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Professional Responsibility: Residency Rule for Admission to Bar Violates Privileges and Immunities Clause. Hampshire v. Piper, 105 S. Ct. 1272 (1985)

Deidre K. Peterson

PROFESSIONAL RESPONSIBILITY — Residency Rule for Admission to Bar Violates Privileges and Immunities Clause. *Supreme Court of New Hampshire v. Piper*, 105 S. Ct. 1272 (1985).

In *Supreme Court of New Hampshire v. Piper*,[1] the United States Supreme Court declared New Hampshire's residency rule[2] for admission[3] to the bar unconstitutional.[4] The Court

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1. 105 S. Ct. 1272 (1985).

2. N.H. SUP. CT. R. 42 provides: "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."

Each state has either no resident requirement for admission to the bar by examination, a simple residency requirement (residence or intent to establish residence in-state at time of application, examination or admission to the bar) or a durational residency requirement (residence in-state for a fixed period before application, examination or admission to the bar). *See generally*, Note, *A Constitutional Analysis of State Bar Residency Requirements Under The Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1478-83 (1979). States with no residency requirement for admission to the bar include: Alabama, Alaska, Arizona, California, Connecticut, District of Columbia, Florida, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, Vermont, Washington, West Virginia, Wisconsin. *See* D. SKIBBE, NATIONAL BAR EXAMINATION DIGEST 8-43 (1985 ed.). The following states have simple residency requirements: Colorado (COLO. SUP. CT. R. 201.14); Delaware (DEL. SUP. CT. R. 52(a)(7)); Idaho (IDAHO SUP. CT. R. 3-10); Indiana (IND. SUP. CT. R. AD 12, 13(1)); Iowa (IOWA SUP. CT. R. 6-102(2)); Kansas (KAN. SUP. CT. R. 702); Kentucky (KY. SUP. CT. R. 2.010(2)); Maine (MAINE BD. OF BAR EXAMINERS, R. 7D); Minnesota (MINN. SUP. CT. R. II. (30)); Nevada (NEV. SUP. CT. R. 51.3); New Hampshire (N.H. SUP. CT. R. 42); New Jersey (N.J. SUP. CT. R. 1:21-(a)); North Carolina (N.C. SUP. CT. (Admission to Practice) § 9501); Oklahoma (OKLA. SUP. CT. R. 1); South Dakota (S.D. BD. OF BAR EXAMINERS R. 16-16-2); Texas (TEX. SUP. CT. R. II A); Utah (UTAH SUP. CT. R. 78-51-10); Virginia (VA. SUP. CT. R. 54-60). States with durational residency requirements include: Arkansas (ARK. SUP. CT. R. III) (60 days); Hawaii (HAWAII SUP. CT. R. 15(c)) (three months); Missouri (MO. SUP. CT. R. VI) (six months); Montana (MONT. SUP. CT. R. VI) (six months); New Mexico (N.M. BAR EXAMINERS R. 8(c)) (90 days); Rhode Island (R.I. SUP. CT. R. 33) (three months); Tennessee (TENN. SUP. CT. R. 16) (two months); Wyoming (WYO. SUP. CT. R. 5) (six months). *See* 7 MARTINDALE-HUBBELL LAW DIRECTORY Part VIII, American Bar Association Section (1985).

3. Attorneys may also be admitted to the bar by reciprocity (commonly called admission by motion) and diploma privilege. States which admit by reciprocity have a simple requirement which makes practice of law in another state for a fixed period of time necessary for admission (Arkansas, Colorado, Connecticut, District of Columbia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming). Other states require attorney applicants to pass a

applied a constitutional analysis combining a fundamental rights analysis[5] with a two-pronged test of substantiality.[6] The majority then called the opportunity to practice law a privilege protected by the privileges and immunities clause of article IV.[7]

Justice White, concurring, suggested that a Supreme Court evaluation of the facial validity of the residency requirement was unnecessary.[8] Justice Rehnquist dissented and maintained that as a non-national profession, the practice of

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modified examination for admission to practice (Alaska, Arkansas, California, Maine, Maryland, Oregon, Utah). Wisconsin is the only state allowing admission to the bar by diploma privilege. *See generally* D. SKIBBE, *supra* note 2.

4. The Supreme Court held Rule 42 in violation of the privileges and immunities clause of U.S. CONST. art. IV, § 2, cl. 1: "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the Several States."

The terms "citizens" and "residents" are used interchangeably for analysis under article IV. *See* Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975). *See also Piper*, 105 S. Ct. at 1276 n.6. For a discussion of the privileges and immunities clause see generally Antieau, *Paul's Perverted Privileges or the TRUE Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967); Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

5. The fundamental rights analysis is used to determine if the interest of the nonresident, who is subjected to discrimination based on his nonresidence, is worthy of protection by the privileges and immunities clause. *See infra* text accompanying notes 36-61. A fundamental right protected by the clause is an interest promoting national unity. Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 388 (1978) (nonresidents' right to elk hunting is not fundamental).

6. *Piper*, 105 S. Ct. at 1276-80. The test of substantiality requires a state to justify its discriminatory practices by proving that 1) there is substantial reason for the discrimination and 2) there is a reasonable relationship between nonresidents and the discrimination practiced. Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978).

7. *Piper*, 105 S. Ct. at 1281. The privileges and immunities clause of article IV is distinguishable from the privileges or immunities clause of U.S. CONST. amend. XIV, § 1: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .." For a discussion of the 14th amendment privileges or immunities clause see Comment, *The Privileges or Immunities Clause of the Fourteenth Amendment: The Original Intent*, 79 NW. U.L. REV. 142 (1984). *See also* Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?*, 11 SUFFOLK U.L. REV. 61 (1976); Beth, *The Slaughter-House Cases — Revisited*, 23 LA. L. REV. 487 (1963); Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U.L.Q. 405 (1972); Lomen, *Privileges and Immunities Under the Fourteenth Amendment*, 18 WASH. L. REV. 120 (1943); McGovney, *Privileges or Immunities Clause — Fourteenth Amendment*, 4 IOWA L. BULL. 219 (1918); Morris, *What are the Privileges and Immunities of Citizens of the United States?*, 28 W. VA. L.Q. 38 (1921).

8. *Piper*, 105 S. Ct. at 1281 (White, J., concurring).

law should be viewed differently from other occupations under the privileges and immunities clause.[9]

The purpose of this Note is to examine the *Piper* decision in light of the majority's holding. It will discuss the factual background of *Piper*, but focus primarily on the United States Supreme Court's constitutional analysis of privileges and immunities clause challenges. More specifically, this Note will show how federal courts and state supreme courts have applied that analysis to bar residency rules. Finally, this Note will review the impact of the majority's holding upon the legal profession.

I. STATEMENT OF THE CASE

In 1979, Vermont resident Kathryn Piper applied to take the February 1980 New Hampshire bar examination and submitted a statement of intent to become a New Hampshire resident.[10] After passing the bar examination, the New Hampshire Board of Bar Examiners informed Piper of her need to establish a home address[11] in New Hampshire to become a member of the bar.[12] Piper made a request to the Clerk of the New Hampshire Supreme Court for a waiver

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9. *Id.* at 1282-83 (Rehnquist, J., dissenting).

10. *Id.* at 1274. This statement of intent fulfills the requirement of N.H. REV. STAT. ANN. § 21:6 (1983) which states:

> A resident or inhabitant or both of this state and of any city, town or other political subdivision of this state shall be a person who is domiciled or has a place of abode or both in this state and in any city, town or other political subdivision of this state, and who has through all of his actions, demonstrated a current intent to designate that place of abode as his principal place of physical presence for the indefinite future to the exclusion of all others.

Id. For a discussion of the difference in meaning between residence and domicile in state statutes see Reese & Green, *That Elusive Word, "Residence"*, 6 VAND. L. REV. 561 (1953).

11. In his concurring opinion, Justice White suggested that the Court could later consider whether New Hampshire may condition bar membership upon maintaining a law office in that state. 105 S. Ct. at 1281 (White, J., concurring). Maintaining an in-state law office will satisfy the residency requirement in: Delaware, Iowa, Minnesota, Missouri, New Jersey, South Dakota and Utah. *See generally* D. SKIBBE, *supra* note 2.

12. *Piper*, 105 S. Ct. at 1274. Rule 42 has been interpreted to mean that an applicant to the New Hampshire bar must be a bona fide resident of the state at the time of swearing in. *Id.* at 1275 n.1. Piper lives only 400 yards from the New Hampshire border. *Id.* at 1274.

from the residency requirement.[13] Her request denied,[14] Piper formally petitioned the New Hampshire Supreme Court to become a member of the bar. Again, she met denial.[15]

Piper commenced an action against the New Hampshire Supreme Court, its five Justices and its Clerk, alleging that New Hampshire Supreme Court Rule 42 violated the privileges and immunities clause[16] of article IV.[17] The United States District Court for the District of New Hampshire held that Rule 42 did not comply with the privileges and immunities clause and granted Piper's motion for summary judgment.[18] The district court found the practice of law to be a fundamental right protected by the clause.[19] The district court also held that Piper's nonresidence was not a source of any evil remedied by the residency rule and New Hampshire's exclusion of nonresident applicants was not closely tailored to its objectives.[20]

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13. *Id.* at 1274. Piper's request, based on special circumstances in her case, were explained in a letter to Ralph Wood, Esq., Clerk of New Hampshire Supreme Court. The special circumstances were an unwillingness to move from a home mortgaged at an attractive interest rate and the recent birth of a child. These "problems peculiar to [her] situation . . . warrant[ed] that an exception be made." *Id.*

14. *See id.* at 1274.

15. *Id.*

16. The privileges and immunities clause of article IV has only recently become the focus of many challenges against state bar residency requirements. *See, e.g.*, 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); Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286 (W.D. Wis. 1980); Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated*, 614 F.2d 943 (4th Cir. 1980); Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Alaska 1982); Sargus v. West Virginia Bd. of Law Examiners, 249 S.E.2d 440 (W. Va. 1982); Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980); Gordon v. Comm. on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

17. Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D.N.H. 1982). In her suit, Piper also alleged that Rule 42 excludes nonresident attorneys from the New Hampshire bar. *See* 105 S. Ct. at 1274-75. However, Piper was not totally excluded from practicing law in New Hampshire. As an out-of-state attorney she may have been able to appear *pro hac vice* in state court. *Id.* at 1275 n.2.

18. *Piper*, 539 F. Supp. at 1064.

19. *Id.* at 1071.

20. *Id.* at 1073. In reaching its holding, the district court applied the "test of substantiality" found in the United States Supreme Court's constitutional analysis for privileges and immunities clause cases. *See supra* note 6. The district court also considered whether the traditional deference given to the states in regulation of the practice of law amounted to an exception in coverage of constitutional provisions. The court reasoned that the United States Supreme Court has not created an exception to the due process clause, equal protection clause of the fourteenth amendment, or the freedom of speech

The First Circuit Court of Appeals found that Rule 42 was reasonably related to furthering the state's legitimate interests and, therefore, did not violate the privileges and immunities clause.[21] On *en banc* reconsideration, however, the First Circuit affirmed the district court's decision in Piper's favor.[22] The circuit court ultimately determined that Rule 42 was not substantially related to the state's regulatory purposes and, therefore, violative of the privileges and immunities clause.[23] The Supreme Court of New Hampshire appealed and the United States Supreme Court noted probable jurisdiction.[24]

II. BACKGROUND

A. Constitutional Analysis of the Privileges and Immunities Clause

In a privileges and immunities clause challenge, the United States Supreme Court typically applies a two-pronged constitutional analysis.[25] The analysis consists of a fundamental rights analysis and a two-pronged "test of substantiality."[26] First, the fundamental rights analysis is applied to decide if the nonresident's interest violated by the state is a privilege protected by the privileges and immunities clause.[27] In order to be protected by the clause, the interest must be a fundamental right.[28] A fundamental right is an interest basic to national

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clause of the first amendment and concluded that there was no exception to the privileges and immunities clause. *Id.* at 1071.

21. Piper v. Supreme Court of New Hampshire, 723 F.2d 98 (1st Cir. 1983). The state's legitimate interest is the state's ability to function as a sovereign entity. *Id.* at 102.

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

23. *Id.* at 118.

24. *Piper*, 104 S. Ct. 2149 (1984). Under 28 U.S.C. § 1254(2) (1976) a court of appeals case may be reviewed by the United States Supreme Court on appeal by a state. The state's statute must have been held by a court of appeals to be invalid as repugnant to the Constitution, treaties, or laws of the United States.

25. By combining the fundamental rights analysis of Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978) and the two-pronged "test of substantiality" from Hicklin v. Orbeck, 437 U.S. 518 (1978), the Supreme Court devised its constitutional analysis for privileges and immunities clause cases.

26. *See supra* notes 5-6.

27. *See Baldwin*, 436 U.S. at 383-84.

28. *See Baldwin*, 436 U.S. 371 (1978). In *Baldwin*, the Court found that elk hunting was not a fundamental right because it was a recreational activity and not a means of livelihood. *Id.* at 388. *See generally Constitutional Law — The Privileges and Immunities Clause of Article IV; Fundamental Rights Revived* — Baldwin v. Fish & Game

unity.[29] If it is determined that the nonresident's interest is not a fundamental right, the constitutional analysis ends.[30]

If the Court concludes that the nonresident interest is indeed a fundamental right, it will apply the second part of its constitutional analysis, the two-pronged "test of substantiality."[31] At this point, the burden of proof shifts to the state to offer a legitimate nondiscriminatory reason for its rule.[32] Under this test, the state must first provide a substantial reason for its discrimination.[33] This is accomplished by proving that nonresidents "constitute a peculiar source of the evil" at which the discriminatory statute is aimed.[34] To pass constitutional muster, the state must satisfy the second prong and prove the existence of "a reasonable relationship between the evil represented by nonresidents as a class and the discrimination practiced upon them."[35]

Commission, 436 U.S. 371 (1978), 55 WASH. L. REV. 461, 462 (1978) (*Baldwin*'s fundamental rights analysis makes recreational activity unlikely to be considered fundamental). However, the Court has never held that just economic pursuits are fundamental. *See* Doe v. Bolton, 410 U.S. 179 (1973) (residency requirement of Georgia abortion statute violated the privileges and immunities clause); *see also Piper*, 105 S. Ct. at 1277 n.11.

29. *See Baldwin*, 436 U.S. at 388. In Corfield v. Coryell, 4 Wash. C.C. 371, 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230), Justice Washington, sitting as Circuit Justice, recognized the "fundamental rights" protected by the privileges and immunities clause as: "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 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 . . . ." *Piper*, 105 S. Ct. 1272, 1277 n.10 (quoting *Coryell*, 6 F. Cas. at 552). Mr. Justice Washington based this concept of "fundamental rights" on a "natural rights" theory. *Baldwin*, 436 U.S. at 387. However, the natural rights theory is no longer applied to fundamental rights. Hague v. CIO, 307 U.S. 496, 511 (1939). *See generally* Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286 (1903) (early 20th century analysis of rights considered fundamental).

30. *See Baldwin*, 436 U.S. at 388.

31. *See* Hicklin v. Orbeck, 437 U.S. at 525-26. For background on *Hicklin*, *see generally* Note, *Domicile Preferences in Employment: The Case of Alaska Hire*, 1978 DUKE L.J. 1069.

32. This test of substantiality "permits disparate treatment of non-residents, but only where the very fact of their non-residents [sic] demonstrably creates problems for legitimate state objectives that cannot be remedied in less discriminatory ways." L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 6-33, at 410 (1978).

33. *Hicklin*, 437 U.S. at 525.

34. *Id.* at 525-26.

35. *Id.* at 526.

B. Constitutional Analysis Applied To Bar Residency Rules

The majority of cases challenging bar residency rules under the privileges and immunities clause[36] have applied the Supreme Court's constitutional analysis to durational residency requirements. As a simple residency requirement, New Hampshire's Rule 42 falls outside of that category.[37]

Gordon v. Committee on Character and Fitness[38] was the first state case in which a residency statute was successfully attacked under the privileges and immunities clause.[39] The New York law[40] in *Gordon*[41] required that an applicant for admission to practice be an "actual" resident for six months

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36. For cases where state bar residency rules have also been challenged under the equal protection clause see: Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated*, 614 F.2d 943 (4th Cir. 1980); Smith v. Davis, 350 F. Supp. 1225 (S.D. W. Va. 1972); Suffling v. Boudurant, 339 F. Supp. 257 (D. N.M. 1972), *aff'd mem. sub nom.*, Rose v. Boudurant, 409 U.S. 1020 (1972); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Potts v. Honorable Justices of the Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970); Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960), *appeal dismissed per curiam sub nom.*, Martin v. Walton, 368 U.S. 25 (1961). For cases where the state bar residency rules have been challenged under the right to interstate travel see: Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977); Suffling v. Boudurant, 339 F. Supp. 257 (D.N.M. 1972), *aff'd mem. sub nom.*, Rose v. Boudurant, 409 U.S. 1020 (1972); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970); Sherman Act, 15 U.S.C. §§ 1, 2 (1976). *See generally* Note, *The Sherman Act and Bar Admission Residence Requirements*, 8 U. MICH. J.L. REF., 615 (1975); See Comment, *Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorney*, 72 NW. U.L. REV. 737 (1978).

37. For an explanation of simple and durational residency requirements for admission to the bar and for examples of those rules *see supra* note 2.

38. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979). *See generally* Note, *The Constitutionality of State Residency Requirements for Attorney Under the Privileges and Immunities Clause: The Attack Continues*, 60 NEB. L. REV. 200 (1981).

39. *See* Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976), *aff'd*, 430 U.S. 925 (1977) (Oregon's residency requirement for admission to the bar upheld). *Wilson* was decided *before* the Supreme Court's revitalization of the privileges and immunities clause in Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978) and in Hicklin v. Orbeck, 437 U.S. 518 (1978). *See also* Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated*, 614 F.2d 943 (4th Cir. 1980) (appeal rendered moot where residency requirement for application to take Maryland bar examination was repealed); Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286 (W.D. Wis. 1980) (action dismissed because 11th amendment barred suit against State of Wisconsin and Wisconsin Supreme Court. The action was dismissed as to remaining defendant for failure to state a claim upon which relief may be granted).

40. N.Y. CIV. PRAC. LAW § 9406 (McKinney 1978).

41. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

immediately preceding submission of an application.[42] The New York Court of Appeals held that the rule "worked invidious discrimination."[43] The court further noted that the rule forced attorneys already admitted to the bar of another state to give up the practice of law for six months or longer if they sought admission to the New York bar.[44]

In *Strauss v. Alabama State Bar*,[45] Alabama Bar Rule IV(A) was interpreted to require an applicant to reside in-state for three weeks prior to the bar examination.[46] The state did not attempt to show that nonresident attorneys constituted "a peculiar source of evil," and the district court held that the durational residency requirement did "little to ensure that applicants are qualified" since the three week period was not used for the observation and evaluation of applicants.[47]

Thirty-day residency requirements were challenged in both *Sheley v. Alaska Bar Association*[48] and *Sargus v. West Virginia Board of Law Examiners*.[49] Citing *Sheley*, the *Sargus* court stated: "We believe that the bar residency requirement is the sort of economic protectionism that the Privileges and Immunities Clause of the United States Constitution was designed to prevent."[50] The durational residency requirements were determined to be in violation of the privileges and immunities clause in both Alaska and West Virginia.[51] Alaska's durational domiciliary rule was invalidated.[52] However, in *Noll v. Alaska Bar Association*,[53] Alaska's simple dom-

42. *Id.* at __, 397 N.E.2d at 1310, 422 N.Y.S.2d at 641. For an explanation of "actual resident" within meaning of statute see *In re Tang*, 39 A.D.2d 357, 333 N.Y.S.2d 964 (1972), *appeal dismissed*, 35 N.Y.2d 851, 321 N.E.2d 879, 363 N.Y.S.2d 88 (1974); Tang v. Appellate Div., 373 F. Supp. 800 (S.D.N.Y. 1972), *aff'd on other grounds*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974).

43. 48 N.Y.2d at __, 397 N.E.2d at 1312, 422 N.Y.S.2d at 645.

44. *Id.*

45. 520 F. Supp. 173 (N.D. Ala. 1981).

46. *Id.* at 175.

47. *Id.* at 178.

48. 620 P.2d 640 (Alaska 1980). The residency rule in *Sheley* was ALASKA SUP. CT. R. (Admission to Bar) 2(1)(e).

49. 294 S.E.2d 440 (W. Va. 1982). The rule challenged in *Sargus* was W. VA. SUP. CT. APP. R. 1.000.

50. *Sargus*, 294 S.E.2d at 444 (quoting *Sheley*, 620 P.2d at 646).

51. In Alaska, the rule was invalidated by *Sheley*, 620 P.2d at 646. In West Virginia, the rule was invalidated by *Sargus*, 294 S.E.2d at 444.

52. *Sheley*, 620 P.2d at 646.

53. 649 P.2d 241 (Alaska 1982).

iciliary requirement was also held in violation of the privileges and immunities clause.[54] In the same year, South Dakota's simple residency rule was found to violate the privileges and immunities clause.[55] The nonresident attorney in *Stalland v. South Dakota Board of Bar Examiners*[56] wanted to engage in a multistate law practice while remaining a Minnesota resident.[57] The United States District Court for the District of South Dakota held that South Dakota's residency rule denied an attorney's right to practice law on a multistate basis and burdened lawyers employed by multistate corporations.[58]

Each of the cases cited in this section contained the necessary ingredients for a review by the United States Supreme Court. However, the plaintiff's successful challenge and the state's willingness to succumb to that challenge prevented those cases from reaching the Supreme Court. In *Supreme Court of New Hampshire v. Piper*,[59] the New Hampshire Supreme Court's reluctance[60] to accept defeat was its downfall. The United States Supreme Court was waiting for the opportunity to apply its constitutional analysis to a bar residency challenge under the privileges and immunities clause. The *Piper*[61] case provided the Court with that opportunity.

III. THE *PIPER* OPINIONS

A. The Majority

The majority opinion, delivered by Justice Powell, affirmed the decision of the First Circuit Court of Appeals.[62] This was achieved through the Supreme Court's application of

54. *Id.* at 242. The rule held in violation of the privileges and immunities clause was ALASKA SUP. CT. R. (Admission to Bar) 5(1)(a)(undated).

55. Stalland v. South Dakota Bd. of Bar Examiners, 530 F. Supp. 155 (D.S.D. 1982). *See* S.D. BD. OF BAR EXAMINERS R. 16-1602.

56. 530 F. Supp. 155 (D.S.D. 1982).

57. *Id.* at 157.

58. *Id.*

59. *Piper*, 105 S. Ct. 1272 (1985).

60. The New Hampshire Supreme Court lost two court battles to Kathryn Piper before finally having its residency rule declared unconstitutional by the United States Supreme Court in Supreme Court of New Hampshire v. Piper, 105 S. Ct. 1272 (1985). *See* Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064 (D.N.H. 1982); Piper v. Supreme Court of New Hampshire, 723 F.2d 110 (1st Cir. 1983).

61. *Piper*, 105 S. Ct. 1272 (1985).

62. *Id.* at 1276.

its constitutional analysis for the privileges and immunities clause.[63] The Court simply subdivided the constitutional analysis and used appropriate parts from *Piper* to fill in each subdivision.[64] The decision first focused on the fundamental rights analysis. The legal profession satisfied the main requirement of that analysis when the Court held that the practice of law is important to the national economy.[65] Furthermore, the Court stated that the legal profession's noncommercial role makes it worthy of protection by the privileges and immunities clause.[66]

The Court applied the "test of substantiality" and further divided it into two prongs; the two prongs appeared as one because the Court combined them in its analysis.[67] Each of New Hampshire's justifications for its bar residency rule were rejected.[68] The majority found no evidence that nonresident attorneys would be lax in their familiarity of local rules and procedures.[69] The Court refused to accept that nonresident attorneys were less likely to behave ethically: "A lawyer will be concerned with his reputation in any community where he practices regardless of where he may live."[70] In addition, the state's other argument, that a nonresident attorney would on some occasions be unavailable for court proceedings also met rejection as the Court reasoned that "even the most conscientious lawyer residing in a distant state" may be unavailable for unscheduled hearings or proceedings.[71] Finally, the *Piper* majority rejected New Hampshire's argument that nonresident attorneys would neglect their share of *pro bono* and volunteer

63. *Id.* at 1276-80.

64. *See id.* at 1277-81.

65. *Id.* at 1277.

66. *Id.* The legal profession's noncommercial role is based on the Court's reasoning that "out-of-state lawyers may — and often do — represent persons who raise unpopular federal claims." *Id. See generally* Mann, *Not for Lucre or Malice: The Southern Negro's Right to Out-of-State Counsel*, 64 NW. U.L. REV. 143 (1969) (suggesting that members of the southern bar tried to prevent out-of-state attorneys from representing southern blacks during the civil rights movement).

67. *See Piper*, 105 S. Ct. at 1279-80.

68. *See id.*

69. *Id.* at 1279.

70. *Id.*

71. *Id.* at 1280.

work because participation in such work serves a lawyer's professional interests.[72]

B. The Concurrence

In concurring, Justice White did not address the majority's application of the Court's constitutional analysis. Instead, he stated that Piper, like New Hampshire lawyers living in New Hampshire, would be able to perform her professional duties.[73] Justice White called the consideration of the facial validity of New Hampshire's residency rule unnecessary. However, he suggested that the constitutionality of conditioning membership in the New Hampshire bar upon maintaining a law office in New Hampshire could be considered at a later date.[74]

C. The Dissent

Justice Rehnquist rejected the majority's application of the constitutional analysis.[75] The dissent's argument focused on the practice of law as fundamentally different from occupations protected by the privileges and immunities clause in earlier cases.[76] By emphasizing this difference, the dissent criticized the majority for failing to recognize the legal profession's need for closer scrutiny under the privileges and immunities clause.[77] Justice Rehnquist did not attempt to place the practice of law above occupations traditionally protected by the clause,[78] but stressed that unlike those occupations, the legal profession does not easily transfer across state lines because laws differ.[79]

IV. CRITIQUE

The *Piper* decision solidifies the United States Supreme Court's constitutional analysis by use of both the fundamental

72. *Id.*
73. *Id.* at 1281 (White, J., concurring).
74. *Id.*
75. *Id.* at 1281-85 (Rehnquist, J., dissenting).
76. *See id.* at 1281-85.
77. *Id.* at 1282.
78. *Id.*
79. *Id.*

rights analysis and the "test of substantiality."[80] However, this new found strength may be diminished unless the Court revises its fundamental rights analysis. The fundamental rights analysis is weakened by its failure to set forth meaningful guidelines in defining rights basic and essential to national well-being.[81] This problem further weakens the constitutional analysis and, ironically, encourages discrimination against states by a clause designed to bar state-based discrimination.[82] Because of the ease with which the fundamental rights analysis will turn a nonresident's interest into a fundamental right, the states in privileges and immunities clause cases will often fail the more stringent "test of substantiality" and consequently have their law invalidated.[83]

The *Piper* Court incorrectly compared the practice of law to the occupations in earlier privileges and immunities clause cases.[84] Unlike those professions, the practice of law is a learned profession.[85] In a hasty effort to find the opportunity to practice law a fundamental right, the Court forgot that lawyers, unlike shrimpers and pipeline workers, are required to meet rigorous criteria established by state regulatory boards. These criteria, including requirements of knowledge and good

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80. The fundamental rights analysis and the "test of substantiality" have been used together in only one other case, United Bldg. Constr. Trades Council v. Mayor & Council of Camden, 104 S. Ct. 1020 (1984).

81. For a discussion of critical flaws in the fundamental rights analysis, see generally 55 WASH. L. REV. 471, 472 (1975).

82. The United States Supreme Court has held that not all state-based discrimination is prohibited. States may discriminate against nonresidents concerning the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to hold public office, Kanapaux v. Ellison, 419 U.S. 891 (1974); the right to receive some state services, Shapiro v. Thompson, 394 U.S. 618 (1969); and access to state courts, Sosna v. Iowa, 419 U.S. 393 (1975).

83. *See* United Bldg. Constr. Trades Council v. Mayor & Council of Camden, 104 S. Ct. 1020 (1984); Hicklin v. Orbeck, 437 U.S. 518 (1978).

84. 105 S. Ct. 1272, 1277 (1985). *See also* Hicklin v. Orbeck, 437 U.S. 518 (1978); Toomer v. Witsell, 334 U.S. 385 (1948); Ward v. Maryland, 12 Wall. 418 (1871).

85. *See* Piper v. Supreme Court of New Hampshire, 539 F. Supp. 1064, 1071:

> "Although there are other professions that provide charitable services, the law is the only one to recognize pro bono work as an obligation of the profession. Attorneys maintain a position unique among fiduciaries in that while zealously guarding their trust to their employer, they are never allowed to forget their obligations to the public and to the courts that hold them officers. An individual assuming the position of attorney not only takes up his trade, but assumes a posture in the administration of justice so vital that in criminal matters, the constitution mandates that society pay the cost when the client cannot."

moral character, ensure that only skilled and ethical attorneys are allowed to practice law.[86] The Court's comparison in *Piper* signals an acceleration of its attempt to reduce the legal profession to a business. This effort began in *In re Griffiths*,[87] where the Court held that a lawyer is not an officer in the political sense.[88] It continued in *Bates v. Arizona*,[89] where the Court upheld a lawyer's right to advertise.[90] Finally, the *Piper* decision has placed the legal profession on a level which subjects it to equal scrutiny with other occupations under the privileges and immunities clause.[91]

The major downfall of the majority's holding in *Piper v. Supreme Court of New Hampshire* was correctly noted by the dissent; the Court clearly ignored the fact that states regulate the practice of law.[92] It is highly inconsistent for the United States Supreme Court to recognize this principle in one case involving a nonresident attorney and to totally ignore it in another case involving a nonresident attorney. Allowing regulation of the practice of law by the State of New Hampshire would have saved an overburdened[93] Supreme Court from unnecessary litigation in *Piper*.

V. CONCLUSION

In *Supreme Court of New Hampshire v. Piper*,[94] the United States Supreme Court declared a state's residency rule for admission to the bar unconstitutional. The *Piper* decision, which will be welcomed by the legal community, will bring lawyers up-to-date in an increasingly mobile society and broaden opportunities for those in multistate practices and interstate corporations. *Piper*, however, foreshadows an end to state bar residency rules as they will continue to be challenged under the privileges and immunities clause. State legislators may be

86. *See generally*, Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal For Change*, 56 CORNELL L. REV. 831, 833-35 (1971).

87. 413 U.S. 717 (1973).

88. *Id.* at 728.

89. 433 U.S. 350 (1977).

90. *Id.* at 382.

91. *Piper*, 105 S. Ct. at 1277.

92. *See id.* at 1282 (quoting Leis v. Flynt, 439 U.S. 438, 442 (1979) (per curiam).

93. *See* Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442 (1983).

94. *Piper*, 105 S. Ct. 1272 (1985).

pressured by the decision to abandon their residency requirements.[95] Those states that desire to retain some vestige of a residency requirement may stipulate that attorneys reside in-state for a period *after* admission to the bar.[96] Irrespective of the response of individual state legislatures, the *Piper* decision clearly limits state control over attorneys excluded from the state bar.[97]

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95. *See* Sargus v. West Virginia Bd. of Law Examiners, 294 S.E.2d 440 (W. Va. 1982); Noll v. Alaska Bar Ass'n, 649 P.2d 241 (Alaska 1982); Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

96. *See* 92 HARV. L. REV. at 1484-87.

97. The United States Supreme Court refutes this statement. *See Piper*, 105 S. Ct. at 1278 n.16.