

CONSTITUTIONAL LAW:
PHYSICIANS & SURGEONS:

The provision of Section 334.031 RSMo 1959 which requires that candidates for licenses as physicians and surgeons in the State of Missouri shall be citizens of the United States is unconstitutional.

OPINION NO. 276

May 22, 1970

Honorable Thomas D. Graham
State Representative
312 East Capitol Avenue
Jefferson City, Missouri 65101



Dear Representative Graham:

This opinion is in response to your question concerning whether the citizenship requirement of Section 334.031, RSMo 1959, is discriminatory and unconstitutional.

Section 334.031 provides in part:

"1. Candidates for licenses as physicians and surgeons shall be citizens of the United States and shall furnish satisfactory evidence of their good moral character, and their preliminary qualifications, to wit: . . ."

Thereafter, the section sets forth in detail the educational prerequisites necessary to qualify as a candidate. Thus, a candidate is required to establish his graduation from an accredited high school or its equivalent and satisfactory evidence of completion of pre-professional education consisting of at least 60 semester hours. He must provide satisfactory evidence that he attended and received a diploma throughout at least four terms of 32 weeks of actual instruction in each term and received a diploma from a reputable medical college or osteopathic college that enforces certain other requirements that are provided for in Section 334.031.

Section 334.040 provides that all persons desiring to practice as physicians and surgeons in Missouri must present themselves to be examined as to their fitness. The type of examination, certain subjects which must be included, average grade levels which must be obtained by each candidate and the administration of the examination is set forth.

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Section 334.031 and 334.040 provide, therefore, a comprehensive qualification and testing procedure through which a person obtains a license to practice medicine in the State of Missouri.

In addition to the foregoing, applicants may be admitted to the practice of medicine under Section 334.043 RSMo 1959 in Missouri without examination where the applicant is "legally qualified" and he has met the educational requirements of this state and holds a certificate in any state or territory of the United States or of the District of Columbia authorizing the practice of medicine. The State Board of Registration for the Healing Arts (Board) does not license an alien licensed in another state and otherwise qualified educationally on the grounds that such a person is not "legally qualified" under Section 334.031.

Section 334.045 allows the Board to issue a temporary license to an otherwise qualified physician to practice in state maintained hospitals or other hospitals approved by the Board even though such a person is not a citizen of the United States where the applicant is legally authorized to practice under the laws of another state, territory or foreign country and who has met such other requirements as the Board may impose. The temporary license shall limit the licensee to practice in the designated hospital under the supervision of the Chief of Staff of the hospital and no fees for services shall be charged by the licensee or the hospital for services performed by the licensee.

The citizenship requirements were not contained in the previous laws with respect to practitioners of medicine, surgery and midwifery. Chapter 334 RSMo 1949.

The opinion request requires an interpretation of that portion of the Fourteenth Amendment to the Constitution of the United States which provides:

"[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

The protection afforded by the above quoted portion of the Fourteenth Amendment extends to both citizens and aliens. In Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1885), the court referred to the above language from the Fourteenth Amendment and stated:

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"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; and the equal protection of the laws is a pledge of the protection of equal laws." loc. cit. 118 U.S. 356, 369.

The plaintiff in this case was a citizen of China and he was attacking an ordinance which in its application was being used to deprive Chinese citizens from operating laundries. Aliens, therefore, enjoy the same right to equal protections enjoyed by citizens.

The requirement that an applicant be a citizen imposed by Section 334.031 is, of course, discriminatory in the sense that all persons other than citizens who have the requisite educational qualifications are qualified applicants. The question, however, is whether the class created is permissible under the Fourteenth Amendment.

In regulating its affairs, each state has through its police power considerable discretion in regulating the affairs of the state and, in the process, to create classifications. The basic requirement in this classification process is that the classes bear some relation to the purpose for which the class was created. In Petitt v. Field, 341 S.W.2d 106, 109 (Mo.S.Ct., 1960) the court stated:

". . . it is arbitrary discrimination violating the Equal Protection Clause of the 14th Amendment to make exclusions not based on differences reasonably related to the purposes of the Act. . . ."

It is necessary, therefore, to undertake to determine the purpose served by licensing physicians. This purpose has been discussed on numerous occasions. In State v. Hathaway, 21 S.W. 1081, 1083 (Mo.S.Ct., 1893) the court in referring to the creation of the Board of Health which then licensed physicians stated:

". . . This statute is the exercise by the legislature of its prerogative to pass all needful laws for the preservation of the health of the people of this commonwealth. Its right to regulate the practice of those trades and professions requiring professional skill and learning can no longer be doubted. . . ."

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"The legislature, then, in the interest of society, and to prevent the imposition of quacks, adventurers, and charlatans upon the ignorant and credulous, has the power to prescribe the qualifications of those whom the state permits to practice medicine. . . ." loc. cit. 21 S.W. 1081, 1083.

In State v. Davis, 92 S.W. 484, 488 (Mo.S.Ct., 1906) the court in referring to the state statute governing the licensing of physicians stated:

". . . The prime object of this law upon the subject of the practice of medicine is the protection of the people from the impositions herein indicated by persons who are not sufficiently skilled in the profession to authorize them to properly administer medicine and therefore relieve the afflicted. . . ." loc. cit. 92 S.W. 484, 488.

Finally, in State v. Scopel, 316 S.W.2d 515, 518 (Mo.S.Ct., 1958) the court stated:

"It is clear that, for protection of the public health and welfare, the legislature is empowered to regulate the practice of medicine in such manner as it reasonably may believe to be proper and wise. . . ." loc. cit. 316 S.W. 515, 518.

The purpose to be served by requiring that an applicant be a citizen must, therefore, relate to and further the protection of the public health from persons who are unqualified and who because of their willingness to represent themselves as physicians might injure the public who are unable to ascertain their true qualifications.

We have been unable to locate any case which has considered the requirement of citizenship to the practice of medicine. In Templar v. Michigan State Board of Examiners of Barbers, 90 N.W. 1058, 1059-1060 (Mich.S.Ct., 1902) the court determined that a requirement that a barbers license be restricted to citizens was unconstitutional as a violation of the Fourteenth Amendment. In its discussion, the court discussed a prior Michigan case which had held that no person has a vested right to practice medicine. The court stated:

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". . . We do not hesitate to reiterate that doctrine. We think it must be considered as settled that in the protection of the public health the legislature has the right to provide for an examination of all persons who seek to engage in the practice of medicine, and to have their qualifications passed upon by a properly constituted board. But the practice of medicine is no more an incident of citizenship than the practice of a trade of a barber. All persons are entitled to enjoy the equal protection of the law, . . ."

The court also indicated that if the legislature has the power to require citizenship, might the legislature not have the power to exclude alien labor wholly? The court answered in the negative.

Citizenship has been upheld as a prerequisite for the right to practice certain vocations or businesses on a number of occasions.

These cases are collected in 39 A.L.R. 346-351. It has been held that a state may deny to aliens the right to act as an auctioneer, Wright v. May, 149 N.W. 9 (Minn.S.Ct., 1914); to sell liquor, Trageser v. Gray, 20 A. 905 (Md.Ct.App., 1890); to obtain a peddlers license, Commissioner v. Hanna, 81 N.E. 149 (Mass.Sup.Jud.Ct., 1907). These cases were rationalized in George v. City of Portland, 235 P. 681 (Ore.S.Ct., 1925) on the grounds that these particular occupations have been historically subject to abuse and that the "occupations involved have been practically placed under the ban of the law and in the domain of privilege only, so that, strictly speaking, no right belongs to anyone to engage in such occupation."

A similar rationale seems to underly Ohio ex rel. Clarke v. Deckevach, 274 U.S. 392, 71 L.Ed. 1115 (1926) where the court upheld as consistent with the Fourteenth Amendment a Cincinnati, Ohio, ordinance which prohibited an alien from obtaining a license to conduct a billiard and pool room. The court noted that in a prior case the court had taken judicial notice of the "harmful and vicious tendency of such establishments." The court held that the ordinance does not preclude the possibility of a rational basis for the legislative judgment and that it had not knowledge of the local conditions sufficient to say that the legislature was clearly wrong.

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Where the court found no relationship between a particular occupation and a prohibition against the employment of aliens, the classification has been struck down. In Truax v. Raich, 239 U.S. 33, 60 L.Ed. 131 (1915) the court had before it an Arizona statutory provision which required every employer of more than five persons to employ not less than 80% qualified electors or native born citizens of the United States. The state asserted that the act was justified as an exercise of the state to make reasonable classifications in promoting health, safety, morals and welfare of those within its jurisdiction. The court held that the broad range of legislative discretion "does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood." The court went on to say:

" . . . It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . ." loc. cit. 239 U.S. 33, 41.

In Takahashi v. Fish and Game Commission, 334 U.S. 410, 92 L.Ed. 1478 (1947) the court struck down a California statute which provided that a commercial fishing license could not be granted to a person "ineligible to citizenship". Under the federal naturalization laws a citizen of Japan was not then eligible to become a citizen. California urged that it had a public interest in the fish on its coastline and that it could regulate commercial fishing to assure to its citizens the use of these fish. The court held that whatever ownership the state might have in these fish, it is inadequate to justify the exclusion of all aliens who are lawful residents of the state from making a living by fishing while permitting all others to do so.

There are a number of other cases which have discussed the basic question of the appropriate limitations that a state may impose upon aliens in their choice of occupations. The above is thought to be representative.

The Attorney General of Texas in an opinion to Honorable M. H. Crabb, December 7, 1950, held that the State of Texas could not constitutionally limit medical licenses to United States citizens. In that opinion, the Attorney General quoted extensively from Wormsen v. Moss, 20 N.Y.S.2d 798, 803 (1941).

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The court there considered the constitutionality of a citizenship requirement for a massage operator. The court stated:

" . . . Thus the alien, like the citizen, has the right to engage in a lawful occupation. If the calling is one that the State, in the exercise of its police power, may prohibit either absolutely or conditionally, by the exaction of a license, the fact of alienage may justify a denial of the privilege. But even then, there must be some relation between the exclusion of the alien and the protection of the public welfare. (Citation omitted.) Classification as between citizens and aliens is permissible, but the classification must have some reasonable basis in the welfare of the community. . . ."

Is there, then, a rational basis for excluding aliens from the practice of medicine in Missouri?

In our opinion, the requirement of citizenship does not further the purpose of providing to the public skillful and well-trained doctors. An alien as well as a citizen must satisfy the Board that he has undergone extensive specialized training. This training is then put to the test of an examination which the candidate must satisfactorily pass. Further, under Section 343.043, a citizen who has obtained a license in a sister state may be admitted without undergoing the testing procedures. Presumably, this reciprocity is based upon the fact that every state protects its residents, as does Missouri, by requiring rigorous tests before such a license can be obtained. A citizen who has a license from another state is presumed to be qualified when he enters Missouri. A non-citizen does not enjoy that presumption and is not permitted to demonstrate his skill by submitting to the testing procedures.

Chapter 334 was amended in 1963 by the addition of Section 334.045 through which an alien is permitted to obtain a temporary license to practice as a physician and surgeon in designated hospitals under the supervision of the Chief of Staff if the alien is legally authorized to practice under the laws of a state, territory or a foreign country, and who meets other requirements the Board may prescribe. The interplay of Sections 334.031 and 334.045 thus allows an alien to practice medicine albeit under supervision, but does not permit the alien to be examined to be determined if his skill is such as to permit him to practice. Thus, the prohibition restricts the power of the Board to actually determine if a physician licensed in a foreign country can meet the standards set in Sections 343.031 and 343.040.

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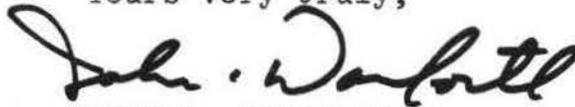
Under these circumstances, we can discern no relationship between the status of citizenship and the qualification of a person to be a candidate for a license to practice medicine.

CONCLUSION

It is therefore, the opinion of this office that the provision of Section 334.031 RSMo 1959 which requires that candidates for licenses as physicians and surgeons in the State of Missouri shall be citizens of the United States is unconstitutional.

The foregoing opinion, which I hereby approve, was prepared by my assistant John C. Craft.

Yours very truly,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is written in a cursive, flowing style.

JOHN C. DANFORTH
Attorney General