RESIDENCY REQUIREMENTS FOR BAR ADMISSION STRUCK DOWN AS VIOLATIVE OF THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV OF THE CONSTITUTION

Piper v. Supreme Court of New Hampshire, 723 F.2d 110 (1st Cir. 1983) (en banc)

In *Piper v. Supreme Court of New Hampshire*,[1] the United States Court of Appeals for the First Circuit[2] cautiously confirmed the prevailing application[3] of the privileges and immunities clause[4] to the legal profession by declaring unconstitutional the New Hampshire Bar residency requirement, which excluded qualified attorneys from practicing within the state solely on the basis of nonresidency.[5]

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1. 723 F.2d 110 (1st Cir. 1983) (en banc), *prob. juris. noted*, 104 S. Ct. 2146 (1984).

2. The First Circuit has heard *Piper* on two separate occasions. In the first proceeding, a divided three-member panel found that the New Hampshire rule requiring bar applicants to be New Hampshire residents did not violate the privileges and immunities clause. 723 F.2d 98, 99-106 (1st Cir.), *vacated*, 723 F.2d 110 (1st Cir. 1983) (en banc), *prob. juris. noted*, 104 S. Ct. 2149 (1984). Upon en banc reconsideration, the four-member court divided equally, thereby affirming the district court decision that the New Hampshire residency requirement violated the privileges and immunities clause. 723 F.2d 110 (1st Cir. 1983) (en banc), *prob. juris. noted*, 104 S. Ct. 2149 (1984). *See infra* notes 62-84 and accompanying text.

3. Prior to the First Circuit's determination in *Piper*, five other courts had determined that state bar residency requirements violated the privileges and immunities clause. *See* Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F. Supp. 173 (N.D. Ala. 1981); Noll v. Alaska Bar Ass'n, 649 P.2d 640 (Alaska 1980); Gordon v. Commission on Character & Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440 (W. Va. 1982). Only one case since 1979 has held that state bar residency requirements do not violate the privileges and immunities clause. *See* Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286 (W.D. Wis. 1980), *vacated*, 645 F.2d 76 (7th Cir. 1981) (*Canfield* was decided prior to the Supreme Court's refinement of the equal privileges standard in Hicklin v. Orbeck, 437 U.S. 518 (1978), and therefore *Canfield* is a dubious precedent).

4. U.S. CONST. art. IV, § 2, cl. 1. That clause provides as follows: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Article IV should not be confused with the privileges or immunities clause of the fourteenth amendment, which states in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1. The article IV provision deals with discrimination as to rights recognized by state law. The fourteenth amendment provision addresses deprivation of rights that derive from national citizenship. For a discussion on the privileges or immunities clause, see Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405.

5. 723 F.2d at 118. Most states have either simple or durational residency requirements. In a simple residency requirement state, an applicant either must indicate a bona fide intent to establish residency or actually establish residency at the time of application or admission. *See, e.g.*, Stalland v. South Dakota Bd. of Examiners, 530 F. Supp. 155 (D.S.D. 1982). A durational residency requirement specifies that an applicant reside in a state for a fixed period of time prior to a

The plaintiff, Kathryn Piper, a resident of Vermont,[6] sought admission to the New Hampshire Bar.[7] The New Hampshire Supreme Court denied the plaintiff admission to the Bar[8] solely on the basis of her nonresidency.[9] The plaintiff subsequently sought an injunction

specified event. *See, e.g.,* Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979). *See generally* NATIONAL BAR EXAMINATION DIGEST 3-35 (D. Skibbe ed. 1980).

6. The plaintiff lives in Lower Waterford, Vermont, less than 400 yards from the New Hampshire border. The plaintiff decided to practice in New Hampshire "due to the innumerable conflict of interest problems that would arise should [she] enter the private practice of law in the same town as [her] husband." Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064, 1065 (D.N.H. 1982), *aff'd,* 723 F.2d 110 (1st Cir. 1983). After the plaintiff signed a statement of intent to become a resident of New Hampshire, personal circumstances arose that prevented the Pipers from moving. *Id.*

7. In *Piper*, the plaintiff faced a simple residency requirement. New Hampshire Supreme Court Rule 42 states, in part: "Any person domiciled in the United States and who either is a resident of the State of New Hampshire or filed a statement of intention to reside in the State of New Hampshire shall be eligible to apply for examination provided he is possessed of qualifications hereinafter provided." *See* N.H. REV. STAT. ANN. §21:6 (Supp. 1983) (A resident of New Hampshire is one who is domiciled in the state and who has demonstrated an intent to remain in the state for the indefinite future).

8. 539 F. Supp. at 1065. The plaintiff was actually denied admission to the bar on two separate occasions. She initially filed a request for an exception to the residency requirement, which the New Hampshire Supreme court denied. *Id.* The plaintiff then filed a formal petition with the state supreme court, seeking an exemption from the residency requirement, which the court also denied. *Id.*

9. *Id.* The New Hampshire Board of Bar Examiners found that the plaintiff possessed good moral character and suitable qualifications to take the bar exam. *Id.* The plaintiff subsequently passed the New Hampshire exam. *Id.*

New Hampshire denies an otherwise fit applicant admission to the bar if he or she is not a resident of New Hampshire at the time of admission. *See supra* note 7. Seven other states have a similar system: Colorado, Idaho, Iowa, Maine, Oklahoma, Texas, and Utah. Six other states permit simple residency requirements or a caveat: Delaware (simple residency requirement or principal office), Kentucky (simple residency requirement or perform major portion of practice in Kentucky or graduate from approved law school in Kentucky), Minnesota (simple residency requirement or maintain an office or designate the Clerk as agent for service of process), Missouri (simple residency requirement or be resident of adjoining county in adjacent state with intent to maintain office and practice full-time in Missouri), New Jersey (simple residency requirement or bona fide office in the state), South Dakota (must be a resident or maintain an office in South Dakota or designate the Clerk as agent for service of process). Eleven states require a specific period of residence before examination or admission: Arkansas (60 days), Hawaii (3 months), Kansas (90 days), Montana (6 months), Nevada (4 months, 28 days), New Mexico (90 days), North Carolina (37-40 days), Rhode Island (3 months), South Carolina (84-117 days), Tennessee (2 months), Virginia (71-76 days), Wyoming (6 months). The remaining twenty-five states have no bar admission residency requirements: Alabama, Alaska, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, Utah, Vermont, Washington, West Virginia, Wisconsin. The District of Columbia also has no bar residency requirement. D. SKIBBE, BAR/BRI DIGEST 6-41 (1984 ed.).

preventing the New Hampshire Supreme Court from enforcing the residency requirement.[10] Piper alleged that the residency requirement deprived her of the privileges and immunities of citizenship guaranteed in article IV of the Constitution.[11]

The district court, applying the analysis set forth in *Hicklin v. Orbeck*,[12] found that the New Hampshire residency requirement violated the privileges and immunities clause.[13] On appeal, a panel of the Court of Appeals for the First Circuit reversed.[14] The First Circuit then granted a petition for rehearing en banc, vacated the panel's judgment, affirmed the decision of the district court by an equally divided vote[15] and *held*: the New Hampshire rule requiring bar applicants to establish residency in that state violates the privileges and immunities clause.[16]

The principles of article IV, section 2 of the Constitution are virtually identical to those embodied in the privileges and immunities clause of the Articles of Confederation.[17] Relying upon the explicit rationale

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10. 539 F. Supp. at 1065.

11. *Id.* The plaintiff also alleged that the residency requirement burdened interstate commerce and violated the equal protection clause. In addition, the plaintiff filed a pendant state claim, alleging that Rule 42 violated N.H. REV. STAT. ANN. § 311:2 (1981), which requires that a member of the New Hampshire bar must be at least 21 years old and must possess good moral character. Neither the district court nor the First Circuit pursued any of these claims.

12. 437 U.S. 518 (1978). *See infra* notes 43-48 and accompanying text.

13. Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D.N.H. 1982).

14. Piper v. Supreme Court of New Hampshire, 723 F.2d 98 (1st Cir. 1983). *See supra* note 2 (In the first *Piper* decision the majority reasoned that lawyers were not analogous to the oil worker in *Hicklin* and therefore did not apply a strict *Hicklin* privilege or immunities test).

15. *See supra* note 2.

16. 723 F.2d 110, 118 (1st Cir. 1983) (en banc), *prob. juris. noted*, 104 S. Ct. 2149 (1984).

17. The privileges and immunities clause of the Articles of Confederation stated in part:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof . . . .

ARTICLES OF CONFEDERATION art. IV, cl. 1. *See generally* Special Project, *Admission to the Bar: A Constitutional Analysis,* 34 VAND. L. REV. 655, 765 (1981); Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV,* 92 HARV. L. REV. 1461, 1470-71 (1979).

In a pamphlet published contemporaneously with the framing of the Constitution, Charles Pinckney of South Carolina, the author of the new privileges clause, proclaimed that"[t]he fourth article [of the Constitution] . . . is formed exactly upon the principles of the fourth article of the present Confederation." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 112 (M. Farrand rev. ed. 1966). In 1898, Justice Harlan used language identical to that found in the preamble to article

of article IV of the Articles of Confederation, courts interpret the privileges and immunities clause in article IV[18] of the Constitution as a means to facilitate national unification and an open economy by preventing states from discriminating against nonresidents.[19] The clause, however, does not completely bar dissimilar treatment of residents and nonresidents.[20]

In 1823, in *Corfield v. Coryell*,[21] the Circuit Court for the Eastern District of Pennsylvania rendered the first salient judicial interpretation of the privileges and immunities clause. In *Corfield*, the court upheld a New Jersey statute that limited the right to rake for oysters in New Jersey waters to New Jersey residents[22] against a claim that the statute violated the privileges and immunities clause.[23] Justice Bushrod Washington, sitting as a Circuit Judge, reasoned that the language of the clause encompassed a broad range of fundamental rights.[24] Because he

IV of the Articles of Confederation to define the constitutional privileges and immunities clause in Blake v. McClung, 172 U.S. 239, 249 (1898). Almost two hundred years after the ratification of the Constitution, Chief Justice Burger recognized that "all the privileges of trade and commerce" protected by the Articles of Confederation language are also protected by the privileges and immunities clause. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 394 (1978) (Burger, C.J., concurring). *See also* Zobel v. Williams, 457 U.S. 55, 79-81 (1982) (O'Connor, J., concurring) (tracing the historical developments of the privileges and immunities clause back to its origin in the Articles of Confederation).

Under the Articles of Confederation, the privileges and immunities clause and the commerce clause were joined in article IV in an attempt to preclude economic balkanization by the newly formed states. Even though the commerce clause and the privileges and immunities clause are no longer in the same article in the Constitution, many courts and commentators argue that the two clauses still have overlapping objectives. *See* Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 270 n.7, 397 N.E.2d 1309, 1311 n.7, 422 N.Y.S.2d 641, 643 n.7; *see also* Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 518-19 (1981); Special Project, *supra*, at 765.

18. *See supra* note 4.

19. "The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948). *See* United States v. Wheeler, 254 U.S. 281, 294-95 (1920) (The purpose of article IV is to create a single economic common market).

20. Toomer v. Witsell, 334 U.S. 385, 396 (1948) ("The privileges and immunities clause is not absolute").

21. 6 F. Cas. 546 (E.D. Pa. 1823) (No. 3230).

22. *Id.* at 548. Plaintiff, a Pennsylvania citizen, violated the statute by removing oysters from a New Jersey bay. *Id.*

23. *Id.* at 552. The court held that the statute justifiably protected New Jersey's natural resources. *Id.*

24. *Id.* at 551-52. Justice Washington included the following rights on his list:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of

found the privileges and immunities secured under the clause to be fundamental, Justice Washington concluded that these rights belong to all citizens of free societies.[25]

For the next forty-five years, courts acknowledged Justice Washington's constitutional orthodoxy,[26] without strictly adhering to his approach.[27] In 1868, the Supreme Court explicitly interpreted the privileges and immunities clause as an analogue to equal protection. In *Paul v. Virginia*,[28] the Supreme Court held that article IV, section 2 embodied general nondiscriminatory principles that required states to grant nonresidents the same privileges given to residents.[29] *Paul*'s al-

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> the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take hold and dispose of property, either real or personal . . . .

Id. at 552. Justice Washington did not believe, however, that raking for oysters was a part of a citizen's fundamental rights. Justice Blackmun borrowed heavily from Justice Washington's list in Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 384 (1978).

Because Justice Washington stated that all citizens have the right to "pass through, or to reside in any other state, for purposes of . . . professional pursuits," it would be reasonable to infer that the practice of law is a right protected by the privileges and immunities clause. Consequently, under a *Corfield* analysis, requirements such as residency for the bar would be unconstitutional. Subsequent court opinions, however, soon made it evident that states had the exclusive power to license lawyers. For instance, in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), the Supreme Court stated:

> [T]he right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license.

Id. at 139. *See* Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated,* 614 F.2d 943 (4th Cir. 1980); Robinson's Case, 131 Mass. 376 (1881); Goodell's Case, 39 Wis. 232 (1875). *But see supra* note 3 (inferior federal district courts have been far less deferential to the states' right to license attorneys).

25. 6 F. Cas. at 551.

26. *See, e.g.,* Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); Conner v. Elliott, 59 U.S. (18 How.) 591 (1855); Wiley v. Parmer, 14 Ala. 627 (1848); Smith v. Moody, 26 Ind. 299 (1866); Oliver v. Washington Mills, 93 Mass. (11 Allen) 268 (1865); Barrell v. Benjamin, 15 Mass. 354 (1819); Davis v. Pierse, 7 Minn. 1 (1862); Kincaid v. Francis, 3 Tenn. (Cooke) 49 (1812). *See generally* Antineau, Paul's *Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 10-15 (1967).

27. *See, e.g.,* Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929); La Tourette v. McMaster, 248 U.S. 465 (1919); Redd v. St. Francis County, 17 Ark. 416 (1856); Haney v. Marshall, 9 Md. 194 (1856); Austin v. State, 10 Mo. 591 (1847); Shipper v. Pennsylvania R.R., 47 Pa. 338 (1864).

28. 75 U.S. (8 Wall.) 168 (1868). Under the *Paul* interpretation, a court would invoke the privileges and immunities clause only if an improper fit existed between the state's purpose and means. Thus, the Court used a quasi-equal protection approach to eradicate discriminatory legislation. *See infra* notes 30-31.

29. 75 U.S. (8 Wall.) at 180.

tered interpretation[30] of the privileges and immunities clause and the growing influence of the fourteenth amendment[31] caused the Court to abandon temporarily the privileges and immunities clause.[32]

Recent Supreme Court decisions have resurrected the privileges and immunities clause. In *Toomer v. Witsell*,[33] the Court struck down a South Carolina statute that imposed a $2,500 license tax on shrimp boats owned by nonresidents while imposing only a $25 license tax on similar boats owned by South Carolina residents.[34] Chief Justice Vinson devised a reasonableness standard to assess asserted violations of the privileges and immunities clause. First, a state must demonstrate that it has a valid reason for making distinctions based on state citizenship. Next, a state must show that the distinction bears a close relationship[35] to that valid reason. Chief Justice Vinson noted that the state

30. Under the *Corfield* interpretation of the privileges and immunities clause, the fundamental rights protected by the clause were meant to be granted by national citizenship. Thus a right secured under the privileges and immunities clause would be protected regardless of whether the individual discriminated against was a resident or a nonresident of the state which impinged upon the right.

Paul rejected this notion of rights that no state can transgress. The modern interpretation only used the privileges and immunities clause to prevent discrimination against non-residents. As Justice Rehnquist noted, dissenting in *Zobel v. Williams,* "[the privileges and immunities clause] assures that *nonresidents* of a State shall enjoy the same privileges and immunities as residents enjoy. . . . We long ago held that the Clause has no application to a citizen of the State whose laws are complained of." Zobel v. Williams, 457 U.S. 55, 84 n.3 (1982) (Rehnquist, J., dissenting) (emphasis in original).

31. Justice Blackmun wrote in Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978), that "[p]erhaps because of the imposition of the Fourteenth Amendment upon our constitutional consciousness and the extraordinary emphasis that the Amendment received, it is not surprising that the contours of art. IV, section 2, cl. 1 are not well developed . . . ." 436 U.S. at 380.

32. The equal protection clause has generally taken over the protections of the privileges and immunities clause. *See* Sosna v. Iowa, 419 U.S. 393 (1975); Shapiro v. Thompson, 394 U.S. 618 (1969); Tang v. Appellate Div. of N.Y. Supreme Court, First Dept., 487 F.2d 138 (2d Cir. 1973), *cert. denied,* 416 U.S. 906 (1974); Aronson v. Ambrose, 479 F.2d 75 (3d Cir.), *cert. denied,* 414 U.S. 854 (1973); Shenfield v. Prather, 387 F. Supp. 676 (N.D. Miss. 1974). *See generally* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 374-79 (10th ed. 1980); J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 414 (2d ed. 1983).

33. 334 U.S. 385 (1948).

34. *Id.* at 388-91.

35. *Id.* at 396. "Thus the inquiry in each case must be concerned with whether [reasons for discrimination] do exist and whether the degree of discrimination bears a close relation to them." *Id.* A court should also grant the states considerable leeway when analyzing local evils and prescribing appropriate cures. Professor Varat argues that the *Toomer* analysis is comparable to the intermediate scrutiny used in Craig v. Boren, 429 U.S. 190 (1976), and other gender-based cases. Varat, *supra* note 17, at 514 n.109.

justification was overinclusive.[36] The Chief Justice then concluded that the South Carolina statute "plainly and frankly" discriminates against nonresidents.[37]

In *Baldwin v. Montana Fish & Game Commission*,[38] the Court combined the *Toomer* test with the fundamental interests concept developed in *Corfield* and its progeny.[39] *Baldwin* presented a challenge to a Montana law requiring all nonresident hunters to purchase a hunting license seven times more expensive than a resident's hunting license.[40] The Court refused to apply the *Toomer* "close" relation test[41] because the right to hunt for sport was not fundamental.[42]

In *Hicklin v. Orbeck*,[43] the Supreme Court amplified the *Toomer* standard.[44] The *Hicklin* Court first demanded that the state show that nonresidents constitute a "peculiar source of evil" at which the statute is aimed.[45] The discrimination against nonresidents must then bear a substantial relationship to the "evil" that nonresidents inflict on the state.[46] Using this test, the Court struck down an Alaska statute, aimed

36. 334 U.S. at 397.

37. *Id.* at 396.

38. 436 U.S. 371 (1978).

39. *Id.* at 387-88. *See supra* notes 20 and 24-29.

40. 436 U.S. at 373-74.

41. The Court described several new perspectives on the privileges and immunities analysis. First, the Court asked whether the activity is so "basic and essential" that "interference with [it] would frustrate the purposes of the formation of the Union. . . ." *Id.* at 387. Next, the Court asked whether the activity is "basic to the maintenance or well-being of the Union." *Id.* at 388. The Court held that elk hunting was neither important to the formation of the nation nor basic to the well-being of the Union. Thus the statute withstood the constitutional attack.

42. *Id.* at 386-88. The Court concluded that elk hunting was nothing more than a recreation and a sport for the wealthy. As such, the activity did not impinge upon one's right to obtain his or her livelihood and therefore was not worthy of being deemed a fundamental right. *Id.* at 388.

43. 437 U.S. 518 (1978).

44. *See supra* notes 35-37 and accompanying text. The Court in *Hicklin* ignored the *Baldwin* Court's mention of fundamental rights. It is unclear whether the Court was purposefully attempting to move away from a fundamental rights analysis in privileges and immunities cases. Justice Brennan, after writing a searing dissent to the Court's reliance on fundamental rights in *Baldwin*, wrote the majority opinion in *Hicklin*, which may indicate that the Court is abandoning a *Baldwin*-type analysis.

Regardless of the Supreme Court's intentions about the fundamental rights analysis in privileges and immunities cases, subsequent lower court decisions have fused the *Baldwin* and *Hicklin* tests to form a new hybrid analysis. *See infra* note 59.

45. 437 U.S. at 525.

46. *Id.* at 527-28. With *Hicklin*, the privileges and immunities clause appears to have matured as a means to deter state economic barriers. Gone are the "reasonable" or "close" relationship analyses used in previous Court decisions. Rather, the Court has decided to use the "substantial" relationship standard. In *Hicklin*, Justice Brennan appeared to care little for the

at nonresidents working on the Alaskan pipeline, requiring employers to give Alaska residents preferential treatment.[47] Justice Brennan, writing for a unanimous Court, concluded that the discriminatory effects of the statute did not bear a substantial relationship to the particular evil that the nonresidents allegedly presented.[48]

After *Hicklin*, several lower courts combined the new privileges and immunities framework with an increased perception of the integration of the legal practice into commercial activity[49] to invalidate residency requirements for admission to the bar.[50] In *Gordon v. Committee on Character & Fitness*,[51] the New York Court of Appeals rejected a durational residency[52] rule that required a bar applicant to be a resident of New York for six months.[53] The court first noted that the practice of law is a species of commercial activity[54] and therefore within the pur-

"due regard" afforded to the state. He argued that even if the state carried its burden of proof that nonresidents constitute a "peculiar source of evil," the statute may still be unconstitutional if less restrictive alternatives exist. *Id.* at 528. *See The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 84-85 (1978) (Court creates a more stringent equal privileges test). One indication that *Hicklin* is the watershed point for the privileges and immunities clause is the number of courts that have used the *Hicklin* analysis to strike down residency requirements. *See supra* note 3.

47. The Court found that neither the high unemployment rate among Alaskans nor Alaska's interest in controlling oil extracted by the employers justified the statute. 437 U.S. at 527-28.

48. *Id.* at 533-34.

49. Supreme Court decisions dealing with the commercial nature of the legal profession ushered in a new judicial attitude toward the legal profession. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1977); *In re* Primus, 436 U.S. 412 (1977); Bates v. State Bar, 433 U.S. 350, 371-72 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773, 778 (1975).

50. *See supra* note 3.

51. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

52. *See supra* note 5.

53. 48 N.Y.2d at 267, 397 N.E.2d at 1310, 422 N.Y.S.2d at 642.

54. The *Gordon* court argued that the act of an attorney pursuing the practice of law is analogous to oil workers employed on the Alaskan pipeline in *Hicklin* in that both plaintiffs are pursuing their employment opportunities. *Id.* at 271, 397 N.E.2d at 1312, 422 N.Y.S.2d at 644. Indeed, the primary triggering mechanism for a privileges and immunities claim has been the denial to a nonresident of equal access to employment in a state. *E.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978) (statute giving qualified Alaska residents an absolute preference over nonresidents in the oil and gas industry violated the privileges and immunities clause); Mullaney v. Anderson, 342 U.S. 415 (1952) (licensing fee that was ten times higher for nonresident commercial fishermen than for resident commercial fishermen violated the privileges and immunities clause); Toomer v. Witsell, 334 U.S. 385 (1948) (license fee of $25 for each commercial shrimp boat owned by a resident and $2,500 for each boat owned by a nonresident violated the privileges and immunities clause); Chalker v. Birmingham & Nw. Ry., 249 U.S. 522 (1919) (tax on railroad construction work that was four times greater for nonresidents than for residents discriminated against citizens of other states); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) (statute prohibiting nonresidents from selling goods within the state violated the privileges and immunities clause). *See supra* note 17.

view of the *Hicklin* test.[55] It then applied this test and determined that a state may not premise a nonresident's right to engage in his chosen profession on state residency alone.[56]

Three years later in *Stalland v. South Dakota Board of Bar Examiners*,[57] the District Court of South Dakota invalidated simple residency[58] requirements for admission to the South Dakota bar. The court held that the practice of law in South Dakota is a fundamental right[59] protected under the privileges and immunities clause.[60] It applied the *Hicklin* test to determine if the discrimination was justified. The court concluded that the nonresidents did not constitute a "peculiar source of evil," and that the statute in question failed to bear a substantial relationship to the particular evils nonresidents posed to the state bar.[61]

In *Piper v. Supreme Court of New Hampshire*,[62] the First Circuit became the first federal court of appeals to make a post-*Hicklin* examination of the privileges and immunities clause's application to residency requirements for admission to a state bar. Judge Bownes, writing for the equally-divided court,[63] noted that the Supreme Court often has used the privileges and immunities clause to invalidate state laws which create economic opportunities favoring residents over nonresidents.[64] Judge Bownes admitted that a state could discriminate on the basis of

55. 48 N.Y.2d at 272, 397 N.E.2d at 1312, 422 N.Y.S.2d at 644.

56. *Id.* at 273-74, 397 N.E.2d at 1313-14, 422 N.Y.S.2d at 645-46.

57. 530 F. Supp. 155 (D.S.D. 1982).

58. *See supra* note 5.

59. By including the determination of whether a particular activity is a fundamental right, the court appears to have altered subtly the *Hicklin* test. *Hicklin* failed to discuss the fundamental rights analysis. *See supra* note 44. Lower courts frequently combine the *Baldwin* analysis and the *Hicklin* analysis into one test. *See, e.g.,* Stalland v. South Dakota Bd. of Examiners, 530 F. Supp. 155, 158 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F. Supp. 173, 177 (N.D. Ala. 1982); Sheley v. Alaska Bar Ass'n., 620 P.2d 640, 642-43 (Alaska 1980).

60. 530 F. Supp. at 158.

61. *Id.* at 159-62. The Board of Bar Examiners argued that out-of-state attorneys constituted a peculiar source of evil because they are unfamiliar with local customs, attitudes, laws, and procedures. *Id.* at 159. The Board also noted that nonresident attorneys would not be subject to the direct control or supervision of local courts. *Id.* at 160. The court rejected these arguments, noting that because an attorney, once admitted to the state bar, may immediately move out of the state and yet retain his South Dakota license, a substantial relationship did not exist between the alleged evil and the statutory means of preventing that evil.

62. 723 F.2d 110 (1st Cir. 1983) (en banc), *prob. juris. noted,* 104 S. Ct. 2149 (1984).

63. Judge Coffin joined with Judge Bownes. Judge Breyer joined with Chief Judge Campbell.

64. *Id.* at 112-13.

residency[65] when confronted with substantial sovereignty concerns.[66] He found, however, that the practice of law did not affect the sovereign authority[67] of the state in this case.[68]

Judge Bownes then applied the *Hicklin* substantial relationship analysis[69] and concluded that New Hampshire residency requirements violated the privileges and immunities clause.[70] He found that existing procedural safeguards[71] and bar examination methods[72] sufficiently in-

65. *Id.* at 114.

66. Judge Bownes recognized that some state activities are impregnable to national pressures. *Id.* These "political rights" present a distinction that courts developed early in the history of the privileges and immunities clause to insure that some activities would be exempt from privileges and immunities review. The rationale for this exception is that each state retained certain residual sovereign power after the ratification of the Constitution. For instance, it offends the basic concept of state sovereignty to allow a voter to cast a vote in elections in several states. *See* Dunn v. Blumstein, 405 U.S. 330 (1972). It also would offend state sovereignty if a politician ran for office in a state in which the candidate did not reside. *See* Chimento v. Stark, 353 F. Supp. 1211 (D.N.H. 1973), *aff'd mem.*, 414 U.S. 802 (1973). One commentator has suggested that the practice of law is such a political right. *See* C. ANTIEAU, MODERN CONSTITUTIONAL LAW 715 (1969). *But see infra* notes 67-68.

67. 723 F.2d at 114-15. Judge Bownes cited Sugarman v. Dougall, 413 U.S. 634 (1973), to define the parameters of the political rights exception. 723 F.2d at 114. *Sugarman* stated that the parameters of political rights encompassed the qualification of voters; individuals holding important elective or non-elective positions in the executive, legislative, or judicial branches; or perform any function that goes to the essence of representative government. 413 U.S. at 647. Bownes then cited *In re* Griffiths, 413 U.S. 717 (1973), to demonstrate that attorneys fall outside the exception and therefore are not subject to residency requirements. 723 F.2d at 114-15. *See In re* Griffiths, 413 U.S. at 729 (Attorneys do not fall within parameters of political occupations because the "practice of law [does not] place one so close to the core of the political process as to make him a formulator of government policy.")

68. 723 F.2d at 115. Judge Bownes' approach to whether the practice of law is a "political right" is logical. Permitting an attorney to practice his trade in more than one state does not offend basic notions of federalism. Attorneys often practice concurrently in more than one state. Multi-state practices are not offensive because the attorney's relationship with the state is far too attenuated to affect the identity of the state and because attorneys are not at the core of the political process. *Sugarman*, 413 U.S. at 729. Thus Judge Bownes correctly stated that no justification exists for exempting the legal profession from privileges and immunities scrutiny.

69. 723 F.2d at 115-16. *See supra* notes 45-47 and accompanying text.

70. 723 F.2d at 115-18.

71. *Id.* at 116. Judge Bownes argued that nonresident attorneys were no more a source of evil to the state judicial system than local attorneys. *Id.* For instance, nonresident attorneys could be reached just as easily as their resident counterparts for court or disciplinary proceedings. *Id.* Also, the state could easily gain jurisdiction over the attorney through the state's long-arm statute. *Id.* Many of the nonresident attorneys live just as close, if not closer, to the New Hampshire courts than attorneys residing in outlying areas of the state. *Id.*

Although Judge Bownes spoke only to the use of long-arm statutes, a state bar could also demand that the nonresident lawyer have an office in the state where he will practice or designate the clerk of the court as an agent for service of process. The Minnesota and North Dakota bars presently employ such a system. *See supra* note 9. Whether by way of a long-arm statute or by

sured that nonresidents would constitute no greater evil than their resident counterparts.[73] He further reasoned that the discriminatory rule bore no substantial relationship to the evils asserted by the state[74] because the rule did not require a lawyer to remain a New Hampshire resident any longer than the day he or she was admitted to the bar.[75] Even if the residency requirement had passed the "peculiar evil" test, the rule would still be unconstitutional, according to Judge Bownes, because the state could have used a less restrictive means to achieve its ends.[76]

In dissent, Chief Judge Campbell first noted that the lead opinion's consideration of the state's right to establish its own bar standards failed to give sufficient weight to principles of federalism.[77] Chief Judge Campbell also stated that the court too liberally applied the *Hicklin* test.[78] According to Chief Judge Campbell, a court confronted

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the designation of the clerk of the court, clearly court and disciplinary proceedings against nonresidents are no more burdensome than those against residents. *See* Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F. Supp. 173 (N.D. Ala. 1981).

72. 723 F.2d at 116. Judge Bownes rejected the defendant's argument that nonresident attorneys would pose a threat to the state bar because they would be ignorant of local practice and rules. *Id.* Judge Bownes reasoned that all attorneys, regardless of residence, would study the same material and pass the same examination before they could practice. *Id.* Thus, neither resident nor nonresident attorneys could pose a greater threat to the state legal system because all will have satisfied the state's required minimum standards. *Id.*

73. *Id.* Judge Bownes argued that the lack of incentive to develop a good reputation is unrelated to a lawyer's state of residence. *Id.* As the district court stated: "[D]eveloping a good reputation is a function of the 'heart,' not the home." 539 F. Supp. at 1072.

74. Because Judge Bownes' analysis failed to find that nonresidents constitute a "peculiar source of evil," his inquiry could have ended. 723 F.2d at 116. Judge Bownes, however, investigated the second part of the *Hicklin* analysis.

75. 723 F.2d at 117.

76. *Id.* Judge Bownes listed several ways in which the New Hampshire bar could easily achieve its goals with less onerous alternatives. These alternatives included continuing educational requirements, standards of courtroom decorum and professional conduct, requirements that nonresidents maintain an office or affiliate themselves with lawyers within the state, case-by-case competency examinations, and sanctions for unprofessional conduct. *Id.*

77. *Id.* at 118.

78. Chief Judge Campbell argued that *Hicklin* required that a state need only show that there was a "substantial reason" for the discrimination and only a "reasonable relationship" between the selected means and the desired end. *Id.*

Chief Judge Campbell's interpretation of the *Hicklin* test is not unfounded. The Supreme Court stated in Toomer v. Witsell, 334 U.S. 385 (1948), that the means only need be reasonably related to a substantial state end. *Id.* at 399. Initially, Justice Brennan repeated this reasonable relation standard in Hicklin v. Orbeck, 437 U.S. 518, 526 (1978).

There are numerous problems with Chief Judge Campbell's interpretation of the *Hicklin*-

with a privileges and immunities challenge always must grant a state broad discretion in its actions.[79] Thus, a proper privileges and immunities analysis demands only a showing of reasonableness by the state.[80] Chief Judge Campbell believed that the New Hampshire Supreme

Toomer standard, however. Chief Judge Campbell completely disregarded language in *Toomer* that demands that state discrimination must have a "*close* relation" to a "substantial" state interest. 334 U.S. at 396 (emphasis added). Chief Judge Campbell also neglected important language in *Hicklin* which states that the state's selected means must pass a "substantially related" test. 437 U.S. at 527. Justice Brennan also stated in Hicklin that the means must be "closely tailored" to the end. *Id.* at 528. By invoking the least restrictive alternative test, Justice Brennan demonstrated that the Court would hold a state to a much higher standard than a mere reasonable relation test. For a discussion on the least restrictive alternative analysis, see Wormuth and Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964); Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria,* 27 VAND. L. REV. 971 (1974). That the *Hicklin* Court struck down an Alaska statute that appeared on its face to be a reasonable means to cure the state's chronically high unemployment further suggests that the *Hicklin* analysis requires more than a reasonable relation between the statute and the perceived danger. *See supra* note 48 and accompanying text. Thus, by invalidating a facially reasonable statute, the *Hicklin* Court invoked a substantial relationship test in privileges and immunities cases.

Since *Hicklin*, the Supreme Court has not had the opportunity to elaborate upon its privileges and immunities analyses. In Zobel v. Williams, 457 U.S. 55 (1982), however, Justice O'Connor restated the two-part test: "First, there must be 'something to indicate that non-citizens constitute a peculiar source of evil at which the statute is aimed.' Second, the Court must find a 'substantial relationship' between the evil and the discrimination practiced against citizens." *Id.* at 76 (O'Connor, J., concurring) (quoting Hicklin v. Orbeck, 437 U.S. 518, 525-27 (1978)). Federal district courts subsequently have employed the substantial relation test. *See, e.g.,* Galahad v. Weinshienk, 555 F. Supp. 1201 (D. Colo. 1983); Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982); Strauss v. Alabama State Bar, 520 F. Supp. 173 (N.D. Ala. 1981); Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Alaska 1980); Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440 (W.Va. 1982).

Legal scholars also have interpreted the *Toomer-Hicklin* test to be a substantial relationship test. *See, e.g.,* G. GUNTHER, CASES AND MATERIALS IN CONSTITUTIONAL LAW 379 (10th ed. 1980); J. NOWACK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 304 (2d ed. 1983); Special Project, *Admission to the Bar: A Constitutional Analysis,* 34 VAND. L. REV. 655, 770, 774 (1981); Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV,* 92 HARV. L. REV. 1461, 1479-81 (1979).

79. 723 F.2d at 118.

80. *Id. But see supra* notes 46 & 78. Chief Judge Campbell further supported his position by analogizing state bar residency requirements to applications for lawyers to appear *pro hac vice*. 723 F.2d at 121. Chief Judge Campbell cited Leis v. Flynt, 439 U.S. 438 (1979) (per curiam), a *pro hac vice* case, for the proposition that states should be given much discretion in the regulation of the practice of law by nonresident lawyers. 723 F.2d at 121. He believed that the *pro hac vice* cases demonstrate a disinclination on the part of federal courts to review stringently the manner in which a state regulates its bar. *Id.*

Judge Bownes rejected this analogy in his opinion and posited two reasons why the *pro hac vice* standard should not apply in the privileges and immunities context. *Id.* at 115 n.5. First, the *pro hac vice* cases dealt with procedural due process, not privileges and immunities. *Id.* Second, *pro*

Court reasonably could have concluded[81] that the admission of nonresident attorneys to the bar would harm the state's court system[82] because of attorneys' status as officers of the court.[83] In addition, Chief Judge Campbell asserted that a federal court should not substitute its judgment about bar requirements for that of the state's supreme court.[84]

The First Circuit reached a logical and well-supported[85] result in

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hac vice cases analyzed the distinction between the members of a state bar and nonmembers—not between resident applicants for the state bar and nonresident applicants. *Id.*

Bownes neglected another major distinction between *pro hac vice* cases and residency requirement cases. If a state refuses to grant a *pro hac vice* case, it is only a temporary impediment to an attorney's ability to practice in that state. A state's discretion in residency requirement cases, on the other hand, permanently impedes the lawyer's ability to practice law. Thus the latter position should be subject to a higher standard of review. *Compare* Rossario v. Rockerfeller, 410 U.S. 752 (1973) (anti-raiding laws are permissible because they only temporarily preclude a person from exercising his right to vote) *with* Dunn v. Blumstein, 405 U.S. 330 (1972) (one year residency requirement is too great an impediment to an individual's right to vote).

81. Chief Judge Campbell acknowledged that *Hicklin* requires that a state must provide a "substantial reason" for discriminating against nonresidents. 723 F.2d at 120. He misinterpreted the language of *Hicklin*, however, and suggested that *Hicklin* requires only a lower-level, deferential standard of review. *Id.* at 120-21. The Chief Judge illogically reasoned that because New Hampshire demonstrated that its reasons for discriminating against nonresidents were not insubstantial, the state provided the requisite "substantial reason" for favoring residents over nonresidents. *Id.* at 121-22. Chief Judge Campbell never showed that New Hampshire's reasons for discrimination were substantial; rather, he only showed that the state's concerns were reasonable.

82. Chief Judge Campbell feared that the dilution of bar residency requirements could lead to the situation where large, out-of-state firms would attract business away from local attorneys. *Id.* at 119. He believed that this usurpation of legal work by out-of-state attorneys would undermine the quality and extent of legal services available to state residents. *Id.* at 119-20. Chief Judge Campbell also feared that the nonresident attorney's ignorance with local "nuance and custom" would subtly alter New Hampshire law into a composite of the laws of the other states. *Id.* at 120.

83. *Id.* Chief Judge Campbell referred to attorneys as "officers of the court." *Id.* The American Bar Association has stated that the term is "at best meaningless, and at worst misleading." AMERICAN LAWYER'S CODE OF CONDUCT Preamble (Discussion Draft 1980), *reprinted in* 16 TRIAL 44, 49 (Aug. 1980). One commentator has stated that the phrase "is at best an imprecise categorization which cannot be accorded any constitutional significance." Note, *supra* note 17 at 1478. The phrase, however, is useful. The legal profession is unique among professions in America today. An attorney is the only professional a court can command to perform services for a specific client for little or no compensation. The only possible explanation for the court's ability to single out and demand pro bono work from lawyers is that the attorney plays an integral role in the state function of administering justice by acting as a conduit into our legal system. Thus the term "officer of the court" serves as shorthand for a means of access to the legal system. This role of the attorney, however, is not enough to grant states the power to set residency standards for the legal profession via the "political rights" exemption from privileges and immunities scrutiny. *See supra* note 66 and accompanying text.

84. 723 F.2d at 120-22.

85. Judge Bownes' interpretation of the *Hicklin* test is well-founded. *See supra* notes 44-48

Piper v. Supreme Court of New Hampshire.[86] The privileges and immunities clause is a valuable vehicle for nonresidents to use to gain access to another state's job market.[87] Article IV also provides greater access to the legal system. Although Judge Bownes does not refer to the client in his analysis, it is apparent that the layman also profits from the invalidation of residency requirements. The relaxation or repudiation of residency requirements permits a greater number of qualified attorneys to practice in a given state, resulting in greater access to the legal system. Chief Judge Campbell's concern that out-of-state law firms might attract business from local practitioners is irrelevant, since the client will be merely exercising his right to choose among the best legal services available.[88] With the advent of more accessible attorneys, competition between the firms may decrease legal fees and thus enable lower income groups to obtain legal services. Residency requirements needlessly restrict the options available to the layman who seeks access to this system.[89] Finally, modern legal practice increasingly has transcended state boundaries[90] further demonstrating the obsolescence of

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and accompanying text. His analysis is supported by other courts and legal commentators. *See supra* note 78.

86. 723 F.2d 110 (1st Cir. 1983) (en banc), *prob. juris. noted,* 104 S. Ct. 2149 (1984).

87. The privileges and immunities clause guarantees that a citizen of State A has the right to pursue his or her occupation in State B on terms of substantial equality with the citizens of State B. Toomer v. Witsell, 334 U.S. 384, 396 (1948); *see supra* note 19. Of course, a state should be allowed to set minimum standards of competency and morality for attorneys practicing within its borders. This can easily be justified under the police power as protecting the citizens of the state from fraud and incompetence. *See supra* note 54.

88. *See supra* note 82. The repudiation of bar residency requirements is desirable because the legal community's main concern should lie with the quality of services available. *See infra* notes 89 & 92.

89. One of the highest goals of any democratic society must be to achieve and maintain equality before the law. Canon 2 of the Code of Professional Responsibility charges each lawyer with the duty to assist the legal profession in fulfilling its duty to make legal counsel available to as many individuals as possible. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1979). Also, Canon 8 of the Code seeks an attorney's assistance in improving the legal system. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 8 (1979). Both of these canons indicate that the legal profession is not only aware of its important role in maintaining equality before the law but also is working affirmatively to obtain that goal. Recent Supreme Court decisions envision an enhanced role for the attorney in providing access to the legal system. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (a rule permitting commercial advertising of services and prices is in accord with the bar's obligation to assist in making legal services fully available); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (part of Court's concern in overruling a county bar association's fee schedule was that the fixed, rigid price floor for minimum fees effectively precluded some laymen from gaining the services of an attorney). *See supra* note 49.

90. The rise of multistate litigation, liberalized reciprocity agreements, and law firms with offices in more than one state have blurred state lines for the legal profession. Special Project,

state residency requirements.[91] Thus, these requirements foster economic protectionism and parochial interests[92] and ignore the needs of both the attorney and the client. The court in *Piper* correctly held these requirements unconstitutional. As the first federal court of appeals to consider the validity of residency requirements under the privileges and immunities clause, *Piper* should serve as significant precedent for other courts to follow.

J.K.P.

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supra note 17 at 768. *But see* Lowrie v. Goldenhersh, 716 F.2d 401 (7th Cir. 1983) (reciprocity arrangements do not violate article IV, section 2).

91. Even if nonresident attorneys do constitute a "peculiar source of evil," the New Hampshire Board of Bar Examiners could easily achieve its goals with less onerous requirements. *See supra* note 46. For example, the Board could increase the number or the difficulty of the questions on the bar exam concerning local procedural and substantive law. These additional requirements would assure that all lawyers possess a substantive knowledge of state procedural and substantive law and rules. If an attorney does not practice in New Hampshire for a predetermined amount of time, the Board could require that the lawyer take a minimum competency test to insure that he is still familiar with the state's rules. The Board also may discipline out-of-state attorneys in the same manner it may discipline resident attorneys.

92. Courts and commentators increasingly view state bar residency requirements as a bastion of archaic economic protectionism. *See* Sheley v. Alaska Bar Ass'n, 620 P.2d 640, 646 (Alaska 1980); Dalton & Williamson, *State Barriers Against Migrant Lawyers,* 25 UMKC L. REV. 144, 147-48 (1957); Howell, *Does Judge Advocate Service Qualify for Admission on Motion?,* 53 A.B.A.J. 915, 915 (1967); Smith, *Time for a National Practice of Law Act,* 64 A.B.A.J. 557, 557 (1978).