example of the special public interest doctrine. It then stated that "*Takahashi* . . . cast doubt on the continuing validity of the special interest doctrine in all contexts."<sup>67</sup> Noting Justice Cardozo's language in *Crane*, the Court continued:

[T]he special public interest doctrine was heavily grounded on the notion that "[w]hatever is a privilege rather than a right may be made dependent upon citizenship." But this Court now has rejected the concept that constitutional rights turn upon whether a

<sup>59</sup> 239 U.S. 195, 36 S. Ct. 85, 60 L. Ed. 218 (1915).

<sup>60</sup> *People v. Crane*, 108 N.E. 427, 430 (1915), *aff'd*, 239 U.S. 195, 36 S. Ct. 85, 60 L. Ed. 218 (1915).

<sup>61</sup> *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917).

<sup>62</sup> *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378, 18 L. Ed. 366, 370 (1867).

<sup>63</sup> 353 U.S. 232, 238 n.5, 77 S. Ct. 752, 756 n.5, 1 L. Ed.2d 796, 801 n.5 (1957).

<sup>64</sup> 366 U.S. 117, 122, 81 S. Ct. 954, 958, 6 L. Ed.2d 156, 162 (1961).

<sup>65</sup> See Van Alstyne, THE DEMISE OF THE RIGHT-PRIVILEGE DISTINCTION IN CONSTITUTIONAL LAW, 81 HARV. L. REV. 1439 (1968).

<sup>66</sup> 403 U.S. 365, 91 S. Ct. 1848, 29 L. Ed.2d 534 (1971).

<sup>67</sup> *Id.* at 374, 91 S. Ct. at 1853, 29 L. Ed.2d at 543 (1971) (emphasis added).

governmental benefit is characterized as a "right" or as a "privilege."<sup>68</sup>

The *Graham* decision appears to have provided the necessary springboard for a reawakening of aliens' rights. In *Dougall v. Sugarman*<sup>69</sup> a federal court in New York, birthplace of *Crane*, held that a subsequent similar state employment statute violated the equal protection clause in its exclusion of aliens.<sup>70</sup> The court relied heavily upon *Graham*, deploring the special public interest doctrine and right versus privilege basis for discriminatory exclusions from occupations. The *Dougall* court noted that "*Graham* did not explicitly overrule . . . *Crane*" but stated that *Crane* is no longer controlling.<sup>71</sup> *Purdy & Fitzpatrick v. State*<sup>72</sup> was cited with approval for the view that recent developments in the law of equal protection removed whatever validity *Crane* might once have had.

As if more were required, the Supreme Court in *Baird v. State* held: "The practice of law is not a matter of grace but of right for one who is qualified by his learning and moral character."<sup>73</sup>

#### AN ALIEN CANNOT TAKE THE REQUIRED OATH OF ALLEGIANCE UPON ADMISSION TO THE BAR

At common law the alien was disqualified from holding land and practicing law.<sup>74</sup> Each of these required an oath of allegiance to the sovereign and because the alien was the subject of another country, he was considered disqualified by the maxim, "No man may serve two masters."<sup>75</sup> An exception was made, however, for the denizen, an alien who had signed letters patent to become a citizen.<sup>76</sup> Today, however, aliens in England are licensed to practice law.<sup>77</sup>

The standard oath administered upon admission to a state bar merely requires the applicant to swear that,

. . . he will support the Constitution of the United States and of this State; that he will honestly demean himself in the practice of law, and will discharge his duty to his client to the best of his ability . . . .<sup>78</sup>

<sup>68</sup> *Id.* at 374, 91 S. Ct. at 1853, 29 L. Ed.2d at 594 (1971) (citations omitted).

<sup>69</sup> 339 F. Supp. 906 (S.D.N.Y. 1971), *prob. juris. noted*, 40 U.S.L.W. 3588 (U.S. March 24, 1972) (No. 71-1222).

<sup>70</sup> *Accord*, *Hsieh v. Civil Serv. Comm'n*, 488 P.2d 515, 519 (Wash. 1971).

<sup>71</sup> *Dougall v. Sugarman*, 339 F. Supp. 906, 909 (S.D.N.Y. 1971), *prob. juris. noted*, 40 U.S.L.W. 3588 (U.S. March 24, 1972) (No. 71-1222).

<sup>72</sup> 456 P.2d 645 (Cal. 1969).

<sup>73</sup> 401 U.S. 1, 8, 91 S. Ct. 702, 707, 27 L. Ed.2d 639, 648 (1971).

<sup>74</sup> I W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*373, 374.

<sup>75</sup> *Id.* at \*367.

<sup>76</sup> *Id.* at \*375.

<sup>77</sup> W. GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINT 126 (1956).

<sup>78</sup> TEX. REV. CIV. STAT. ANN. art. 309 (1959). See AM. JUR. 2d DESK BOOK, *Doc. No. 92*,

There is nothing to disqualify an alien, even one with no desire to become a citizen, from taking such an oath.

The very basis for extending the equal protection of the laws to aliens is that they have equal obligations with citizens under the law. An alien owes allegiance to the country in which he is domiciled and obedience to its laws.<sup>79</sup> The alien in the United States must pay taxes,<sup>80</sup> is subject to the military draft,<sup>81</sup> and may even serve as an officer in the military.<sup>82</sup> Whether he enlists or is drafted, the alien must take an oath of allegiance.<sup>83</sup>

It is obvious that an alien can in fact take an oath of allegiance, but this argument for exclusion assumes that he cannot do so in good faith. The oath requirement itself has been upheld,<sup>84</sup> but the Supreme Court cases severely limit bar examiners' inquiries into the loyalty of bar applicants.<sup>85</sup> The argument presumes the inability of an alien to take an oath while another nation has first call on his loyalties in the event of war. Yet one who professes that he can in clear conscience take an oath should be allowed to do so, even though there exists some conceivable, but improbable, set of circumstances which would cause him to renege on his oath.<sup>86</sup> This view is supported by Justice Marshall's characterization of the oath as "promissory and forward looking in nature."<sup>87</sup>

The states which exclude aliens from bar admissions do not recognize the common law distinction between an alien and a denizen or declarant. Several courts have now recognized that the declarant can with total propriety take an oath to support the constitution of the country he has adopted, seeks to live in and has applied to for citizenship.<sup>88</sup> While it is this author's contention that even a non-declarant can take any oath constitutionally permissible to require in licensing

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at 234 (1962) for the *American Bar Association's Recommended Oath of Admission to the Bar*.

<sup>79</sup> *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 154, 21 L. Ed. 426, 429 (1873).

<sup>80</sup> *Treas. Reg. § 1.1-1(6)* (1971); 26 U.S.C. §§ 871 *et seq.* (1967).

<sup>81</sup> 50 U.S.C.A. App. §§ 453, 454(a) (Supp. 1972), 50 U.S.C. App. § 455(a) (1970). It should be noted that under 8 U.S.C. § 1426(a) (1970) an alien may claim an exemption from the draft but he is thereby made ineligible to attain citizenship. This is the only remaining class of ineligible aliens and it is not this author's contention that statutes excluding these aliens from bar admission are unconstitutional.

<sup>82</sup> 10 U.S.C. § 591(b)(1) (1970); 50 U.S.C. App. § 455 (1970).

<sup>83</sup> 10 U.S.C. § 502 (1970).

<sup>84</sup> *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed.2d 749 (1971).

<sup>85</sup> *Baird v. State Bar*, 401 U.S. 1, 91 S. Ct. 702, 27 L. Ed.2d. 639 (1971); *Application of Stolar*, 401 U.S. 23, 91 S. Ct. 713, 27 L. Ed.2d 657 (1971).

<sup>86</sup> *See In re Ramadass*, 284 A.2d 133, 137-39 (Pa. 1971).

<sup>87</sup> *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 192, 91 S. Ct. 720, 740, 27 L. Ed.2d 749, 775 (1971) (dissenting opinion).

<sup>88</sup> *See, e.g., Application of Park*, 484 P.2d 690, 694 (Alas. 1971); *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1271 (Cal. 1972).

an attorney, the general alien exclusion must fail as a denial of equal protection, at least in so far as it includes alien declarants.<sup>89</sup>

AS AN OFFICER OF THE COURT AN  
ATTORNEY SHOULD BE A CITIZEN

This is the most inscrutable of the arguments propounded. It is nowhere explained.<sup>90</sup> The attorney's role as an officer of the court must be examined to give this argument any meaning.

In *Cammer v. United States*<sup>91</sup> the Supreme Court held that an attorney is "not an 'officer' within the ordinary meaning of that term." In *Cohen v. Hurley* the Supreme Court, through Justice Harlan, characterized the practice of law in the following manner.

[L]awyers must operate in a three-fold capacity, as self-employed businessman as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.<sup>92</sup>

Thus, Justice Harlan related the term "officer of the court" to character.

In *Theard v. United States*<sup>93</sup> the Court described the attorney's role as an instrument or agency to advance the ends of justice. Another court has said that as an officer of the court, the attorney is "charged with obedience to the laws of this state and to the laws of the United States . . ."<sup>94</sup> Again the references appear to relate to the character of the attorney.

It has been stated that the two permissible standards in licensing attorneys are character and fitness to practice law and the Supreme Court has reiterated this view.<sup>95</sup> An officer of the court should, of course, be a competent representative of the court, but this standard is measureable by the bar examination and a requirement that applicants have graduated from an accredited law school.

As to character, no longer may it be assumed that aliens as a class lack character<sup>96</sup> in order to exclude an "entire class rather than its

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<sup>89</sup> Denial of equal protection may frequently occur through an overly inclusive classification, one which has exceeded the numbers of those similarly situated with respect to the legislative purpose. General alienage restrictions are of this type—and should at best be those who have not registered any intent to become citizens. See, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1086 (1969).

<sup>90</sup> Application of Park, 484 P.2d 690, 694 (Alas. 1971). See also *In re Day*, 54 N.E. 646, 650 (Ill. 1899).

<sup>91</sup> 350 U.S. 399, 405, 76 S. Ct. 456, 459, 100 L. Ed. 474, 478 (1956).

<sup>92</sup> 366 U.S. 117, 124, 81 S. Ct. 954, 958, 6 L. Ed.2d 156, 162 (1961).

<sup>93</sup> 354 U.S. 278, 281, 77 S. Ct. 1274, 1276, 1 L. Ed.2d 1342, 1345 (1957).

<sup>94</sup> *People v. Wilson*, 490 P.2d 954, 955 (Colo. 1971).

<sup>95</sup> *Baird v. State Bar*, 401 U.S. 1, 8, 91 S. Ct. 702, 707, 27 L. Ed.2d 639, 647 (1971); *Law Students Civil Rights Research Council, Inc. v. Wadmond*, 401 U.S. 154, 159, 91 S. Ct. 720, 724, 27 L. Ed.2d 749, 756 (1971).

<sup>96</sup> *People v. Lovato*, 65 Cal. Rptr. 638, 642 (Dist. Ct. App. 1968): "[A] person does not

objectionable members selected by more empirical methods."<sup>97</sup> Because "[t]he practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character,"<sup>98</sup> the equal protection clause dictates that the alien be accorded individual analysis.

#### RECENT DEVELOPMENTS

Within a one year period, four state supreme courts have reconsidered their bar admission rules excluding aliens. In *Application of Park*,<sup>99</sup> the Alaska Supreme Court analyzed the five arguments for exclusion and rejected them all. The court recognized the interests to be protected by licensing attorneys, but found, "None of these interests is directly served by a requirement that attorneys be citizens of the United States."<sup>100</sup> The court, however, avoided the necessity of ruling on the constitutionality of the citizenship requirement by merely finding it an unacceptable requirement for the reason that it "does not . . . 'have a rational connection with one's fitness to practice law' . . . ."<sup>101</sup>

The Washington Supreme Court followed the lead set by *Park*. In *In re Chi-Doo Li*<sup>102</sup> the court amended its rule excluding aliens rather than finding it violative of the equal protection clause. The court did not discuss the validity of the reasons for excluding aliens, but did cite *Park* for "[s]ome of the salutary reasons for this rule change."<sup>103</sup>

It should be noted that in both *Park* and *Chi-Doo Li* the courts did not open the door for admission to all alien applicants. In each instance the petitioner had signed a sworn declaration of intent to become a United States citizen with the Immigration and Naturalization Service. Both courts altered their rules only to allow admission of aliens who had manifested their intent to become citizens.

In 1972, however, the Connecticut Supreme Court was faced with the application for admission to the bar of an alien who had no desire to become a United States citizen. In *In re Griffiths*<sup>104</sup> the Connecticut Supreme Court became only the second court to determine the validity of an equal protection attack on the exclusion of aliens from the bar. The court noted the recent cases of *Graham v. Richardson* and *Dougall v. Sugarman*, but rejected the applicant's constitutional challenge.

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demonstrate instability, nor does he show a tendency toward crime, simply because he is not a citizen of this country."

<sup>97</sup> *Ohio ex rel. Clarke v. Deckebach*, 274 U.S. 392, 397, 47 S. Ct. 630, 632, 71 L. Ed. 1115, 1120 (1927).

<sup>98</sup> *Baird v. State Bar*, 401 U.S. 1, 8, 91 S. Ct. 702, 707, 27 L. Ed.2d 639, 648 (1971).

<sup>99</sup> 484 P.2d 690 (Alas. 1971).

<sup>100</sup> *Id.* at 692.

<sup>101</sup> *Id.* at 695.

<sup>102</sup> 488 P.2d 259, 260 (Wash. 1971).

<sup>103</sup> *Id.* at 260 n.1.

<sup>104</sup> — A.2d — (Conn. 1972), *prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. April 17, 1972) (No. 71-1336).

The Connecticut court sought to give added meaning to the term "officer of the court" by explaining the "unique status accorded to members of the Connecticut bar. . . ."<sup>105</sup> In Connecticut an attorney is a commissioner of the superior court and in that capacity is empowered to sign writs otherwise issuable only by a clerk or judge. This, the court felt, provided the Connecticut attorney with such an integral role in the judicial system as to require only citizens to participate.

The court's argument cannot support alien exclusion. Although an attorney may be afforded an elevated status by some states, the powers listed by the Connecticut court relate only to character, not to citizenship. In its decision the Connecticut court relied on four cases "which have discussed the relationship between citizenship and admission to the bar":<sup>106</sup> *Ex parte Thompson, Agg Large v. State Bar, Petition of Rocafort*,<sup>107</sup> and *Application of Skousen*.<sup>108</sup> None of these cases rationally support alien exclusion.

*Ex parte Thompson* has been noted as preceding the equal protection clause and ends with the justification that aliens would debase the practice of law. *Agg Large v. State Bar* has stood for 38 years as the sole court to rule on an equal protection challenge and uphold alien exclusion. In turn, *Agg Large* had relied on *Thompson* elevating it to whatever relevance it now has. But *Agg Large* has recently been overruled.<sup>109</sup>

The other two cases relied upon by the Connecticut court are *Skousen* and *Rocafort*. The *Skousen* case is merely a one page per curiam affirmation denying an alien entrance to the bar with no discussion on or claim made under the equal protection clause.<sup>110</sup> The *Rocafort* case does mention the citizenship requirement but does not discuss it. What *Rocafort* does say, however, is that "[a]lthough earned by an alien, an LLB degree from a Florida law school creates a vested interest or right therein which neither in law nor in equity can be impaired."<sup>111</sup> This language squares with the exclusion of aliens from the bar?

In its summation, the Connecticut court states that it had applied the *Graham* test in reaching its decision. The court's findings are condensed in the following passage.

Attorneys are the means through which the majority of the people seek redress for the grievances, enforcement and defense of their rights and compensation for their injuries and losses. The courts

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<sup>105</sup> *Id.* at —.

<sup>106</sup> *Id.* at —.

<sup>107</sup> 186 So. 2d 496 (Fla. 1966).

<sup>108</sup> 289 P.2d 406 (Ariz. 1955).

<sup>109</sup> *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1273 (Cal. 1972).

<sup>110</sup> *Application of Skousen*, 186 So. 2d 496 (Fla. 1966).

<sup>111</sup> *Petition of Rocafort*, 186 So. 2d 496, 498 (Fla. 1966).

not only demand their loyalty, confidence and respect but also require them to function in a manner that will foster public confidence in the profession and, consequently, the judicial system. In this light the requirement of citizenship is not simply reasonable but is basic to the maintenance of a viable system of dispensing justice under our form of government.<sup>112</sup>

This passage appears to be no more than a rewording of the argument that to the public an attorney is a representative of the judicial system, an officer of the court, and as such should be a citizen. The premise may be correct but "the conclusion remains a non sequitur."<sup>113</sup>

In *Raffaelli v. Committee of Bar Examiners*<sup>114</sup> the California Supreme Court reconsidered an attack on alien exclusion from the bar for the first time since it had rendered the *Agg Large* decision. Citing *Purdy & Fitzpatrick v. State*<sup>115</sup> for appropriate language, the court unanimously agreed that

. . . recent developments in the law of equal protection have removed whatever vitality [the earlier cases in point] may have possessed at the time of their rendition. . . . [Agg] *Large* no longer reflects current constitutional reality, and it is hereby overruled.<sup>116</sup>

The comprehensive opinion of the California court relies heavily on the authorities already cited and adds those of *Purdy & Fitzpatrick* and a recent California attorney general's opinion.<sup>117</sup> From the former the court quotes:

[A]ny classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis.<sup>118</sup>

From the latter the court notes:

It is well established that the purpose behind occupational licensing is to protect the public from unqualified practitioners and it seems clear that citizenship bears no relationship to one's professional or vocational competency or qualification.<sup>119</sup>

From the facts of the case, it is obvious that Raffaelli intends to become

<sup>112</sup> *In re Griffiths*, — A.2d — (Conn. 1972).

<sup>113</sup> *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1273 (Cal. 1972).

<sup>114</sup> *Id.*

<sup>115</sup> 456 P.2d 645 (Cal. 1969).

<sup>116</sup> *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1273 (Cal. 1972) (court's brackets).

<sup>117</sup> 55 OPS. CAL. ATTY. GEN. 80 (1972).

<sup>118</sup> *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1271 (Cal. 1972), citing *Purdy & Fitzpatrick v. State*, 456 P.2d 645, 656 (Cal. 1969).

<sup>119</sup> *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1275 (Cal. 1972), citing 55 OPS. CAL. ATTY. GEN. 80, 82 (1972).

an American citizen, yet the California court does not so state and its decision is not based upon this fact. Rather, it finds the general exclusion of aliens to be unconstitutional. Although the court distinguishes the Connecticut decision, it does not do so on a declarant-non-declarant basis but upon the Connecticut court's emphasis on the unique status of an attorney in that state.<sup>120</sup> Although any distinction made between the two cases is lamentable, it is not inexplicable.<sup>121</sup> The decision in *Griffiths* should not be accepted and distinguished, but rather should be rejected. The reasonings of *Griffiths* cannot coexist with those of *Raffaelli* and the alien exclusion remains unsupportable in light of the authority upon which *Raffaelli* rests.

#### CONCLUSION

The exclusion of aliens from the bar is a "lingering vestige of a xenophobic attitude,"<sup>122</sup> an attitude which the bench and the bar cannot afford to promote. The demise of the right versus privilege and special public interest doctrines and the expanding applications of the equal protection clause now place the alien in an advantageous position to successfully challenge his exclusion from the legal profession.

If the states wish to retain control over their own bar admissions, they should examine *Raffaelli* and *Park* and re-evaluate their rules excluding aliens. The federal district courts have demonstrated in the residency requirement cases that they will not hesitate to use the equal protection clause to guarantee the right to practice law to any qualified applicant who has even temporarily been denied that right. In the *Griffiths* appeal,<sup>123</sup> the Supreme Court will have its first opportunity to decide whether non-declarant aliens may be excluded from the bar. Whichever course the Court follows,<sup>124</sup> the state courts must now recog-

<sup>120</sup> *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1274 n.10 (Cal. 1972).

<sup>121</sup> The *Griffiths* decision was rendered in February of 1972 and was unreported when the *Raffaelli* case was filed on May 24, 1972. *Griffiths* is referred to only in one footnote in *Raffaelli* and the language quoted is only that which appears in United States Law Week.

<sup>122</sup> *Raffaelli v. Committee of Bar Examiners*, 496 P.2d 1264, 1266 (Cal. 1972).

<sup>123</sup> *Prob. juris. noted*, 40 U.S.L.W. 3576 (U.S. April 17, 1972) (No. 71-1336).

<sup>124</sup> There are three possibilities offered by a Supreme Court review of the *Griffiths* decision.

- (1) The Court may affirm, finding no violation of equal protection. If so, only the question of the exclusion of non-declarant aliens would be resolved and the *Raffaelli* and *Griffiths* cases would coexist as authority for states to exclude *only* non-declarant aliens.
- (2) The Court may reverse, finding a violation of equal protection. This ruling would encompass all aliens because if the states cannot exclude aliens with no intention of becoming citizens, they certainly cannot exclude those who have manifested an intent to become a citizen.
- (3) The Court, may, however, avoid reaching the equal protection question by re-



nize that citizenship bears no rational relationship to the only permissible licensing standards, character and knowledge of the law, and should admit non-declarant aliens.

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versing on one of two other grounds of appeal, see 40 U.S.L.W. 3576 (1972) (No. 71-1336), thus leaving the question of alien exclusion in its present status.