Constitutional Law - Privileges and Immunities Clause - Commerce Clause - Equal Protection Clause

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CONSTITUTIONAL LAW—PRIVILEGES AND IMMUNITIES CLAUSE—COMMERCE CLAUSE—EQUAL PROTECTION CLAUSE—The Court of Appeals for the Seventh Circuit has upheld the constitutionality of an Illinois reciprocity provision that requires that nonresident attorneys pass that state's bar examination prior to admittance, but waives that requirement with respect to former nonresident attorneys who later establish residence in Illinois.

Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985).

Anthony J. Sestric, a member of the Missouri bar, filed suit in the United States District Court for the Central District of Illinois against responsible state officials to invalidate a state requirement that precluded nonresident attorneys from being admitted to the Illinois bar without first having passed the Illinois bar exam. The district court dismissed Sestric's complaint upon defendants' motion for summary judgment. Sestric then appealed to the United States Court of Appeals, Seventh Circuit, which affirmed the result reached by the district court.

Sestric's challenge before the Seventh Circuit was directed at the constitutional validity of Illinois Supreme Court Rule 705. Sestric's initial challenge at the district court level was directed at Illinois Supreme Court Rule 703, which contained a provision that precluded nonresident attorneys from being admitted to the Illinois bar without first having passed the Illinois bar exam. The prohibition contained in Illinois Supreme Court Rule 703 was rescinded while Sestric's appeal from the district court was pending. On appeal to the Seventh Circuit, the court permitted Sestric to change theories, thus enabling Sestric to redirect his attack at Illinois Supreme Court Rule 705. 765 F.2d at 657.

Illinois Supreme Court Rule 705 provided in pertinent part:

Qualification on Foreign License
Any person who has been admitted to practice in the highest court of law in any other State . . . may make application to the Board of Law Examiners for admission to the bar without academic qualification examination, upon the following conditions:

(a) The educational qualifications of the applicant are such as would entitle him to write the academic qualification examination in this State at the time he seeks admission, and he has resided and actively and continuously practiced law in such other jurisdiction for a period of at least five years of the seven years immediately prior to making the application.

(b) . . . An applicant from any jurisdiction which does not grant reciprocal admission to attorneys licensed in Illinois on the basis of practice in this State shall not be entitled to admission under this rule.

(c) . . . [T]he applicant has written and successfully passed the Illinois profes-

1. Sestric v. Clark, 765 F.2d 655, 656 (7th Cir. 1985).
2. Id.
3. Id. at 657. Sestric's initial challenge at the district court level was directed at Illinois Supreme Court Rule 703, which contained a provision that precluded nonresident attorneys from being admitted to the Illinois bar without first having passed the Illinois bar exam. The prohibition contained in Illinois Supreme Court Rule 703 was rescinded while Sestric's appeal from the district court was pending. On appeal to the Seventh Circuit, the court permitted Sestric to change theories, thus enabling Sestric to redirect his attack at Illinois Supreme Court Rule 705. 765 F.2d at 657.
4. 765 F.2d at 657. Illinois Supreme Court Rule 705 provided in pertinent part:
rule, which was basically a reciprocity provision, required nonresident attorneys to pass the Illinois bar exam, in addition to meeting certain other provisions, before being permitted to practice law within that state on a permanent basis. However, Supreme Court Rule 705 waived the exam-taking requirement with respect to (new) resident attorneys (attorneys licensed in a foreign state who later established residence in Illinois). Thus, a small class of (new) resident attorneys could be admitted to the Illinois bar, without academic examination, provided that such attorneys had fulfilled certain other requirements. The crux of Sestric’s complaint, therefore, was that Illinois had arbitrarily discriminated between experienced (new) resident attorneys and equally qualified nonresident attorneys solely on the basis of residence. In support of this claim, Sestric relied on the Privileges and Immunities Clause, arti-

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sional responsibility examination or, in the alternative, the applicant proves to the satisfaction of the board that he or she has written and scored a passing grade (as determined by the board) on the Multistate Professional Responsibility Examination of the National Conference of Bar Examiners within five years prior to the date of the application.

(d) . . . Each applicant shall establish, to the satisfaction of the Board of Law Examiners, that he is an actual resident of the State of Illinois, that he is at least 21 years of age, of good moral character and general fitness to practice law, and that upon admission he will actively and continuously engage in the practice of law in this jurisdiction . . . . Each application shall be supported by a certificate of a judge of a court of general jurisdiction from which the applicant seeks admission certifying that the applicant has been admitted to, and that at the time of making said application he is a member in good standing of, the bar of that jurisdiction.

ILL. S.CT. R. 705.

5. 765 F.2d at 661. Bar admission reciprocity provisions, such as that contained in ILL. S.CT. R. 705(b), have been implemented by a majority of states. See Hafter, Toward the Multistate Practice of Law Through Admission by Reciprocity, 53 Miss. L.J. 1, 4 (1983). Such provisions are a method of permanent admission, generally known as “admission by reciprocity,” “admission by comity” or “admission by motion,” which afford qualified nonresident attorneys an alternative to admission by academic qualification examination. Id. at 3-4. Admission by motion should not be confused with admission pro hac vice, a universal practice which enables nonresident attorneys to practice law in foreign jurisdictions in connection with specific matters, upon a court’s discretion. Id. at 4 n.8. Thus, the inherent limitations of admission pro hac vice are “no assistance to the relocating or multistate practitioner.” Id.

6. For purposes of this casenote, unless otherwise qualified, the term “nonresident” attorney shall signify an attorney who has not taken the Illinois bar exam and who was initially licensed to practice law in a state other than Illinois.

7. 765 F.2d at 657. See supra note 4.

8. Id.

9. Id. The other requirements included, for example, reciprocal provisions between Illinois and the applicant’s state, fulfillment of the “continuous practice” requirement, and compliance with the “professional responsibility” criteria. See supra note 4.

10. 765 F.2d at 661.
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in section 2, the Equal Protection Clause contained in the fourteenth amendment, and the Commerce Clause, article I, section 8, clause 3. After observing that the issue raised by Sestric was one of first impression at the federal appellate level, the United States Court of Appeals for the Seventh Circuit held that Illinois Supreme Court Rule 705, which treated a small class of (new) resident attorneys more favorably than nonresident attorneys, did not violate any provision of the Constitution.

In so holding, the Seventh Circuit initially addressed Sestric's Privileges and Immunities Clause argument. Judge Posner, writing for the court, noted the significance of a recent decision of the United States Supreme Court in Supreme Court of New Hampshire v. Piper, and concluded that the principal case could not be resolved strictly on the basis of pre-Piper decisions. In Piper, the Supreme Court first held that the practice of law was a fundamental right; the Piper Court then held that the absolute exclusion of nonresident attorneys from a state's bar violated the Privileges and Immunities Clause. However, Judge Posner distinguished the principal case from Piper on the grounds that the Illinois rule, unlike the rule in Piper, did not operate to exclude all nonresident attorneys from practicing law in Illinois on a permanent basis.

In distinguishing Sestric's case from Piper, Judge Posner analogized Sestric's case to Baldwin v. Fish & Game Commission of

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11. Id. at 656. The Privileges and Immunities Clause states: The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. U.S. Const. art. IV, § 2. The Equal Protection Clause states in pertinent part: No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. art. XIV, § 1. The Commerce Clause states in pertinent part: [The Congress shall have the power to] . . . regulate Commerce with Foreign Nations, and among the several States . . . . U.S. Const. art. I, § 8, cl. 3. The Commerce Clause represents an affirmative grant of power to Congress to regulate interstate commerce between states. As state interference with interstate commerce is not expressly limited by the Constitution, Sestric's Commerce Clause claim necessarily flows from the judicially created doctrine which has developed with respect to the negative implications of article I, section 8. See L. Tribe, American Constitutional Law, § 6-1, 319-21 (1978).

12. 765 F.2d at 657.
13. Id. at 665.
14. Id. at 657.
17. Piper, 105 S. Ct. at 1277, 1281.
18. 765 F.2d at 658.
Montana, in which the Supreme Court held that only fundamental rights were protected by the Privileges and Immunities Clause. Judge Posner reasoned that the "right" which the Illinois rule denied Sestric was not the right to practice law in Illinois, but merely the privilege that some new residents had of being permitted to practice law within that state upon motion. Thus, the Seventh Circuit concluded that Sestric was not excluded in the Piper sense, since, as a nonresident, he was afforded the opportunity to obtain admission to the Illinois bar by examination.

After concluding that Sestric had not been denied a fundamental right, the Seventh Circuit further distinguished the principal case from the "usual" Privileges and Immunities Clause case, in which a state conditions a substantial "privilege" upon residence within that state. Under Illinois Supreme Court Rule 705, only a small class of (new) resident attorneys was favored while most (old) resident attorneys, as well as all nonresident attorneys, were required to pass the Illinois bar exam as a prerequisite to admission to the Illinois bar. Thus, the court concluded that the Illinois scheme, as such, did "not create a clear-cut preference for residents." Judge Posner rationalized that if Sestric's argument were adopted, the ramifications of such a result would, in fact, be more burdensome than the present rule upon all nonresident lawyers as a class, as all nonresident attorneys, even those establishing residence in Illinois, would be required to pass the Illinois bar exam; the net effect being to increase the cost of becoming an Illinois

20. Id. at 388. The Baldwin Court stated: "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." See infra notes 61-63 and accompanying text.
22. Id. Judge Posner reasoned that it was a "matter of conjecture" whether the exam requirement would exclude many nonresident attorneys with a "serious desire to conduct a substantial practice" in Illinois and stated that to exclude those with no such desire would not contravene the policy underlying the Privileges and Immunities Clause. Id. at 659.
23. Id. at 658-69.
25. 765 F.2d at 659.
26. Id.
27. Id.
resident while not affording the relief sought by Sestric.\textsuperscript{28}

Based upon the above reasoning, the Seventh Circuit concluded that Sestric had failed to make out a prima facie case under the Privileges and Immunities Clause.\textsuperscript{29} Further, Judge Posner emphasized that even had a prima facie case been made out, the constitutionality of the Illinois rule would have been upheld even after applying the \textit{Piper} test.\textsuperscript{30} The Seventh Circuit reasoned that the requirement that nonresident attorneys pass the Illinois bar exam had a "close or substantial" relationship to the state's legitimate objective of maintaining the quality of its bar.\textsuperscript{31} The court also emphasized that less discriminatory alternatives to the Illinois rule could not be reliably calculated.\textsuperscript{32}

The Seventh Circuit next briefly addressed the claim raised by Sestric that the Illinois rule violated the "negative" Commerce Clause.\textsuperscript{33} Judge Posner explained that the burden placed upon nonresident attorneys was rationally related to the state's legitimate interest in promoting the quality of its legal profession.\textsuperscript{34} A determination was also made by the court that the rule may have, in fact, increased the interstate mobility of all attorneys.\textsuperscript{35} Thus, the court concluded that the Illinois bar rule imposed only a minor "inconvenience" upon nonresident attorneys, and did not, as such, create an unreasonable burden upon the interstate movement of lawyers.\textsuperscript{36}

Finally, the Seventh Circuit disposed of Sestric's claim that Illinois Supreme Court Rule 705 violated the Equal Protection

\begin{itemize}
\item \textsuperscript{28} \textit{Id.} The Seventh Circuit emphasized that while it was "clearly constitutional" to require all nonresident attorneys to pass the Illinois bar exam prior to admitting such attorneys to that state's bar, adoption of such a rule would not improve Sestric's position and would place (new) resident attorneys in a worse position. \textit{Id.}
\item \textsuperscript{29} \textit{Id.} at 661.
\item \textsuperscript{30} \textit{Id.} at 664. The two-part Privileges and Immunities Clause test adopted by the Supreme Court in \textit{Piper} requires that the state show both a "substantial reason" for the discrimination, and a "substantial relationship" between the discrimination and the state objective as demonstrated by an absence of less discriminatory alternatives. \textit{Piper}, 105 S. Ct. at 1281. See infra notes 68-73 and accompanying text.
\item \textsuperscript{31} Sestric, 765 F.2d at 664.
\item \textsuperscript{32} \textit{Id.} at 664-65. See infra notes 118-19.
\item \textsuperscript{33} 765 F.2d at 661. See supra note 11 (pertaining to Sestric's Commerce Clause claim).
\item \textsuperscript{34} 765 F.2d at 661. In its Commerce Clause analysis, the court examined "both the gravity of the interference with free interstate trade and the justifications offered for it, to see whether the burden [was] an unreasonable one in the circumstances." \textit{Id.} at 664.
\item \textsuperscript{35} \textit{Id.} at 661.
\item \textsuperscript{36} \textit{Id.} at 661, 664.
\end{itemize}
Clause. Judge Posner first suggested that the Illinois rule did not discriminate between similarly situated persons. Furthermore, the court held that even had there been a discrimination between equally qualified nonresident attorneys, such discrimination was rationally related to a legitimate state purpose. The court emphasized that a nonresident attorney who established residence in Illinois was making a “firmer commitment” to “bone up” on Illinois law, and that it was not patently unreasonable to make a nonresident attorney pass the Illinois bar exam if such attorney merely wanted to establish a multi-state practice. While noting that the Illinois rule was “underinclusive,” Judge Posner maintained that that fact alone did not make the rule unconstitutional.

In conclusion, Judge Posner reasoned that striking down the Illinois rule would force the state to choose between abolishing its reciprocity provision and accepting a substantial number of nonresident attorneys on motion. In light of the universal acceptance of the bar exam as a means of promoting the quality of a state’s legal profession, and in view of the state’s interest in controlling who may practice law within its jurisdiction, the Seventh Circuit held that the Illinois rule did not violate any provisions of the Constitution. Thus, the Court of Appeals for the Seventh Circuit affirmed the district court’s determination that the requirement was valid.

The cornerstone of the Sestric decision was the assumption by the Seventh Circuit that there was some constitutionally significant difference between admission by motion and admission by examination. Therefore, in order to assess the soundness of Sestric,
the historical scope of the Privileges and Immunities Clause, the Commerce Clause and the Equal Protection Clause must be examined.

Historically, the roots of the Privileges and Immunities Clause, contained in article IV, section 2, can be found in the Articles of Confederation. Undoubtedly, the purpose of the clause was to promote the formation of a national union, not a "league of states." In the formative years of Privileges and Immunities Clause analysis, the Supreme Court attempted to use the clause as a vehicle for reading a natural rights doctrine into the Constitution. Thus, in the seminal case of Corfield v. Coryell, the Court premised its holding upon the notion that each citizen of the United States possessed a bundle of "natural rights" which were constitutionally protected from state discrimination regardless of which state such citizen occupied. Although subsequent decisions by the Supreme Court had seemingly discarded the "natural rights" theory suggested in Coryell, the Court has indicated that the "rights" specifically enumerated in the Coryell decision do fall

legitimate state purpose, or that the Illinois rule did not satisfy the stringent Privileges and Immunities test as set forth in Piper. But see infra notes 83-86.

46. The fourth article of the Articles of Confederation provided in pertinent 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, paupers, vagabonds and fugitives excepted, 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 respectively . . .


47. See Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868), wherein the Court stated:

Indeed, without some provision of the kind removing from citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Id. at 180. See also Austin v. New Hampshire, 420 U.S. 656, 660-63 (1975); Toomer v. Witsell, 334 U.S. 385, 395 (1948). See generally Tribe, supra note 11, § 6-32, at 404.


50. Id. at 552. In Corfield, the Court held that the Privileges and Immunities Clause, at the very least, protected the following fundamental rights:

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

Id.
within the scope of the Privileges and Immunities Clause.\textsuperscript{51}

The leading case of the 20th century with respect to the ability of a state to create favorable employment opportunities for its own citizens\textsuperscript{52} was \textit{Toomer v. Witsell}.\textsuperscript{53} In \textit{Toomer}, the Supreme Court defined the scope of the Privileges and Immunities Clause as follows: "It was designed to insure to a citizen of State A who ventures into State B the same privileges and immunities which the citizens of State B enjoy."\textsuperscript{54} The \textit{Toomer} Court adopted a two-part test in which state-imposed discrimination between residents and nonresidents would be constitutional only if the state proved that there were both a "substantial reason" for such discrimination, and a "substantial relationship" between the discrimination practiced and a legitimate state objective.\textsuperscript{55} Furthermore, the Court held that in order to clear the "substantial reason" hurdle, the state must demonstrate that nonresidents, as a class, "constitute a peculiar source of the evil at which the statute is aimed."\textsuperscript{56} Thus, the significance of \textit{Toomer} was that the Supreme Court shifted the focus of Privileges Immunities Clause analysis from the categorization of fundamental rights which attach to state citizenship toward the justification offered by the state for maintaining the discrimination.\textsuperscript{57} The two-part \textit{Toomer} test was reiterated by the Supreme Court in \textit{Hicklin v. Orbeck}.\textsuperscript{58} In addition, the \textit{Hicklin} Court held that discrimination based upon state citizenship would not withstand Privileges and Immunities Clause analysis if less discrimina-
tory alternatives were available to the state. Thus, in light of *Toomer* and *Hicklin*, the standard of review invoked in a Privileges and Immunities Clause context was difficult, though not impossible, for a state to satisfy.

The Supreme Court, however, significantly restricted the scope of the Privileges and Immunities Clause in *Baldwin v. Fish & Game Commission of Montana*. The *Baldwin* Court held that the Privileges and Immunities Clause protected only "fundamental" rights, thereby giving renewed significance to the *Coryell* Court's interpretation of the clause. In *Baldwin*, the Court did not find that a nonresident's right to hunt elk in Montana was sufficiently fundamental, hence discriminatory licensing fees between residents and nonresidents were upheld on a rational basis standard.

Taken together, the *Hicklin* and *Baldwin* decisions have delineated the approach that the Supreme Court has adopted in Privileges and Immunities Clause cases. First, the Court will make an ad hoc determination as to whether or not state-imposed discrimination between residents and nonresidents has impaired a fundamental right. If the Court determines that a fundamental right has not been impaired, such discrimination will be upheld upon a minimum rationality standard of review. On the other hand, if the Court finds that state-imposed discrimination has burdened a fundamental right, the discrimination will be subject to the stringent standard of review adopted by the Court in *Hicklin*.

Not surprisingly, the Supreme Court has consistently held that the right to pursue one's livelihood (common calling) in a foreign state is a fundamental right which comes within the purview of the

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59. *Id.* at 528.
60. *See infra* note 64, at 84-85.
62. *Id.* at 383. *See supra* notes 50-51 and accompanying text.
63. 436 U.S. at 388-89. Finding "no nexus between the activity and any fundamental right," a sharply divided *Baldwin* Court upheld the discriminatory licensing fees as being rationally related to a legitimate state objective. *Id.*

The *Baldwin* majority, per Justice Blackmun, cited *Corfield* as support for its holding that the Privileges and Immunities Clause was intended to protect only "fundamental" rights. *Id.* at 387. However, in a dissenting opinion, Justice Brennan (joined by Justices White and Marshall) rejected the "fundamental" rights approach adopted by the *Baldwin* majority. *Id.* at 399 (Brennan, J. dissenting). The dissenters presumably would apply the two-part *Toomer* test whenever a discrimination between residents and nonresidents was found by the Court.

Privileges and Immunities Clause. In *Supreme Court of New Hampshire v. Piper*, a case of significant importance in analyzing the principal case, the Supreme Court held that the right to practice law was a fundamental right. After applying the two-part Hicklin test, the Court specifically held that a New Hampshire bar rule, which absolutely excluded all nonresidents from admission to the New Hampshire bar, violated the Privileges and Immunities Clause. The *Piper* Court concluded that the state had failed to show that there was a "substantial reason" for the discrimination between resident and nonresident attorneys. The Court further concluded that the state had failed to show that there was a "substantial relationship" between the discrimination and a legitimate state interest as defined by the absence of less discriminatory alternatives. Thus, it was within this historical context that the Court of Appeals for the Seventh Circuit addressed Sestric's Privileges and Immunities Clause argument.

In analyzing the principal case in a Privileges and Immunities Clause context, the Seventh Circuit initially held that Sestric had "failed to make out a prima facie case." In support of that conclusion, the court explained that Sestric had not been denied a fundamental right and that Illinois Supreme Court Rule 705 did not discriminate against nonresident attorneys. Nevertheless, the Seventh Circuit's reasoning was not in accord with the holdings rendered in *Piper* and in other decisions, primarily by state courts.

67. *See, e.g.*, United Bldg. & Constr. v. Mayor & Council of Camden, 104 S. Ct. 1020 (1984). In *United Building*, the Supreme Court stated: "Certainly, the pursuit of a common calling is one of the most fundamental of the privileges protected by the [Privileges and Immunities] Clause." *Id.* at 1028. *See also* Hicklin, 437 U.S. at 518; Baldwin, 436 U.S. at 387; Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).


69. *The Piper* Court held that the practice of law was a fundamental right on two grounds. First, the Court recognized the important commercial function that lawyers play in a national economy. Second, the Court believed that nonresident attorneys served the important function of "champion[ing] unpopular causes" in foreign states. *Id.* at 1277.

70. *Id.* at 1281.

71. *Id.* at 1279-81.

72. *Id.*

73. *Id. See also supra* notes 114-15 and accompanying text.

74. Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985).

75. *Id.* at 661.

76. *Id.* at 658-61. *The Sestric* Court stated:

Because Illinois has not barred nonresidents from practicing law; has not discriminated against residents in gross, and may not even have imposed a net burden on nonresidents compared to the small class of favored residents, Sestric has failed to make out a prima facie case under the privileges and immunities clause.

*Id.* at 661.
which have addressed similar Privileges and Immunities Clause issues.

By holding that Sestric did not meet the threshold requirement as set forth in Baldwin, the court apparently assumed that there was some constitutionally significant difference between admission by motion and admission by examination. Such an assumption could only be derived from a very narrow reading of Piper, and in disregard of the fact that the Piper Court specifically noted cases in which the reasoning contained therein was broad enough to encompass the very issue raised by Sestric.

In In re Jadd, a case which was directly on point with Sestric, the Supreme Judicial Court of Massachusetts held that a similar bar rule, which provided a waiver of the examination requirement only to those nonresident attorneys who established residence in Massachusetts, violated the Privileges and Immunities Clause. The Jadd Court reasoned that a nonresident attorney's right to equal treatment did not become less fundamental merely because the state "afford[ed] him the option to remain a nonresident and achieve admission to the Bar by examination." In addition to Jadd, the reasoning contained in Gordon v. Commission on Character & Fitness, decided by the Court of Appeals of New York, further supports the contention that there is no constitutionally

77. See infra notes 80-86 and accompanying text.
78. 765 F.2d at 661. See also supra note 20.
79. See supra note 45.
82. Id. at 228, 237, 461 N.E.2d at 762, 765. The Jadd court correctly anticipated that the Supreme Court would find the practice of law to be a "fundamental" right. Accordingly, the court struck down the Massachusetts bar rule as violative of the Privileges and Immunities Clause, holding that the rule did not satisfy the two-part Hicklin test. Id.
83. 391 Mass. at 237, 461 N.E.2d at 766. Significantly, the Jadd court framed its holding as follows:

If we are willing to admit a qualified person on motion if he or she moves to Massachusetts, we have already concluded that passing a bar examination is not an essential means in assessing his or her knowledge of local law or any other qualifications for admission to the bar. Thus, the discrimination among persons seeking admission on motion is based solely on residence. We conclude that the right of a nonresident attorney to equal treatment with resident attorneys does not become less than fundamental or the discrimination justified, in a privileges and immunities sense, because Massachusetts affords him the option to remain a nonresident and achieve admission to the bar by examination.

Id.

84. 48 N.Y.2d 266, 397 N.E.2d 1309 (1979).
significant difference between admission by motion and admission by examination. As the Gordon Court stated:

The disparity of treatment between residents of the State and nonresidents is manifest: given two equally qualified candidates who have passed the bar examination (or, for that matter, meet the other requirements for admission on motion) and possess the requisite character and fitness, the rule would deny one admission based solely upon residence.

As both the Jadd and Gordon decisions were noted by the Piper Court, it would appear that the Supreme Court was cognizant of their applicability to its specific holding in Piper. The Piper Court also gave no indication that its holding was to be restricted only to those situations in which a state's bar rule absolutely excluded nonresident attorneys. Therefore, in light of the principle espoused in Piper, it would appear that any significant barrier, with respect to the interstate mobility of lawyers, which treated a class of resident attorneys more favorably than an equally qualified class of nonresident attorneys should be struck down under the Privileges and Immunities Clause. As evidenced by its decision in Sestric, the Seventh Circuit did not agree.

In further support of its holding that Sestric had failed to make out a prima facie Privileges and Immunities Clause claim, the Seventh Circuit concluded that the bar exam requirement was merely an "inconvenience," as compared to a burden. The court considered the inconvenience a reasonable one, explaining that nonresident attorneys establishing multi-state practices in Illinois would be in a superior economic position to those attorneys who relocated in Illinois with the intention of conducting all of their business in that state. However, in Zobel v. Williams, Justice O'Connor, in

85. Id. at 273, 397 N.E.2d at 1313.
86. Id. (emphasis added).
87. See supra note 82.
88. Piper, 105 S. Ct. at 1272-1281.
89. See Note, A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV, 92 Harv. L. Rev. 1461 (1979) [hereinafter cited as State Bar Residency Requirements]. The commentator concludes that "[n]one of a state's interests in regulating admission to the bar [are] closely served by simple or durational requirements." Id. at 1489.
90. Sestric, 765 F.2d at 658, 661, 664.
91. Id. at 660. Judge Posner stated:

A person who moves to another state is unlikely to have a multistate practice, while a person who applies for admission to a state's bar as a nonresident must be seeking to have at least a two state practice. It is not obviously unreasonable to make him take a second bar exam.

Id. Cf. Brakel & Loh, Regulating the Multistate Practice of Law, 50 Wash. L. Rev. 699, 708 (1975) (the bar admission process "fails to account for lawyers who have some part time business in several states.").
a significant concurring opinion, emphasized that the "'burden' imposed on nonresidents was relative to the benefits enjoyed by residents." The Privileges and Immunities Clause was designed to address only "differences in treatment," it would appear that the semantical gamesmanship engaged in by the Sestric Court as to whether or not the Illinois rule "burdened" or "inconvenienced" nonresident attorneys was inappropriate. The proper inquiry, which the Sestric Court should have made, was whether or not nonresident attorneys were unreasonably burdened, relative to (new) resident attorneys, in pursuing the fundamental right to practice law on an interstate scale.

Perhaps Judge Posner's rationale for concluding that the Illinois rule did not discriminate between resident and nonresident attorneys can best be described as judicial amnesia. Illinois Supreme Court Rule 705 was not operative until an attorney, licensed in a foreign state, became an "actual resident" of Illinois. By its terms, the Illinois rule bestowed a substantial privilege only upon a small class of (new) resident attorneys, to the exclusion of equally qualified nonresident attorneys. The Sestric Court refuted the discriminatory nature of the Illinois rule by reasoning that as long

93. Id. at 76 (O'Connor, J. concurring). The Zobel majority, per Chief Justice Burger, struck down an Alaska dividend program that attempted to reward its citizens for past contributions based upon a durational residency requirement. The Court held that the Privileges and Immunities Clause was not applicable in situations where a discrimination was imparted only between new and old residents. Id. at 59-60 & n.5. Nevertheless, the Court held that the durational residency requirement was not rationally related to a legitimate state interest and struck down the Alaska program as violative of the Equal Protection Clause. Id. at 65.

94. Id. at 76 n.6.

95. See Sestric, 765 F.2d at 658.


97. See supra note 4.

98. Id. The Sestric Court did not believe that the bar exam requirement would have a chilling effect on those nonresident attorneys desiring to practice law in Illinois on a substantial basis. 765 F.2d at 659. But see Note, Restrictions on Admission to the Bar: A Byproduct of Federalism, 98 U. PA. L. REV. 710, 716 (1950) [hereinafter cited as Admission Restrictions] ("As an attorney becomes further removed from the systemized knowledge of his law school days, his chances of success on the bar exam will decrease, [even though] his general ability may have increased through active practice."). See also Note, Attorneys: Interstate and Federal Practice, 80 HARV. L. REV. 1711, 1712-13 (1967) [hereinafter cited as Attorneys]; Smith, A Time for a National Practice of Law Act, 64 A.B.A.J. 557-60 (1978) (experienced lawyers, as well as those attorneys who have specialized, "will find bar exams increasingly onerous.").
as a large class of (old) residents attorneys was similarly burdened, there was "some assurance" that the burden imposed upon nonresident attorneys was not "arbitrary."99 In United Building & Construction v. Mayor & Council of Camden,100 however, the Supreme Court reasoned that a state scheme was "not immune from constitutional review [under the Privileges and Immunities Clause] merely because some in-state residents were similarly burdened."101 Thus, whether or not the majority of Illinois resident attorneys are required to pass that state's bar exam does not foreclose a Privileges and Immunities Clause attack.102

In short, the Seventh Circuit's preliminary holding that Sestric had failed to make out a prima facie Privileges and Immunities Clause claim represented an unwarranted attempt by the court to take the principal case outside the scope of the Piper decision,103 even though the claim raised in Sestric was only one step removed from the claim raised in Piper.104 Notwithstanding its preliminary holding, the Seventh Circuit further held that the principal case could not withstand the Piper test.105 However, the court's Privileges and Immunities Clause analysis improperly focused upon the state's power to regulate its legal profession rather than the manner in which the state could constitutionally regulate the practice of law within its jurisdiction.106

In applying the Piper test to the principal case, the Seventh Circuit based its analysis upon the proposition that the Illinois bar exam requirement, as applied to nonresident attorneys, was an appropriate means of promoting the overall competence and quality of that state's legal profession.107 However, the real constitutional issue raised in Sestric involved the legitimacy of the residence distinction as the sole factor in determining which non-resident attorneys would be subject to the state's bar examination requirement.108 As the legitimacy of the bar exam requirement was

99. 765 F.2d at 659.
101. Id. at 1027.
103. Sestric, 765 F.2d at 658, 661.
104. See supra note 45.
105. 765 F.2d at 664. See supra note 30.
106. See State Bar Residency Requirements, supra note 89, at 1472.
107. 765 F.2d at 664. See supra note 29.
108. See Brakel & Loh, supra note 91, at 707, in which the commentators explain that a (new) resident attorney who is admitted to a state's bar via admission by reciprocity is "[c]onceptually . . . admitted as a foreign attorney, though the vast majority of jurisdictions blur the conceptual point by adding residence requirements . . . ." Id. See also Admissions
necessarily dependent upon the legitimacy of the residence distinction, correct application of the *Piper* test to the principal case required that the legitimacy of both the bar exam requirement and the residence distinction be examined with respect to the state interest which was sought to be protected by Illinois Supreme Court Rule 705.¹⁰⁹

The legitimate state interest which the Illinois rule sought to effectuate and to safeguard was the overall competence and quality of that state's legal profession.¹¹⁰ The *Piper* test consisted of two distinct hurdles which the state was required to overcome, the first of which required the state to show that there was a "substantial reason" for the discrimination.¹¹¹ Judge Posner's opinion, however, was devoid of any reference to a demonstration by the state that nonresident attorneys posed a substantial threat to attorney competence with the State of Illinois.¹¹² On the contrary, in light of its purpose, the Illinois rule was both markedly "overinclusive" and markedly "underinclusive."¹¹³ In *Piper*, the Supreme Court reasoned that there was no cause to believe that nonresident attorneys would be less inclined to: familiarize themselves with local law and court proceedings, conduct ethical in-state practices, avail themselves to court proceedings, or partake in their fair share of pro bono work.¹¹⁴ Furthermore, the *Piper* Court emphasized that

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¹⁰⁹ *Restrictions*, supra note 93, at 716 (residence requirements "preclude an attorney from being admitted without changing his domicile . . . .").

¹¹⁰ See supra note 4.

¹¹¹ See, e.g., *Lowrie v. Goldenhersh*, 716 F.2d 401, 408 (7th Cir. 1983); *Hawkins v. Moss*, 503 F.2d 1171, 1176 (4th Cir. 1974); *In re Griffiths*, 413 U.S. 717, 723 (1973). Cf. *Brakel & Loh*, supra note 91, at 702. There are two principal rationales for stringent bar admission standards: protection of a state's citizens and economic protection of a state's resident attorneys. *Id.* However, as the second rationale is "prima facie unconstitutional," state bar admission rules must necessarily be grounded in the public protectionism rationale. *Id.* See also *Hafer*, supra note 5, at 6-7.

¹¹² *See supra* note 30 and text accompanying notes 68-69.

¹¹³ The Illinois rule was "underinclusive" because the burden of passing the Illinois bar exam prior to permanent admission to that state's bar fell upon a much narrower class of similarly situated nonresident attorneys than the purpose of the rule otherwise logically dictated. The Illinois rule was also "overinclusive," as the burden of passing that state's bar exam fell upon a class of nonresident attorneys who were not similarly situated in terms of the purpose of the Illinois rule. *See generally Tribe*, supra note 11, § 16-4, at 997-99; *Tussman & tenBroek*, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 346, 348-52 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1084, 1086 (1969) [hereinafter cited as *Developments*].

¹¹⁴ *Piper*, 104 S. Ct. at 1279. *See also In re Jadd*, 391 Mass. 227, 460 N.E.2d 760
nonresident attorneys would be subject to the disciplinary board of the state in which they were admitted to practice law. As was the case in Piper, the State of Illinois failed to demonstrate that nonresident attorneys created peculiar problems of incompetence which did not also emanate from resident attorneys, hence, the first prong of the Piper test was not met.

The second prong of Piper test required the state to show that there was a "substantial relationship" between the discrimination and the legitimate state interest, as demonstrated by an absence of less discriminatory alternatives. In applying this part of the Piper test to Sestric, the Seventh Circuit rejected suggested alternatives for promoting in-state attorney competence, believing that such alternatives would have been more burdensome upon nonresident attorneys than the general bar exam requirement contained in the Illinois rule. However, the court's analysis was misguided in that each of the alternative methods rejected would have been applied equally to all attorneys admitted to the Illinois bar, without regard to whether such attorneys were originally admitted upon motion or by examination. Thus, each alternative method would have promoted attorney competence while not discriminating against nonresident attorneys. Hence, the State of Illinois also failed to satisfy the second prong of the Piper test. While the

(1984), in which the Supreme Judicial Court of Massachusetts stated: "In the cases, there has been no showing that nonresidents are 'peculiar sources' of attorney incompetence or that a residency requirement is substantially related to the solution of any problem; in the sense that less discriminatory means could not be adopted." Id. at 234, 460 N.E.2d at 764. See also Gordon v. Commission on Character & Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309 (1979), wherein New York's highest court stated: "Indeed, aside from the oblique reference to purported 'dangers' said to be inherent in the licensing of nonresident attorneys, the State is at a complete loss to justify the . . . discrimination against nonresidents. . . ." Id. at 273-74, 397 N.E.2d at 1313. See also supra note 86 and accompanying text.

115. 105 S. Ct. at 1279-80.
116. See supra note 30 and text accompanying notes 69.
117. 105 S. Ct. at 1279.
118. 765 F.2d at 662-63. The "alternative methods" rejected by the Sestric court for assuring that nonresident attorneys were competent to practice Illinois law included: "[a] continuing practice requirement measured by a minimum volume of local work per year," "mandatory continuing legal education" for all attorneys, and "periodic re-examination" of all attorneys in areas of general law and specialization, and the requirement of a "stiff fee." Id. But see Jadd, 391 Mass. at 233-34, 460 N.E.2d at 764-66 (court suggested an exam on local practice and appointment of agents for service of process within the state); Gordon, 48 N.Y.2d at 274-75, 397 N.E.2d at 1314 (court suggested several less discriminatory alternatives available to the state to insure attorney competence.).
119. 765 F.2d at 663.
120. See generally Hafter, supra note 5, at 39-42.
121. Id.
Privileges and Immunities Clause does not interfere with a state's ability to maintain the quality of its legal profession, it does preclude a state from discriminating against nonresident attorneys, relative to privileges bestowed upon (new) resident attorneys, for no apparent reason other than the fact that such equally qualified nonresident attorneys choose to remain nonresidents. Such was the case in Sestric.

The Seventh Circuit next addressed Sestric's Commerce Clause claim. Historically, the origins of the Commerce Clause are found in the Articles of Confederation. While both the Privileges and Immunities Clause and the Commerce Clause have a "mutually reinforcing relationship," the Supreme Court acknowledged in United Building that each clause "ha[d] different aims and set different standards for state conduct." In Pike v. Bruce Church, Inc., the Supreme Court enunciated the general rule that when a statute or regulation acts "evenhandedly" to promote a legitimate state interest, such state action will be upheld "unless the burden imposed upon such commerce is clearly excessive in relation to the putative local benefits." Thus, when a state imposes nondiscrimi-

122. See also Jadd, 391 Mass. at 236, 460 N.E.2d at 765-66; Gordon, 48 N.Y.2d at 275, 397 N.E.2d at 1314.
123. 765 F.2d at 664.
125. Hicklin, 437 U.S. at 531.
126. United Bldg. & Constr. v. Mayor & Council of Camden, 104 S. Ct. 1020, 1028 (1984). In United Building, the Supreme Court noted that the "Commerce Clause acts as an implied restraint upon state regulatory powers [while the] Privileges and Immunities Clause ... imposes a direct restraint on state action in the interests of interstate harmony." Id.

Thus, given the current state of the law with respect to both the Privileges and Immunities Clause and the Commerce Clause, the Sestric court was incorrect in its assumption that in examining an alleged discrimination, the same standard of review should apply without regard to which clause is cited as the basis for one's claim. See Sestric, 765 F.2d at 664.

In United Building, a Commerce Clause claim could not be maintained because the state was acting as a market-participant rather than as a market-regulator. See also White v. Massachusetts Council of Constr. Employers, 103 S. Ct. 1042 (1983). However, the United Building case stands for the proposition that a Privileges and Immunities clause claim can be maintained even though a Commerce Clause claim is foreclosed. 104 S. Ct. at 1027.

128. Id. at 142. The Pike Court summarized the law with respect to state regulation of interstate commerce as such:

\[\text{[T]he general rule that emerges can be phrased as follows: Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. ... If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the}\]
inatory burdens upon interstate commerce, the standard of review invoked, within the context of Commerce Clause analysis, is sufficiently broad enough to uphold the state conduct upon any "conceivable" rational basis once a legitimate state interest is found. However, when the burdens imposed by a statute or regulation have the effect of discriminating exclusively against nonresidents, the Supreme Court has invoked a less deferential standard of review, such that the burden of proof falls upon the state to show that less discriminatory alternatives were not adequate to effectuate a legitimate state interest.

The traditional notion that the practice of law was not an activity sufficiently commercial in nature to place it within the scope of the Commerce Clause is no longer valid. In Goldfarb v. Virginia State Bar, the Supreme Court recognized that "lawyers play an important part in commercial intercourse." Hence, the Goldfarb Court held that minimum fee schedules, which were set by a local chapter of the Virginia State Bar and enforced by the Virginia State Bar, constituted illegal restraints on trade. Similarly, in Bates v. State Bar of Arizona, the Supreme Court again acknowledged the important commercial function that lawyers play.

local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id.

129. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1982) ("Only if the burden on interstate commerce clearly outweighs the State's legitimate purposes does such a regulation violate the Commerce Clause."); United States v. Carolene Products Co., 304 U.S. 144, 154 (1938) (a statute affecting interstate commerce will be upheld "unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis ... "). See generally Trans., supra note 11, § 16-3, at 996.

130. See, e.g., Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-56 (1951) (origin of discriminatory effect on interstate commerce analysis coupled with less restrictive alternative inquiry); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (unanimous adoption of the standard of review set forth in Dean Milk); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (adoption of a virtual per se rule of invalidity with respect to state regulation of interstate commerce through application of discriminatory means). See also Note, Commerce Clause, 92 Harv. L. Rev. 57, 61 (1978) (suggesting that the significance of the New Jersey decision is that it represents a finding by the Court of "protectionism" without a finding of "impermissible economic motivation.").

131. See State Bar Residency Requirements, supra note 89, at 1472-75.


133. Id. at 788.

134. Id. at 785. In Goldfarb, minimum fee schedules concerning routine legal matters were set by the local bar and enforced by the Virginia State Bar. The Supreme Court struck down the price-fixing scheme, holding that the minimum fee schedules constituted a restraint on trade as defined by § 1 of the Sherman Antitrust Act. 421 U.S. at 785.

in modern society and invalidated an Arizona Supreme Court rule which restrained attorney advertising.\footnote{136} Although neither Goldfarb nor Bates involved Commerce Clause analysis, each case is significant in that the Supreme Court recognized that the practice of law is basically a commercial endeavor.\footnote{137} As the Supreme Court has consistently applied a liberal definition as to what constitutes “commerce” under the Commerce Clause,\footnote{138} it is undisputed that the practice of law is subject to the implied restraints of the Commerce Clause.

In view of this deferential standard of review, the Sestric Court was correct in holding that the Illinois rule did not violate the implied restraints of the Commerce Clause.\footnote{139} Although the rule did not act “totally evenhandedly,”\footnote{140} the proper inquiry was whether the Illinois rule so burdened the interstate mobility of attorneys such that the impact of the rule was “clearly excessive” in relation to the state’s legitimate interest in maintaining the quality of its legal profession.\footnote{141} Since Illinois Supreme Court Rule 705\footnote{142} did not operate to exclude all nonresident attorneys, and because most (old) resident attorneys were required to take the bar exam, the Illinois rule was probably not unreasonably excessive under the Commerce Clause.

Finally, the Seventh Circuit addressed Sestric’s claim that Illinois Supreme Court Rule 705 violated the Equal Protection Clause of the fourteenth amendment.\footnote{143} In essence, Sestric argued that the Illinois rule arbitrarily distinguished between equally qualified

\footnote{136} Id. at 368 n.19. In Bates, the Court struck down a ban on attorney advertising which was enforced by the Arizona State Bar as being violative of such attorneys’ first amendment right to truthful commercial advertising. \textit{Id.} at 350. Cf. Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978) (Supreme court upheld Ohio bar rule which precluded face-to-face solicitation of prospective clients by attorneys).

\footnote{137} See also \textit{State Bar Residency Requirements}, supra note 89, at 1474; Hafter, \textit{supra} note 5, at 30.

\footnote{138} See, e.g., City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (the free flow of garbage protected by the Commerce Clause); Edwards v. California, 314 U.S. 160 (1941) (people constitute commerce within the definition of the Commerce Clause).

\footnote{139} 765 F.2d at 661. But see \textit{State Bar Residency Requirements}, supra note 85, at 1472-73 (suggesting that although state bar residency requirements arguably violate the implied restraints of the Commerce Clause, the Privileges and Immunities Clause represents the “preferable approach.”).

\footnote{140} 765 F.2d at 664.

\footnote{141} See \textit{supra} notes 128-29 and accompanying text.

\footnote{142} See \textit{supra} note 4.

\footnote{143} See \textit{supra} note 11. It was Justice Holmes’ view that the Equal Protection Clause represented “the last resort of constitutional arguments.” Buck v. Bell, 274 U.S. 200, 208 (1927).
candidates for admission by motion to the Illinois bar solely on the basis of residence.\textsuperscript{144}

Traditionally, with respect to economic and general social welfare legislation, any discrimination between similarly situated persons\textsuperscript{145} by a state\textsuperscript{146} will be upheld if such discrimination is rationally related to any legitimate state interest.\textsuperscript{147} However, when a discrimination between similarly situated persons involves either a "suspect" class\textsuperscript{148} or a "fundamental" right,\textsuperscript{149} such discrimination will be subject to strict scrutiny.\textsuperscript{150} Historically, then, equal protection attacks by nonresident attorneys with respect to a particular state's residency requirements\textsuperscript{151} have been unsuccessful due to the inability of such attorneys to characterize themselves as a "suspect" class or to characterize the practice of law as a "fundamental" right.\textsuperscript{152} Thus, given a state's legitimate interest in promoting

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\item \textsuperscript{144} 765 F.2d at 661.
\item \textsuperscript{145} See Tussman & tenBroek, supra note 113, at 346, wherein the authors state: "A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law." \textit{Id.} See also Developments, supra note 113, at 1077.
\item \textsuperscript{146} See Developments, supra note 113, at 1072 (sufficient state action, determined on an ad hoc basis, is required before the Equal Protection Clause of the fourteenth amendment becomes an appropriate vehicle to eradicate discrimination).
\item \textsuperscript{147} See supra note 129. Cf. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920), in which the Court formulated a higher standard of review than traditional minimum rationality: "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." \textit{Id.} at 415.
\item \textsuperscript{148} See Developments, supra note 113, at 1087-88 (the traditionally "suspect" classes are race, lineage, and alienage). See also Tussman & tenBroek, supra note 107, at 360.
\item \textsuperscript{149} See Developments, supra note 113, at 1120. Some "fundamental" rights which have been found by the Court include: the right to procreate (Skinner\textsuperscript{153} v. Oklahoma, 316 U.S. 535 (1942)); the right to vote (Reynolds\textsuperscript{154} v. Sims, 377 U.S. 533 (1964)); the right to certain fundamental criminal procedures (Griffin\textsuperscript{155} v. Illinois, 351 U.S. 12 (1956)); the right to travel (Shapiro\textsuperscript{156} v. Thompson, 394 U.S. 618 (1969)); and, the right to equivalent employment opportunities, such as the practice of law (Supreme Court of New Hampshire v. Piper, 105 S. Ct. 1272 (1984)).
\item \textsuperscript{150} See, e.g., Loving v. Virginia, 388 U.S. 1, 9, 11 (1967) (indicating that the state had the "very heavy burden" of establishing that the discriminatory classification was necessary to promote a compelling state interest); Shapiro v. Thompson, 394 U.S. 618 (1969) ("[A]ny classification which serves to penalize the exercise of a [fundamental] right, [must be] shown to be necessary to promote a compelling governmental interest . . . .") (emphasis in original)).
\item \textsuperscript{151} See State Bar Residency Requirements, supra note 89, at 1461. There are two types of residency requirements: "simple," such as that in Illinois Supreme Court Rule 705(d) (see supra note 4), or "durational." \textit{Id.}
\item \textsuperscript{152} See Hafter, supra note 5, at 23-28. See also State Bar Residency Requirements, supra note 89, at 1462-64, in which the commentator suggests that residency requirements (simple and short durational) are virtually immune from an equal protection minimum rationality standard of review. See also Note, The Constitutionality of State Residency Requirements for Admission to the Bar, 71 Mich. L. Rev. 838, 851-52 (1973), in which it is
the quality of its legal profession, equal protection challenges initiated by nonresident attorneys have not been able to survive the minimum rationality standard of review applied by the courts.

In *San Antonio Independent School District v. Rodriguez,* the Supreme Court enunciated the policy that it would not "create substantive constitutional rights in the name of guaranteeing equal protection of the laws." Thus, the *San Antonio* Court signaled that courts would not subject an alleged state discrimination to strict scrutiny, within the context of equal protection analysis, unless the "right" which had been impaired were expressly or implicitly guaranteed by the Constitution. In light of *Piper,* in which the Supreme Court held that the opportunity to practice law was a "fundamental" right within the meaning of article IV, section 2 of the Constitution, the *Sestric* Court should have subjected the Illinois rule to strict scrutiny.

Given the fundamental character of the right involved in the principal case, the discrimination between similarly situated nonresident attorneys could only be upheld if the state showed that such discrimination was necessary to promote a compelling state interest. However, because of the existence of less discriminatory

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153. See Note, supra note 152, at 851 (a state's interest in promoting the quality of its legal profession is compelling).


156. *Id.* at 33-34. The *Rodriguez* Court, per Justice Powell, defined the scope of "fundamental" right Equal Protection Clause analysis as follows: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. . . . Rather, the answer lies in assessing whether there is a right . . . explicitly or implicitly guaranteed by the Constitution." *Id.*

157. *Id.*

158. See supra notes 11, 66-72 and accompanying text.

159. The first inquiry in an Equal Protection Clause analysis necessarily involves a determination as to whether there has been a discrimination between similarly situated persons with respect to the purpose of the law. See supra note 145. Because economic protectionism is per se unconstitutional, the purpose of the Illinois bar rule must be perceived as promoting the quality of that state's legal profession. The *Sestric* court apparently did not dispute the fact that *Sestric* was *similarly situated,* in terms of demonstrated competence, with (new) resident attorneys; however, the *Sestric* court hypothesized that the Illinois rule did not discriminate against nonresident attorneys. 765 F.2d at 661. Yet, by its terms, the Illinois rule made it more difficult for nonresident attorneys to pursue the fundamental right to practice law than similarly situated (new) resident attorneys, even though essentially, (new) resident attorneys were admitted to the Illinois bar on the basis of their foreign license. As it cannot be forcefully argued that there was not a sufficiently close nexus between the opportunity to practice law on a permanent basis in Illinois and Illinois Supreme
alternatives, it cannot be forcefully argued that the provision of the Illinois rule which required all potential applicants to become "actual residents" of Illinois was necessary to ensure attorney competence within that state. That being the case, Illinois Supreme Court Rule 705 violated the Equal Protection Clause.

Unquestionably, the issues raised in Sestric are controversial because they touch directly upon the notion of state sovereignty, a concept which was presupposed by the Framers of the Constitution and reinforced by the tenth amendment. As the Piper decision itself represents such an extraordinary departure from the traditional deference afforded to states, the Sestric Court, ultimately, was unwilling to extend its scope.

Although the Seventh Circuit feared that invalidation of the "actual resident" provision would force the State of Illinois to choose between "admit[ting] on motion most lawyers in the country" and repealing Illinois Supreme Court Rule 705 in total, the Court Rule 705, the discriminatory impact of the rule can only be sustained if necessary to promote a compelling state interest (i.e., attorney competence).

160. See supra note 118. See, e.g., cases cited supra note 115. See generally Brakel & Loh, supra note 87, passim.

161. See supra note 4.


163. See Tribe, supra note 11, § 5-20, at 301 ("It is clear . . . that the Constitution does presuppose the existence of states as entities independent of the national government.").

164. The tenth amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

165. Cf. In re Griffiths, 413 U.S. 717, 729 (1973), wherein the Court held: "[L]awyers are not officials of government by virtue of being lawyers . . . [n]or does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy." Id.

166. See supra note 4.

167. 765 F.2d at 663. The Sestric court "feared" that invalidation of the "actual resident" provision contained in the Illinois bar rule would inundate the state with nonresident attorney applicants. However, given the realities of the situation, that "fear" was totally unwarranted. The State of Illinois would not be "forced" to admit nonresident attorneys who had not demonstrated that they were otherwise qualified with respect to Illinois Supreme Court Rule 705. Thus, all nonresident applicants would still be required to show: attainment of sufficient educational qualifications, fulfillment of the continuous practice requirement, reciprocal provisions between Illinois and the nonresident's state, and competence with respect to the professional responsibility examination. See supra note 4. In ef-
Supreme Court did not suggest in Piper that the state would be required to admit to its bar any nonresident attorney who was not otherwise qualified. Furthermore, both the state bar and the citizens of Illinois would be adequately protected by that state's retention of full disciplinary power over all attorneys practicing law within its jurisdiction, in conjunction with the state's appointment of in-state agents for service of process with respect to nonresident attorneys. In effect, the simple residency requirement contained in the Illinois rule served no legitimate purpose other than to substantially burden otherwise qualified nonresident attorneys desirous of establishing multi-state practices. Certainly, the protectionist aspect of such a rule cannot be easily dismissed.

The justifications offered by the Sestric Court for perpetuating an antiquated system in which the practice of law is substantially restricted by the jurisdictional limits of each state are inconsistent with the evolution of law as an important national and commercial activity. The Seventh Circuit concluded that the Illinois rule merely represented a "healthy form of rivalry" between states, in which the State of Illinois was attempting to attract qualified attorneys into its citizenry. Yet, it does not follow that when a state has failed to attract nonresidents into its citizenry, that state can then treat the class of nonresidents less favorably than its own citizens when a fundamental right is involved.

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168. See supra notes 114-15 and accompanying text.
169. See supra notes 114 & 118 and accompanying text.
171. See supra notes 123-28 and accompanying text.
172. 765 F.2d at 660.