THE CONSTITUTIONALITY OF LEGISLATIVE RESTRICTIONS ON THE EMPLOYMENT RIGHTS OF LEGAL RESIDENT ALIENS IN NEW YORK STATE

I. INTRODUCTION

The legal resident alien[1] in the United States today is, by statute, denied access to many occupations and professions.[2] Although in the early history of the United States the alien was afforded a warm welcome, United States policy toward aliens has changed since that time.[3] The change is evident in United States immigration policy. In the country's early years there were virtually no restrictions upon alien immigration into the United States. Congressional restrictions on aliens were just initiated in 1875.[4] Today, a comprehensive scheme of regulation exists under the Immigration and Naturalization Act.[5]

The political rights of aliens who have gained entry into the United States are also subject to restriction. Twenty-two states and territories formerly granted aliens or declarant aliens[6] the right to vote.[7] By the 1928 national elections, however, no alien in

1. 8 U.S.C. § 1101(a)(20) (1976). "The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."

2. *See, e.g.*, occupations cited, note 15 *infra*.

3. M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW (1946).

4. Act of March 3, 1875, ch. 141, 18 Stat. 477. Actually, the scope of restriction of this statute was fairly limited, excluding only felons and prostitutes. As stated in § 5:

> [I]t shall be unlawful for aliens of the following classes to immigrate into the United States, namely, persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration, and women "imported for the purposes of prostitution."

5. 8 U.S.C. §§ 1101-1362 (1976).

6. Declarant aliens are those who have "declared their intention to become citizens. . . ." Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114 (1931). Statutes restricting aliens from certain types of employment may sometimes exempt declarant aliens. *See, e.g.*, N.Y. EDUC. LAW § 3001(3) (McKinney 1970) which states that,

> The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen.

7. M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 180 (1946).

any state was eligible to vote for any elected official.[8]

At common law there were very few restrictions on an alien's right to work in this country.[9] Alien labor was seen as essential to its overall development.[10] A combination of factors, however, led to the enactment of restrictive legislation in the employment field. United States citizens often viewed aliens as political radicals and with fear. In addition, aliens competed with citizens in the job market.[11] Restrictive legislation thus developed as a result of the influence of pressure groups hoping to preclude aliens from competing in particular fields.[12]

New York has historically been a leading state in the amount of legislation enacted restricting the entry of aliens into certain occupations and professions.[13] The first such restrictive statute in that state was passed in 1871.[14] Following the enactment of this statute, New York initiated a succession of statutes requiring citizenship, or a declaration of intention to become a citizen, in at least thirty-eight occupations and professions.[15]

Limited progress has been made in the repeal of these statutes.[16] Some statutes have been judicially repealed or modified by

8. "For the first time in over a hundred years, a national election was held in 1928 in which no alien in any state had the right to cast a vote for a candidate for any office—national, state, or local." Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114 (1931).

9. Haralambie, *Employment Rights of Resident Aliens in Arizona*, 19 ARIZ. L. REV. 409 (1978).

10. *Id.*

11. *Id.* at 411.

12. M. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 195 (1946).

13. *Id.* at 196-97.

14. 1871 N.Y. Laws ch. 486, currently N.Y. JUD. LAW § 460 (McKinney 1968). The statute has no force following In re Griffiths, 413 U.S. 717 (1973) although it has not been repealed.

15. Brief for Appellee, Nyquist v. Mauclet, 432 U.S. 1 (1977). The occupations listed in this brief include in order of enactment: attorneys, pawnbrokers, laborers on public employment projects, traffickers in liquor, certified public accountants, blind adult vendors of goods and newspapers, private investigators, certified shorthand reporters, ship masters, pilots and engineers, bank directors and trustees, architects, state police officers, teachers, surveyors, operators of billiard and pocket pool halls, medical doctors, pharmacists, real estate brokers, embalmers and undertakers, engineers, dentists, forest preserve guides, nurses, employees of a competitive class in civil service, racing track parti-mutual employees, funeral directors, veterinarians, psychologists, dental hygienists, employees of private institutions acquired by the state, landscape architects, chiropractors, masseurs and masseuses, physical therapists and animal health technicians. *Id.* at 19-22.

16. *See, e.g.*, N.Y. EDUC. LAW § 7305 (McKinney) (repealed 1971) which required citizenship for architects; N.Y. EDUC. LAW § 7404 (McKinney) (repealed 1971) which required citizenship for certified public accountants.

the Supreme Court of the United States or New York state courts.[17] A substantial number of statutes, however, retain discriminatory citizenship requirements as a prerequisite for certain professions and occupations.[18]

It is the purpose of this Note to examine the most significant statutory restrictions which remain applicable to the legal resident alien of New York.[19] In order to understand the present and future status of these statutes, it is necessary to compare them with past statutory citizenship restrictions. Such an understanding requires an analysis of the constitutional limitations which have been applied to restrictive statutes. The major limitations to be examined are the doctrines of federal preemption and equal protection. Under the equal protection clause of the fourteenth amendment, the Supreme Court of the United States has established a standard of strict judicial scrutiny for restrictive statutes. Several recent Supreme Court decisions[20] upholding New York statutes with citizenship requirements, however, indicate a possible retreat or deviation from this standard. With this background in mind, the constitutionality of New York's restrictive employment statutes will be considered.

II. CONSTITUTIONAL LIMITATIONS

Legislation restricting aliens as a class is subject to certain constitutional limitations. State legislation comes under the doctrine of federal preemption when it appears that the state is encroaching upon matters dealt with by federal regulation. Often restrictive state legislation is declared unconstitutional under the equal protection clause of the fourteenth amendment.[21]

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17. *See, e.g.*, Ambach v. Norwick, 441 U.S. 68 (1979), N.Y. EDUC. LAW § 3001(3) (McKinney 1970) which restricts non-citizens from teacher certification unconstitutional; *see also* Kulkarni v. Nyquist, 446 F. Supp. 1269 (N.D.N.Y. 1977), holding N.Y. EDUC. LAW § 6534(6) (McKinney 1972), which similarly restricts physical therapists and N.Y. EDUC. LAW § 7206(1)(6) (McKinney), which similarly restricts engineers, unconstitutional.

18. *See, e.g.*, N.Y. EDUC. LAW §§ 6554(6) (chiropractors), 6604(6) (dentists), 6805(6) (pharmacists), 7504(6) (certified shorthand reporters), 7804(6) (masseurs) (McKinney 1972); N.Y. EXEC. LAW § 215(3) (state troopers) (McKinney Supp. 1976-77); N.Y. REAL PROP. LAW § 440(a) (real estate brokers) (McKinney 1968).

19. It is not within the scope of this Note to examine restrictive legislation dealing with the illegal alien.

20. Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978).

21. U.S. CONST. amend. XIV, § 1 provides that, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

A. *Federal Preemption*

Under the supremacy clause, the federal government is granted exclusive control over immigration and naturalization.[22] Congress has specified, in the Immigration and Nationality Act,[23] which aliens are to be admitted and which aliens are to be excluded from the United States. In *Truax v. Raich*,[24] the first case holding constitutional limits on a state's power to limit alien employment, the Supreme Court considered the constitutionality of an Arizona statute requiring an employer of five or more persons to hire at least four citizens out of every five new employees. The Court decided that control over immigration was vested solely in the federal government and that a state may not deprive lawfully admitted aliens of the right to earn a living in common occupations of the community. The Court considered such state legislation tantamount to denying aliens admission into the country and residency. Though this statute did not directly regulate or control immigration, the deprivation of the right to work acted as an effective deterrent to immigration.[25] The Supreme Court reaffirmed the federal preemption doctrine in *Graham v. Richardson*.[26] In that decision the Court held that state alien residency requirements encroached upon exclusive federal power and are constitutionally impermissible.[27]

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22. U.S. CONST. art. 1, § 8, cl. 4.

23. Immigration and Nationality Act, 8 U.S.C. § 1182 (1976). The aliens denied admission into the United States by statute include those who are retarded, insane, drug addicts, and dangerously diseased as well as those who are beggars, polygamists, prostitutes and anarchists. In relation to employment, the statute excludes all aliens who are "seeking to enter the United States, for the purpose of performing skilled or unskilled labor," unless they have received certification through the Secretary of Labor.

24. 239 U.S. 33 (1915).

25. *Id.* at 42.

26. 403 U.S. 365 (1971).

27. In *Graham*, the Court states that, "[t]he National Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, and regulation of their conduct before naturalization . . . . Pursuant to that power, Congress has provided, as part of a comprehensive plan for the regulation of immigration and naturalization . . . ." *Id.* at 377. The Court further states that "[s]tate laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." *Id.* at 378. In Hines v. Davidowitz, 312 U.S. 52 (1941) a similar view is expressed. "[W]here the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation . . . , states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or compliment, the federal law, or

The federal preemption doctrine has limited statutes restricting alien employment. Lower courts, however, may choose not to reach the question of federal preemption. It is possible to consider the question of whether the restrictive statute in question is constitutional solely on equal protection grounds.[28]

B. Equal Protection

The basis of the second major constitutional limitation upon state legislation restricting aliens as a class in the employment field is found in the equal protection clause of the fourteenth amendment.[29] It has been firmly established that an alien, after being admitted into the United States, is entitled to equal protection under the laws.[30] A legal resident alien is included within the meaning of a person under the fourteenth amendment.[31] The cases of *Truax v. Raich*[32] and *Takahashi v. Fish and Game Commission*[33] expanded protection of the alien by establishing equal access to employment as a fundamental right guaranteed by the fourteenth amendment.[34]

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enforce additional or auxiliary regulations." *Id.* at 66-67. *See also*, Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); Truax v. Raich, 239 U.S. 33, 42 (1915).

28. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634, 646 (1973).

29. U.S. CONST. amend. XIV, § 1.

30. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886), where the Court held invalid a municipal ordinance regulating the operation of laundries because it was discriminatorily enforced against Chinese operators; Truax v. Raich, 239 U.S. 33 (1915), where the Court held invalid an Arizona statute requiring that an employer hire at least eighty percent citizens under the fourteenth amendment; Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), where a California statute barring the issuance of fishing licenses to aliens was held to discriminate against aliens as a class.

31. The Court in Yick Wo v. Hopkins, 118 U.S. 356 (1886), stated that

> [t]hese 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; and the equal protection of the laws is a pledge of the protection of equal laws . . . . The questions we have to consider and decide in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court.

Id. at 369. *See also* Graham v. Richardson, 403 U.S. 365, 371 (1971); Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228, 238 (1896).

32. 239 U.S. 33 (1915).

33. 334 U.S. 410 (1948).

34. U.S. CONST. amend. XIV, § 1. The Court in *Takahaski* added the further insight that "[t]he Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws." 334 U.S. at 420.

Several cases have established the standard of scrutiny to be employed in determining whether a statute permissibly discriminates against aliens as a class.[35] The Supreme Court in *Graham v. Richardson*[36] first articulated a standard of strict judicial scrutiny to be applied to aliens classified, in a statute, as a group. The Court held in that case that classifications based on alienage are inherently suspect and subject to close judicial scrutiny.[37] The state has a heavy burden of justification to show that such a statute is "necessary, and not merely rationally related, to the accomplishment of a permissible state policy."[38] Generally the Court has continued to apply a standard of strict judicial scrutiny.[39] Statutes have been struck down on the grounds that they are not necessary to achieve the state's purpose,[40] or that the state interest is insufficient to warrant complete exclusion of all aliens.[41] Therefore, where a standard of strict scrutiny is involved, "the governmental interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn."[42]

In contrast, in several recent decisions the Supreme Court of the United States has refused to apply a standard of strict judicial scrutiny.[43] Those decisions were reached notwithstanding state statutes discriminating against aliens as a class.[44] In those cases

35. Nyquist v. Mauclet, 432 U.S. 1 (1977); Sugarman v. Dougall, 413 U.S. 634 (1973); In re Griffiths, 413 U.S. 717 (1973).

36. 403 U.S. 365 (1971).

37. "[C]lassifications based on alienage . . . are inherently suspect and subject to close judicial scrutiny." *Id.* at 372. Aliens as a class have been referred to as a "discrete and insular minority." United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). McLaughlin v. Florida, 379 U.S. 184 (1964). In *McLaughlin* the Court states that such classifications are subject to the "most rigid scrutiny" and "in most circumstances irrelevant to any constitutionally acceptable legislative purpose." *Id.* at 192. *See also* Korematsu v. United States, 323 U.S. 214, 216 (1944), and Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

38. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

39. Nyquist v. Mauclet, 432 U.S. 1 (1977); Sugarman v. Dougall, 413 U.S. 634 (1973); In re Griffiths, 413 U.S. 717 (1973).

40. In re Griffiths, 413 U.S. at 724.

41. *Id.* at 725.

42. Examining Board of Engineers v. Flores de Otero, 426 U.S. 572, 605 (1976).

43. Ambach v. Norwick, 441 U.S. 68 (1979); Foley v. Connelie, 435 U.S. 291 (1978).

44. Norwick, *supra* note 43, at 74; Foley, *supra* note 43, at 293.

the Court applied a rational basis test.[45] When the rational basis test is used, the statute in question is normally accorded a presumption of constitutionality which may not be disturbed unless the enactment is shown to rest on grounds wholly irrelevant to the achievement of the state's objective.[46] If the rational relation standard is used, the state no longer has the heavy burden of justifying the discriminatory statute.[47]

III. TRADITIONAL RATIONALES JUSTIFYING RESTRICTIVE STATE LEGISLATION

The majority of state legislation denying the alien access to certain occupations and professions has traditionally been justified under three broad rationales. First, through a proprietary interest in its natural resources, a state may restrict certain occupations derived from those resources.[48] Second, as an outgrowth of this doctrine, a state holds a proprietary interest in certain occupations.[49] Lastly, under the police power a state may regulate occupations of a dangerous or antisocial nature and make reasonable classifications in the interest of the public health, safety and morals.[50] Some of the different occupations and professions denied by statute to the alien will be categorized under these three broad rationales.

A. The State's Proprietary Interest in Its Natural Resources

The view that a state's interest in its natural resources justifies regulation of occupations dealing with these resources is thought to have its basis in a common law property rationale.[51] Two major Supreme Court decisions[52] restricting the right of aliens to share in natural resources were based on the property ra-

45. *Id.*

46. McGowan v. Maryland, 366 U.S. 420, 425 (1961); *see also* Williamson v. Lee Optical, 348 U.S. 483 (1955).

47. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, 239 (1957); Kotch v. Board of River Pilot Commissioners, 330 U.S. 552, 556 (1947).

48. Note, *Constitutionality of Restrictions on Aliens' Right to Work*, 57 COLUM. L. REV. 1012, 1014 (1957).

49. *Id.* at 1016-21.

50. *Id.* at 1021-27.

51. In England, title to game was in the King who held it for the use of his subjects. Therefore the right to acquire game was subject to governmental authority. *Id.* at 1014.

52. Patsone v. Pennsylvania, 232 U.S. 138 (1914) (killing wild game) and McCready v. Virginia, 94 U.S. 391 (1876) (growing oysters).

tionale. In *McCready v. Virginia*[53] a Virginia statute prohibiting anyone who was not a citizen of the state from taking or planting oysters in certain rivers was held constitutional. The Court reasoned that the owners of the public property of the state are its citizens and that its use may naturally be restricted to them. Though *McCready* did not directly differentiate between aliens and citizens, it served as an important precedent for later decisions restricting the alien's right to employment.[54]

Truax v. Raich[55] extended equal protection under the fourteenth amendment to aliens as to a fundamental right of employment, but the decision left open certain areas where restrictive legislation may be considered constitutional. It was indicated by the Court that the use of a state's natural resources could be restricted to citizens. The Court observed that a state would be more capable of showing specific danger to its general welfare if its natural resources are involved than if common occupations of the community are concerned.[56]

In *Patsone v. Pennsylvania*,[57] the Supreme Court, taking advantage of the *Truax* natural resources exception, found constitutional a statute which prohibited aliens from hunting for pleasure in the state of Pennsylvania.[58] The Court found as a rational basis for the statute that a state may protect and preserve its wild game for its citizens.[59]

Today the restriction of aliens from occupations dealing with natural resources is no longer a constitutionally permissible state objective. The Supreme Court, in *Takahashi v. Fish and Game Commission*,[60] applied the rational basis test and found that a California statute barring aliens from obtaining fishing licenses[61] was

53. 94 U.S. 391 (1876).

54. *E.g.*, Heim v. McCall, 239 U.S. 175 (1915) (only citizens to build a subway); Crane v. New York, 239 U.S. 195 (1915) (right to contract for labor).

55. 239 U.S. 33 (1915).

56. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other States.

Id. at 39-40.

57. 232 U.S. 138 (1914).

58. *Id.*

59. *Id.* at 145-46.

60. 334 U.S. 410 (1948).

61. 1945 Cal. Stats., ch. 181, currently CAL. FISH & GAME CODE § 7149 (West).

unconstitutional. The opinion that this type of exclusion is no longer permissible is reinforced by the fact that the Supreme Court has initiated a standard of strict judicial scrutiny whenever aliens are treated as a class.[62]

In addition to restricting aliens from occupations dealing with natural resources, states have in the past successfully excluded aliens from certain state-related occupations. Legislatures have claimed a special proprietary interest over occupations under State control.

B. The State's Proprietary Interest Over Certain Occupations

A state's proprietary interest over employment positions in government agencies and departments developed out of the common property theory. Since a state has the absolute right of ownership over the use of public property, it may be reasoned that public employment opportunities are a privilege which a state may grant or withhold at its own discretion.[63] The Supreme Court in *Heim v. McCall*[64] considered a New York statute prohibiting the employment of aliens on public works. The statute also prohibited certain persons who contracted with the state from employing aliens.[65] The statute was held to be constitutional. The Court reasoned that it was within a state's own right to prescribe the conditions under which public works projects are completed.[66] In this case the condition was the exclusion of alien laborers.[67]

In *Crane v. New York*,[68] the Court, in effect, reiterated the view that the right to employment in public works is a privilege rather than a right dependent on citizenship.[69] In contrast, in *C.D.R. Enterprises, Ltd. v. Board of Education*,[70] a New York

62. See discussion, *supra* notes 36-42.

63. See Note, *supra* note 48.

64. 239 U.S. 175 (1915).

65. 1909 N.Y. Laws, ch. 36, § 31 (Consol.):

§ 14: **Preference in employment of persons upon public works.** In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York.

66. Heim v. McCall, 239 U.S. at 191.

67. *Id.* at 193.

68. 239 U.S. 195 (1915).

69. *Id.* at 196.

70. 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd* 429 U.S. 1031 (1977).

Labor Law statute[71] giving preference in the construction of public works to New York citizens was held unconstitutional.[72] The statute displayed a preference for citizens who had been residents of New York State for at least twelve consecutive months.[73] The Court found within the statute an invidious classification. The lawfully admitted resident alien was put in a class with fewer privileges than were enjoyed by citizens of the state. The Court found no compelling justification to support the statute.[74] The right-privilege distinction and special public interest doctrines of *Heim*[75] and *Crane*[76] were held insufficient to justify the statute.[77] The Court did not consider the state's interest in this occupation important enough to justify the exclusion. The state, the Court reasoned, has an equal duty to all of its lawful residents including aliens to keep unemployment as low as possible.[78]

The legal resident alien's right to employment in public works appears to have been established in New York by *C.D.R. Enterprises*.[79] State restrictions on government occupations of a professional nature had once been justified under the right-privilege and special public interest justifications. These justifications seem no longer viable.[80] For this reason, occupations of a professional nature will be examined in the next section.

C. The State's Police Power

The legal resident alien may not be denied the right to engage in an ordinary occupation of the community under the Constitution.[81] He is to be treated on equal terms with citizens wherever the public welfare is not involved.[82] Under the police power of the

71. N.Y. LAB. LAW § 222 (McKinney 1965).
72. 412 F. Supp. at 1172.
73. N.Y. LAB. LAW § 222 (McKinney 1965).
74. 412 F. Supp. at 1171.
75. 239 U.S. 191 (1915).
76. 239 U.S. 195 (1915).
77. 412 F. Supp. at 1170.
78. *Id.*
79. *Id.*
80. *Id. Graham* rejects the concept that constitutional rights turn on whether a government benefit is a right or a privilege. Graham v. Richardson, 403 U.S. 365 (1971). "Taken together, *Graham* and *Takahashi* sufficiently weaken the value of *Crane* and *Heim* as precedents for upholding state laws denying aliens government employment and, therefore, those cases can be viewed as implicitly overruled and no longer law." Sugarman v. Dougall, 413 U.S. 634 (1973).
81. Truax v. Raich, 239 U.S. 33, 41 (1915).
82. *Id.* at 39-40.

state, however, certain types of employment may be prohibited or conditionally controlled.[83] A state may require a license under its police power in order to make reasonable qualifications in the interest of the public health, safety, and welfare.[84] A license may be denied to an alien if there is some logical relation between the exclusion of the alien and the protection of the public.[85]

Some states in the past have excluded aliens from employment in occupations of a dangerous or anti-social nature under the police power.[86] In *Clark v. Deckebach*,[87] the Supreme Court held that it was not unconstitutional to prohibit aliens from the operation of pool and billiard rooms by the denial of a license.[88] The classification was held to have a rational basis because of the Court's assumption that aliens were not as qualified as citizens to engage in "conduct of a dubious nature."[89] The Court accepted the view that since aliens were less likely to be familiar with local conditions, they would not be as well equipped as a citizen to deal with the maintenance of what the court characterized as an inherently dangerous enterprise.[90] The rationale of *Clarke* has been questioned,[91] but its basic holding has never been overruled. New York State still retains the discriminatory citizenship requirement for operation of billiard and pocket pool halls.[92]

In the professional fields, which normally require licensure under the state's police power,[93] citizenship requirements in New York are apparently based on the assumption that an alien is deficient in either his moral or educational background. The licensure requirements leading to the exclusion of aliens were ultimately

83. *See* Note, *supra* note 48.

84. *See id.* at 1021-27.

85. *See id.* at 1021-27.

86. *See id.* at 1021.

87. 274 U.S. 392 (1927).

88. *Id.*

89. *Id.* at 397.

90. *Id.*

91. In both *Sugarman* and *In re Griffiths* the Court indicated that Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948), weakened the doctrinal foundations of *Clarke*. In re Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 645 (1973).

92. N.Y. GEN. BUS. LAW § 461 (McKinney Supp. 1978-79).

93. The constitutionality of statutes requiring licensure is well established in New York State. *See, e.g.*, Roman v. Lobe, 213 A.D. 162, 208 N.Y.S. 617 (1925), *aff'd*, 150 N.E. 535, 241 N.Y. 514 (1925), *aff'd*, 152 N.E. 461, 243 N.Y. 51 (1926); Sockel v. Degel Yehudo, 268 A.2d 207, 49 N.Y.S.2d 176 (1944); Groetzinger v. Forest Hills Terrace Corp., 123 Misc. 274, 205 N.Y.S. 125 (1924).

designed to protect the public from the ineptitude, inexperience or dishonesty of persons not qualified to practice a particular profession.[94]

An example of a restricted profession is the field of real estate brokerage. Licensure there is thought to be helpful in the prevention of fraud upon the trusting public[95] and in assuring competency and observance of professional conduct in a relationship which presents many opportunities to extract illicit gains by concealment and collusion.[96]

Though regulation through licensing is necessary to protect the public interest, statutes similar to the New York legislation requiring brokers to be citizens[97] may be unconstitutional. Assuming that real estate brokerage is a "common occupation of the community"[98] and that a standard of strict scrutiny is judicially applied, it is likely that the statute would be declared invalid. The case of *Satoskar v. Indiana Real Estate Commission*,[99] affirmed on appeal by the Supreme Court, confirms this view. In *Satoskar* plaintiffs successfully challenged the constitutionality of an Indiana statute precluding aliens from applying for or obtaining real estate licenses.

There should be an increased awareness in the courts of the unconstitutional nature of many of these restrictive licensure requirements.[100] California, in contrast to New York, has taken firm action toward the abolishment of such requirements.[101] The opinion of the California Attorney General states that, in the absence of a reasonable connection between the requirements of citizenship and an individual's fitness to practice a given profession or

94. Dodge v. Richmond, 5 A.D.2d 593, 173 N.Y.S.2d 786 (1958).

95. *Id.* The statute involved in this case relating to the licensing of real estate brokers and salesmen was designed to "protect the public from inept, inexperienced or dishonest persons who might perpetrate or aid in the perpetration of frauds upon it, and to establish protective or qualifying standards to that end." *Id.* at 787-88.

96. In re Wilson Sullivan Co., 289 N.Y. 110, 44 N.E.2d 387, 33 N.Y.S. 203 (1942).

97. N.Y. REAL PROP. LAW § 440(a) (McKinney 1968).

98. *See* discussion, *supra* notes 36-42. In view of *Griffiths*, the State Department is no longer enforcing the requirement though it has not yet been repealed by the legislature. Letter from New York Department of State to Claire M. Schenk (November 2, 1978).

99. 417 U.S. 938 (1974).

100. *See* discussion, *supra* notes 8 & 84; *infra* note 101.

101. California has repealed a statute similar to N.Y. REAL PROP. LAW § 440(a) (McKinney 1968), CAL. BUS. & PROF. CODE § 10150.5 (West) (repealed 1972) which was repealed in addition to other citizenship requirements dealing with common occupations of the community.

vocation, United States citizenship is not a valid requirement for professional licensure and such a requirement would be violative of the equal protection clause of the fourteenth amendment.[102]

This opinion is based on *Purdy and Fitzpatrick v. State*[103] where the California Supreme Court found that a classification which discriminates arbitrarily on the basis of status has no rational basis. *Purdy* holds that it is not a legitimate interest to favor United States citizens. The California court indicated that a statute justified by this reason will fail notwithstanding whether a standard of strict scrutiny is applied.[104]

Several recent New York cases[105] indicate that the New York courts may be gradually moving toward a viewpoint similar to California. In *Surmeli v. New York*,[106] the constitutionality of New York Education Law § 6524(6)[107] was challenged by eight Turkish physicians who were residents of New York and had been licensed to practice under the statute. Each was now being excluded from his profession for failure to have become a citizen as required within a statutory time period of ten years from the date of licensure. The district court for the South District of New York found that there was no rational basis for the requirement of continued licensure as the physicians had already been qualified and licensed and had demonstrated professional competency for a significant time period. The state's argument that a political commitment to the United States was desirable and necessary to promote stability for his patient's welfare was rejected by the court.[108]

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102. 55 Cal. Op. Att'y Gen. 80 (1972).

103. Purdy and Fitzpatrick v. State, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969).

104. *Id.*

105. 412 F. Supp. 394 (S.D.N.Y. 1976), *aff'd*, 556 F.2d 560 (2d Cir. 1976), *cert. denied*, 436 U.S. 903 (1978); Kulkarni v. Nyquist, 446 F. Supp. 1269 (N.D.N.Y. 1977).

106. 412 F. Supp. at 394.

107. N.Y. EDUC. LAW § 6524(6) (McKinney 1972), which requires that in order to qualify for a license as a physician an applicant must ". . . be a United States citizen, or file a declaration of intention to become a citizen, unless such requirement is waived, in accordance with the commissioner's regulations. . . ." This section replaced former § 6509 (repealed 1971) which stated:

> There shall be issued to an applicant who, when admitted to the licensing examination, was a citizen of a foreign country, and who had declared intention of becoming a citizen of the United States, upon passing the examination, a license but upon failure of such licensee within ten years from the date of such declaration of intention to furnish evidence that he has become a citizen his license shall terminate and his registration shall be annulled.

N.Y. EDUC. LAW § 6509 (McKinney) (repealed 1971).

108. 412 F. Supp. at 397.

In *Kulkarni v. Nyquist*,[109] the holding of *Surmeli*[110] was broadened. *Kulkarni* held several citizenship requirements to be unconstitutional because of their denial to aliens of access to certain professions.[111] This case, unlike *Surmeli*, did not involve professionals who had already demonstrated their competency through years of practice but did involve qualified aliens desiring to enter certain professions. Though the court found the citizenship requirements clearly unconstitutional, it refused to certify those aliens as the representatives of a class of qualified legal resident aliens denied access to professions through citizenship requirements. This decision is indicative of an attitude of conservatism in New York courts. In choosing to consider requirements on a purely case-by-case basis the judiciary may be preserving an option to withdraw protection of the employment rights of legal resident aliens.

IV. CURRENT RATIONALE JUSTIFYING RESTRICTIVE STATE LEGISLATION

New York courts may find a possible avenue of retreat from the expanded protection of the employment rights of the legal resident alien by relying on the rationale of *Sugarman v. Dougall*.[112] In *Sugarman*, the Supreme Court applied a standard of strict judicial scrutiny and held invalid a New York Civil Service statute[113] which prohibited non-United States citizens from holding permanent positions in competitive classes of the state civil service.[114] Although the Court held this particular discriminatory statute to be unconstitutional in this decision, it stated that there may be certain situations where a state may be justified in excluding aliens from certain types of employment.[115] The type of occupation

109. 446 F. Supp. 1269 (N.D.N.Y. 1977).

110. 412 F. Supp. at 397-98.

111. 446 F. Supp. at 1271; N.Y. EDUC. LAW §§ 6534 (physical therapists) and 7206 (engineers) (McKinney 1972).

112. 413 U.S. 634 (1973).

113. N.Y. CIV. SERV. LAW § 53 (McKinney 1973).

114. Sugarman v. Dougall, 413 U.S. 634 (1973).

115. We do not hold that, on the basis of an individualized determination, an alien may not be refused, or discharged from, public employment, even on the basis of noncitizenship, if the refusal to hire, or the discharge, rests on legitimate state interests that relate to qualifications for a particular position or to the characteristics of the employee . . . .

Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office . . . . Such power inheres

with which the Court is concerned is of a political nature, particularly where important elective and non-elective state positions are involved.[116]

The notion of the necessity of the preservation of "the basic conception of a political community"[117] is not new to New York.[118] The political rights of aliens have been restricted in New York for a significant period of time.[119] Aliens are not allowed to hold public office,[120] to vote,[121] or to serve on juries.[122] The citizenship requirement for jurors is well established and has been upheld by the Supreme Court of the United States as recently as 1976.[123] In *Carter v. Jury Commission of Greene County*,[124] the Court stated that a jury was an institution at the heart of the country's system of government. The Court indicated that an alien, specifically because of his status as a non-citizen, was unable to serve.[125]

In *Foley v. Connelie*,[126] the political exception in *Sugarman* was used to uphold a New York statute[127] excluding aliens from employment as state troopers. The Supreme Court indicated that a standard of strict judicial scrutiny would not be applied where rights and privileges involving an alien's participation in the democratic processes were concerned.[128] Political policy making

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> in the State by virtue of its obligation . . . 'to preserve the basic conception of a political community' . . . . And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go the heart of representative government.

413 U.S. at 646-47.

116. *Id.*

117. *Id.* at 647.

118. "New York accordingly, acted during the first fifty years of independence to refine its 'political community.'" Brief for Appellee at 18, Nyquist v. Mauclet, 432 U.S. 1 (1977).

119. "By 1825 it was clear that aliens were excluded from public office, voting and jury service." *Id.*; 1825 N.Y. LAWS, ch. 307, § 4.

120. N.Y. PUB. OFF. LAW § 3 (McKinney 1952).

121. N.Y. CONST. art. 2, § 1.

122. N.Y. JUD. LAW § 510 (McKinney 1975); N.Y. CIV. RIGHTS LAW § 13 (McKinney 1976).

123. Perkins v. Smith, 426 U.S. 913 (1976).

124. 396 U.S. 320 (1970).

125. *Id.* at 332.

126. 435 U.S. 291 (1978).

127. N.Y. EXEC. LAW § 215(3) (McKinney 1972).

128. The Court in *Foley* stated: "The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification." 435 U.S. at 296.

aspects of a state trooper's job were emphasized by the Court in finding that citizenship is a compelling and necessary requirement.[129] The New York decision, the Court felt, indicated that an alien would be less "personally committed to the proper application and enforcement of the laws of the United States" than a citizen.[130] The underlying assumption is that an alien is less interested in the preservation of the state than a citizen. The Court was also concerned that an alien may potentially encounter a conflict of loyalties.[131] The decision recognizes that a state may reasonably presume a citizen to be more familiar with, and sympathetic to, American traditions than an alien.[132] This rationale has been rejected by a number of cases.[133] Those courts have asserted that an alien is no less capable of understanding American law or appreciating American institutions or being loyal and committed to the United States than is a citizen.[134]

The choice of the Court in *Foley* to draw an analogy between state troopers and jurors is also subject to criticism. A comparison between the duties of a policeman and those of an attorney[135] would bear a much greater similarity. Both involve long term commitments to a profession dealing with the law. It appears that the Court in *Foley* has glossed over the many mechanical, routine functions of a state trooper. A state trooper has an obligation to enforce, but not to create, the law.

The dissent in *Foley* acknowledges the inconsistency between *Griffiths* and *Foley*.[136] It also points out that the majority based its holding upon language which is essentially dictum.[137] Crucial to the majority's decision is its characterization of the job of a state trooper as a policy-making position. Nowhere, however, is the line between policy making and non-policy making positions drawn in a clear and consistent fashion.[138]

129. *Id.* at 297-98.

130. Foley v. Connelie, 435 U.S. 291 (1978).

131. *Id.* at 897-98.

132. 435 U.S. at 299-300.

133. In re Griffiths, 413 U.S. 717 (1973); In re Park, 484 P.2d 690 (1971); Raffaelli v. Committee of Bar Examiners, 7 Cal. 3d 288, 496 P.2d 1264 (1972) (en banc).

134. *Id.*

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

136. "Unless the Court repudiates its holding in *In re Griffiths*, . . . it must reject any conclusive presumption that aliens, as a class, are disloyal or untrustworthy." Foley v. Connelie, 435 U.S. 291, 308 (1978) (Stevens, J., dissenting).

137. 435 U.S. at 303 (Marshall, J., dissenting).

138. 435 U.S. at 310 (Stevens, J., dissenting).

The decision in *Foley* also shows some inconsistencies with the decision in *Nyquist v. Mauclet*.[139] In *Mauclet*, the Supreme Court held a New York statute[140] barring resident aliens from state financial assistance for higher education to be in violation of the equal protection clause of the fourteenth amendment.[141] Although this case dealt with an alien's right to an education rather than employment, the Supreme Court discussed the political exception of *Sugarman*.[142] The Court, in speaking of the narrow scope of the exception in *Foley*, states that, "as *Sugarman* makes quite clear, the Court had in mind a State's historical and constitutional powers to define the qualifications of voters, or of 'elective or important nonelective' officials 'who participate directly in the formulation, execution, or review of broad public policy.'"[143]

Perhaps the inconsistency between the decisions of the Court in *Griffiths* and *Mauclet* in light of *Foley* may be explained by a change in attitude on the part of the Court. The Court seems to be placing a heavier emphasis on the importance of the rights, benefits, and privileges of citizenship than on the employment rights of the legal resident alien. This possibility is recognized by Justice Stewart in his concurring opinion in *Foley*:

> The dissenting opinions convincingly demonstrate that it is difficult if not impossible to reconcile the Court's judgment in this case with the full sweep of the reasoning and authority of some of our past decisions. It is only because I have become increasingly doubtful about the validity of those decisions (in at least some of which I concurred) that I join in the opinion of the Court in this case.[144]

The recent decision of the Supreme Court in *Ambach v. Norwick*[145] also suggests the possibility that the Court may be retracting the scope of employment rights previously granted to the legal resident alien. In *Norwick* the Court overturned the decision of the New York Southern District Court.[146] The lower court, in that

139. 432 U.S. 1 (1977).
140. N.Y. EDUC. LAW § 661(e) (McKinney Supp. 1978).
141. 432 U.S. at 12.
142. 413 U.S. at 646-47.
143. 432 U.S. at 11.
144. 435 U.S. at 300 (Stewart, J., concurring).
145. 441 U.S. 68 (1979).
146. *Id.*

case, found a New York statute[147] which required public school teachers to be United States citizens unconstitutional.[148] Although the New York court had examined the statute with strict scrutiny,[149] the Supreme Court only looked to the statute for a rational basis.[150] The Supreme Court made an initial determination that teaching in public schools constitutes a governmental function.[151] It then proceeded to the conclusion that the statute bears a rational relationship to the State's interest of furthering its educational goals.[152]

The Court's decision in *Norwick* is subject to a number of criticisms. As the dissent in that case points out, "it is logically impossible to differentiate between this case concerning teachers and *In re Griffiths* concerning attorneys."[153] The majority in *Norwick* attempts to counter this point. New York's citizenship requirement is limited to a governmental function because it applies only to teachers employed by and acting as agents of the state. In contrast, the Connecticut statute, held unconstitutional in *In re Griffiths*, applied to all attorneys though most do not work for the government. The exclusion of aliens from access to the bar involved the right to pursue a chosen occupation rather than access to public employment.[154]

An analysis of the *Norwick* decision shows a few weaknesses in the court's line of reasoning. First, the exclusion does not refer to the substance of the occupation. In determining whether a governmental function is involved, a teacher's duties are of greater import than the status of a teacher as a state employee. Second, the fact that teachers are state employees is not a proper basis to distinguish them from attorneys. "States owe all of their lawful residents, whether aliens or citizens, equal access to public as well as private employment, absent the necessity for restrictions designed to promote compelling state interests."[155]

Both *Norwick* and *Foley* have a potentially far reaching effect in the area of state legislative restrictions of the employment

147. N.Y. EDUC. LAW § 3001(3) (McKinney 1970).
148. Ambach v. Norwick *sub nom* Norwick v. Nyquist, 417 F. Supp. at 922.
149. *Id.* at 918.
150. 441 U.S. 80 (1979).
151. *Id.* at 75.
152. *Id.* at 80.
153. *Id.* at 81 (Blackmun, J., dissenting).
154. *Id.* at 76 n.6.
155. 417 F. Supp. at 981 n.9.

right of the legal resident alien. Legislative repeal or amendment of restrictive statutes may slow or cease as a result of these decisions. New restrictive legislation may proliferate. Absent limits on the state's power to classify employment as a political relationship, a new mode of infringement upon employment rights of the legal resident alien may result. It is noteworthy that the decision in *Foley* has already been adopted by at least one lower New York court. In *Di Franco v. City of New York*,[156] a New York court upheld a code requirement[157] which barred aliens from becoming policemen.

An example of the potentially wide scope of the political exception is found in the California case of *Chavez-Salido v. Cabell*.[158] In that case the state attempted to justify a restriction on a significant range of occupations which involve the powers of a peace officer.[159] Those occupations include superintendents of cemeteries as well as sheriffs.[160]

The issue may be even further compounded. If a court determines that an occupation fits within the hazy boundaries of the political exception, a restrictive statute itself will only be examined to determine whether it has a rational relationship to the state's interest.[161] At that stage the statute is most likely to withstand constitutional challenge.[162] It has been observed that "several recent decisions addressing the issue of aliens' right to work indicate that the suspect class status of alienage is slowly eroding. As a result, it is possible that state action against aliens will no longer be strictly scrutinized. . . ."[163] A return to the rational basis standard of scrutiny presents a serious threat to the established employment rights of the legal resident alien.

V. CONCLUSION

The current constitutional status of New York statutes which restrict certain types of employment to citizens has been placed in

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156. DiFranco v. City of New York, 88 Misc. 2d 852, 389 N.Y.S.2d 968 (1976).

157. NEW YORK, N.Y. ADMIN. CODE Tit. A, ch. 18, § 434a-8.0 (1963).

158. Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), *vacated and remanded*, 436 U.S. 901 (1978).

159. 427 F. Supp. at 170.

160. 427 F. Supp. at 169-70, note 22.

161. *See* Ambach v. Norwick, *supra* note 43; Foley v. Connelie, 435 U.S. 291 (1978).

162. See discussion, *supra* notes 43-47.

163. Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 FORDHAM L. REV. 835, 838 (1977).

a state of flux by the decisions in *Norwick* and *Foley*. Before these cases were decided, it appeared that statutes which discriminated against aliens as a class would be examined with close judicial scrutiny.[164] Any retreat from a standard of strict judicial scrutiny would result in a reduction of the already established employment rights of the legal resident alien. Although *Norwick* and *Foley* indicate a retraction of employment rights, they may be explained or distinguished by the unique type of employment in each case.

A refinement of the distinction between policy and non-policy making occupations is needed. The over-expansive political exception of *Sugarman* is unwarranted. Most of New York's restrictive statutes relate to common occupations of the community. Such statutes are unconstitutional, and it is recommended that they either be repealed by the New York legislature or be judicially invalidated by the New York courts. Those official bodies should limit rather than promote the threatening trend against the established employment rights of the legal resident alien.

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164. *See* discussion, *supra* notes 35-42.