North Dakota Law Review

Volume 48 | Number 3 Article 6

1971

Constitutional Law - Residency Requirements - Equal Protection for Nonresident Bar Applicants

Paul E. Godlewski

Follow this and additional works at: https://commons.und.edu/ndlr

 Part of the Law Commons

Recommended Citation

Godlewski, Paul E. (1971) "Constitutional Law - Residency Requirements - Equal Protection for Nonresident Bar Applicants," *North Dakota Law Review*: Vol. 48 : No. 3 , Article 6.
Available at: https://commons.und.edu/ndlr/vol48/iss3/6

This Case Comment is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact und.commons@library.und.edu.

tion organized for the purpose of engaging in farming or agriculture, does not qualify for the reasonably necessary exception,[36] the supreme court after more than thirty-five years of confusion has settled the question by their decision in *Coal Harbor*. It seems clear that a prospective corporation expressly designed to engage in farming is contrary to section 10-06-01 of the North Dakota Century Code, and as such it should not be allowed to incorporate.[37] By so deciding, the court impliedly found that the legislative intent was to prohibit corporate farming. It is implicit in such a decision, that any future change in the law, relaxing the ban on corporate farming, should come from legislative action and not judicial innovation.

It has been suggested that a corporation need only dispose of all land not reasonably necessary once every ten years, repurchase later, and thereby avoid the escheat provisions.[38] In so doing, it is contended that it is possible to effectively circumvent the corporate farming ban.[39] There is an obvious fault in this reasoning. Since the supreme court has determined the legislative intent to ban corporate farming, a method of circumventing the law resulting in an abrogation of both the spirit and the letter of the law, is a proper place for judicial action. The courts must enforce the spirit, as well as the letter of the law, until the legislature deems it proper to act.

Apparently after *Coal Harbor*, the only way for the farmer to enjoy the basic advantages of incorporation,[40] is to attempt to qualify for the co-operative corporation exception.[41] Since corporate farming is now under no circumstances allowable, this seems the obvious means to achieve the desired result.

ORELL D. SCHMITZ

CONSTITUTIONAL LAW—RESIDENCY REQUIREMENTS—EQUAL PROTECTION FOR NONRESIDENT BAR APPLICANTS—Plaintiff brought a class action in Federal District Court seeking an injunction against the enforcement of a state statute requiring bar applicants to es-

36. Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583, 588 (N.D. 1971).
37. N.D. CENT. CODE § 10-19-54 (1960) (matters set forth in articles of incorporation shall be in conformity with law).
38. N.D. CENT. CODE § 10-06-06 (1960).
39. Appellants Brief, at 11. Coal Harbor Stock Farm, Inc. v. Meier, 191 N.W.2d 583 (N.D. 1971).
40. N.D. CENT. CODE § 10-15-31 (1960). This section provides for limited liability. For an excellent analysis of the tax benefits *see* Pearson, *The Farm Co-operative and the Federal Income Tax*, 44 N.D. L. REV. 490 (1968).
41. N.D. CENT. CODE § 10-06-04 (1960).

tablish residency within the state one year prior to application for examination and admission.[1] At the time of his application plaintiff was clerking in a state licensed law office and concomitantly established his domicile therein. He alleged that the routine rejection of applications which did not satisfy the residency period was a denial of Equal Protection under the Fourteenth Amendment.

The court found the statute in question to "create two classes of bar applicants: (1) those who have resided in Mississippi for one year preceding the date of application, and (2) those who are also residents but have not resided in the state for the requisite time."[2] Even though members of the second class may have all the qualifications as those in the first, they are nevertheless prohibited from applying for examination.[3] Accordingly, the lengthy residing period prior to application was *held* unconstitutional as an arbitrary and unreasonable regulation serving no purpose other than inordinate delay. The court was unable to find any rational connection between an applicants fitness or capacity to practice law and living within the state for one year. However, in compliance with the express severability provision of the statute[4] only that portion requiring residence "for a period of one year preceding the date of such application"[5] was invalidated. The remainder of the statute was expressly found constitutional including the plainly divisible requirement that the applicant be a resident of the state when applying for examination. Residency at the time of application was not unreasonable inasmuch as it served a legitimate state interest in having those persons seeking admission to the bar live within its boundaries. *Lipman v. Van Zant* 329 F. Supp. 391 (N.D. Miss. 1971).

Historically, Equal Protection problems arise in situations where a legislature attempts to regulate a class by imposing restrictions on the various members of the group.[6] Justification for such burdensome regulations are predicated on the interest which the state is seeking to protect, usually under the guise of it's police power.[7]

---

1. MISS. CODE ANN. § 8654 (1954). Qualifications for Admission:
   The applicant for admission to the bar, in order to be eligible for the examination for admission, shall be a citizen of the United States and an actual bona fide resident of this state for a period of one (1) year preceding the date of such application, above the age of twenty-one (21) years, of good moral character. . . .
2. Lipman v. Van Zant, 329 F. Supp. 391, 399 (N.D. Miss. 1971).
3. *Id.* at 399.
4. MISS. LAWS ch. 213, § 12 (1954):
   If for any reason any section, paragraph, provision, clause or part of this act shall be held unconstitutional or invalid, that fact shall not affect or destroy any other section, paragraph, provision, clause or part of the act not in and of itself invalid, but the remaining portion hereof shall be in force without regard to that so invalidated.
5. Lipman v. Van Zant, 329 F. Supp. 391, 402 (N.D. Miss. 1971).
6. *See generally Developments in the Law: Equal Protection,* 82 HARV. L. REV. 1065 (1969).
7. *See e.g.,* Dent v. W. Va., 129 U.S. 114 (1889).

To be satisfactory under the United States Constitution the exercise of that power must bear a reasonable relation to the interest protected,[8] or where fundamental rights are involved,[9] must satisfy the test by showing a compelling state interest.[10] Consequently, in the former case, a classification would be valid if it included "all persons who are similarly situated with respect to the purpose of the law,"[11] as distinguished "upon some ground of difference having a fair and substantial relation to the object of the legislation."[12] The burden in the latter instance is on the state to justify the classification, and for the regulation to be upheld, it must be a "necessary means of achieving a legitimate state purpose."[13]

The court in the instant case reached its conclusion on the constitutionality of the residency requirements by applying the traditional reasonable-relation-to-state-purpose test and rejected the stricter compelling state interest standard.[14] The opinion is representative of the continuing trend on the part of the judiciary to examine carefully the validity of state bar residency requirements as an aid to determining the educational and character qualifications of an applicant.[15]

---

8. As to bar applicants, the state is interested in determing that only competent counsel are licensed to practice law among the citizenry. However, it has been suggested that residence requirements serve little or no protection to that state or its bar: ". . . residence does not go far to establish a man's character and only careful investigation of the applicant's former place of residence is apt to disclose those habits or qualities which would make him an undesirable member of the local bar." Horack, *"Trade Barriers" to Bar Admission*, 28 J. AM. JUD. SOC'Y. 102, 103 (1944).

9. Fundamental rights are those aspects of our American heritage which cannot be abridged by state or federal law and include the individual's right to travel and vote. Though not specifically listed in the Constitution, such rights being inherent in our democratic government are among the penumbra and emanations protected by the fifth and fourteenth amendments. *See* Keenan v. Board of Law Examiners of State of North Carolina, 317 F. Supp. 1350 (E.D.N.C. 1970); *cf.* Palko v. Conn., 302 U.S. 319 (1937); Griswold v. Conn., 381 U.S. 479 (1965).

10. The purpose of residence requirements may not always be manifest; latent motives might include the desire of the state and its bar "to discourage, as much as possible, the entrance of foreign attorneys in order that legal business in their state go exclusively to their own native attorneys." Dalton & Williams, *State Barriers Against Migrant Lawyers*, 25 U. KAN. CITY L. REV. 144, 147-148 (1957). Such reasoning would not qualify under either the strict or traditional Equal Protection tests. The application of each minimally presumes the presence of a legitimate state interest which is not indicated by the oppressive suggestion above. *See* discussion in accompanying text *infra*.

11. Tussman & tenBroek, *The Equal Protection of the Law*, 37 CALIF. L. REV. 341, 346 (1949).

12. F. S. Royster Guano Co. v. Va., 253 U.S. 412, 415 (1920).

13. Loving v. Va., 381 U.S. 1, 11 (1964); McLaughlin v. Fla., 379 U.S. 184, 196 (1964). But where fundamental rights are not infringed by the classification there is a strong presumption in favor of its validity. McGowan v. Md., 366 U.S. 420, 425-426 (1961); Madden v. Ky., 309 U.S. 83, 88 (1940).

14. "[W]e deem the traditional test to be the only one applicable, and that it would be incorrect to judge any aspect of this case in terms of the stricter test mandating us, as a prerequisite to constitutionality, to ascertain either the presence of compelling state interest or the absence of penalty upon the exercise of the citizen's constitutional rights of interstate travel." Lipman v. Van Zant, 329 F. Supp. 391, 403-404 (N.D. Miss. 1971).

15. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Webster v. Woffard, 321 F. Supp. 1259 (N.D. Ga. 1970); Potts v. Honorable Justices of Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971).

In *Schware v. Board of Bar Examiners of New Mexico*[16] for example, the United States Supreme Court overturned a decision which had denied an applicant the right to take the New Mexico bar examination. Plaintiff had satisfied all the criteria set out by the state in order to qualify for examination but his moral character was found to be questionable because of his prior subversive activities. Plaintiff had previously been affiliated with the Communist Party, assumed various aliases, and was arrested on several occasions. However, because he had since changed his style of living and offered sufficient proof of an honest effort to reform, the Court found current satisfaction of moral stability. Recognizing a violation of Equal Protection, the opinion stated that even though "[a] State can require high standards of qualification . . . officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."[17]

The decision in *Schware* was affirmed the same day in *Konigsberg v. State Bar of California*[18] where the plaintiff's application was likewise rejected for prior participation in Communist Party activities. The Supreme Court found that the applicant's refusal to answer relevant questions on party functions was not a sufficient justification for declining his application. Unable to submit sufficient evidence which would rationally support California's refusal to admit plaintiff, the Court vitiated the state's denial on grounds of due process and equal protection because the ruling was both "arbitrary and discriminatory."[19] Examining in depth the good moral character criteria of the state and its bar, the decision exacted strict standards of proof on the state to show that plaintiff was not so qualified.

A further tracing of this trend is reflected in the recent decision of *Webster v. Woffard*,[20] where a federal district court struck a Georgia one year residence requirement.[21] Applying the Equal Protection standards discussed above, the provision was "declared unconstitutional insofar as it denies admission to the bar to one who, though found to be qualified, has not resided in Georgia for twelve months prior to admission."[22]

A similar statute was also invalidated in *Keenan v. Board* of

16. Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).
17. *Id.* at 239.
18. Konigsberg v. State Bar of California, 353 U.S. 252 (1957).
19. *Id.* at 262.
20. Webster v. Woffard, 321 F. Supp. 1259 (N.D. Ga. 1970).
21. GA. CODE ANN. § 9-103(e) (Supp. 1971). The applicant is allowed to take the bar examination but cannot be admitted to practice until he has resided in state for one year.
22. Webster v. Woffard, 321 F. Supp. 1259, 1262 (N.D. Ga. 1970).

Law Examiners of State of North Carolina.[23] The court went further than *Lipman* or *Webster* and found an infringement of an individual's right to interstate travel in the absence of a compelling state interest. Commenting on the unreasonableness of the classification between resident and non-resident applicants the *Keenan* court stated:

> [W]hile the one year residency requirement may deny licenses to some applicants who lack character or competence, it also bars, arbitrarily and capriciously, applicants who are eminently qualified for admission. Its constitutional infirmity is 'over-inclusion' . . . It burdens some who, because of unfitness or incompetence should not be licensed to practice; but it also injures others who are both fit and capable. There are here no exigent circumstances justifying such over inclusion.[24]

The opinion above would seemingly have offered strong precedent for the *Lipman* court to adopt and expand the compelling state interest test. However, on analagous facts the instant court predicated its decision on the traditional test by not finding an infringement upon the applicant's fundamental right to interstate travel. In applying the less stringent standard, *Lipman* was apparently acting with great deference to the state by refusing to question further the discretion of its legislature.

In regard to residency, appropriate arguments may also be found in other contexts. For example, the Supreme Court in *Shapiro v. Thompson*[25] invalidated a state's one year residence requirement for welfare benefits indicating the existence of an unconstitutional infringement on the fundamental right to interstate travel.[26] It is interesting to note that *Keenan* and *Shapiro* did not express an opinion on the validity of short term residency requirements[27] while *Lipman* limited its decision to upholding residency contemporaneous to application. Not commenting on the permissible length of such requirements, the instant court implicitly leaves open two important questions: (1) Are pre-admission residency requirements which are longer in time than the Mississippi statute, but shorter than one year, constitutional? (2) Do such short term residency requirements

23. Keenan v. Board of Law Examiners of State of North Carolina, 317 F. Supp. 1350 (E.D.N.C. 1970).
24. *Id.* at 1360 (footnotes omitted).
25. Shapiro v. Thompson, 394 U.S. 618 (1969).
26. *See also* Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948). The Supreme Court recognized that a Japanese citizen's right to fish and earn a living was fundamental and subject to the compelling state interest test. It would not seem unreasonable to extend the logic of this decision to find that a bar applicant and attorney also have fundamental rights to earn a living in practicing their profession.
27. Keenan v. Board of Law Examiners of North Carolina, 317 F. Supp. 1350, 1362 n.17 (E.D.N.C. 1970); Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969).

impinge upon an individual's right to interstate travel, and if so, would such requirements satisfy the compelling state interest test?[28]

From an historical point of view, the state has always had a legitimate interest in determining the qualifications of the members of its bar. The Supreme Court in *Baird v. State Bar of Arizona*[29] found that the practice of law is a matter of right only for one who is qualified by his learning and moral character. In this regard however, unrestricted regulation is unfounded and "it is clear that state control of the practice of law is not plenary, but is . . . subject to restraints . . . imposed by the Fourteenth Amendment."[30] Further, recent alternatives have appeared to render residency requirements unnecessary to achieve the purpose of examining an applicant's character and educational qualifications. One commentator, for example, has noted that "[I]llinois . . . permits nonresident admission to the bar if the applicant intends to practice within the state, presumably on the assumption that actual practice is more relevant than residence for encouraging competence in local law."[31]

In line with current Constitutional standards, North Dakota is among the states statutorily maintaining minimal residence requirements[32] while apparently demanding strict professional qualifications among applicants, members of the bar, and a continuing interest in the law school itself.[33] The authority to appoint a Board of Bar Examiners has been vested at different times in the Supreme Court of North Dakota,[34] the Governor,[35] and since 1923 has remained under the guidance of the former.[36] In 1964, pursuant to an order of the North Dakota Supreme Court,[37] the current bar admission statute was enacted setting forth qualifications to be met by applicants requiring *inter alia* good moral character, edu-

28. Most states require some period of residency prior to or at the time of examination or admission. For an exacting analysis of state statutes and rules regarding bar residency requirements *see* Note, *Residency Requirements for Initial Admission to the Bar: A Compromise Proposal For Change,* 56 CORNELL L. REV. 831 n.4 *et seq.* (1971). *See also* 5 MARTINDALE-HUBBEL LAW DIRECTORY, ATTORNEYS AND COUNSELORS (1972).

29. Baird v. State Bar of Arizona, 401 U.S. 1 (1970).

30. Keenan v. Board of Law Examiners of State of North Carolina, 317 F. Supp. 1350, 1353 (E.D.N.C. 1970); *cf.* Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957).

31. Note, *Attorneys: Interstate and Federal Practice,* 80 HARV. L. REV. 1711, 1716 (1967) (footnotes omitted).

32. In North Dakota residency for bar applicants is required at the time of application for admission. N.D. CENT. CODE § 27-11-03 (Supp. 1971).

33. *See* 43 N.D. L. REV. 201 (1966); *See also* Crum, *The History of the University of North Dakota School of Law,* 35 N.D. L. REV. 5 (1959).

34. N.D. SESS. LAWS ch. 50 (1905).

35. N.D. SESS. LAWS ch. 69 (1919).

36. N.D. SESS. LAWS ch. 134 (1923).

37. *In re* Order for Adoption and Promulgation of a RULE of the Supreme Court Pertaining to Qualifications of Applicants FOR ADMISSION TO PRACTICE in the State of North Dakota, 132 N.W.2d 924, 926 (N.D. 1964).

cational specifications, and residency at the time of application for admission.[38]

Commentators have expressed favorable opinions as to the desirability of minimal residency requirements[39] while the length of such periods remain currently debatable. *Lipman* in failing to recognize the presence of a fundamental right, avoided the application of the strict compelling state interest test which would place such short term pre-admission residency requirements for bar applicants on a doubtful constitutional footing. The significance of the decision can be appreciated with the recognition that many states require six months of residency[40] while most others vary in decreasing magnitude.[41] The logical extension of *Lipman* in light of the *Keenan* decision would seem to indicate further abrogation of residency requirements in the future, with a narrowing definition of their permissible length measured against a demonstrable state interest.

PAUL E. GODLEWSKI

INTOXICATING LIQUORS — PROXIMATE CAUSE OF INJURY — LIABILITY OF TAVERN OWNER FOR TORTS COMMITTED BY INTOXICATED PATRON—Appellant, motorist, brought an action against a tavern

38. N.D. CENT. CODE § 27-11-03 (Supp. 1971).

39. Note, *Residence Requirements For Initial Admission To The Bar: A Compromise Proposal For Change,* 56 CORNELL L. REV. 831, 843 (1971). *See generally* Horack, *"Trade Barriers" to Bar Admissions,* 28 J. AM. JUD. SOC'Y. 102 (1944); Note, *Restrictions on Admission to the Bar: By-Product of Federalism,* 98 U. PA. L. REV. 710 (1950).

40. The validity of a six month residency requirement for bar applicants now appears to be questionable after the recent decision of Potts v. Honorable Justices of Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii, 1971). Plaintiff was a member of the armed services stationed in Hawaii and had statutorily qualified for the bar examination in all respects except for residency. A statute required all voters over the age of fifteen years-six months to reside within the state six months before being eligible to register. By Hawaii Supreme Court Rules, rule 15(c), all bar applicants had to be eligible registered voters in order to qualify for examination. The Federal District Court found a violation of Equal Protection stating:

> The periods of required residency in the statute and the rule here bear no valid relation to the educational and moral qualifications of bar applicants, and are thereby arbitrary and capricious and constitutionally impermissible. Both the act and the rule thus severally invidiously discriminate against an identifiable class, favoring registered voters or six-months residents over otherwise equally qualified applicants who have not the same residential status.

Id. at 1398.

In applying the traditional test, *Potts,* along with *Shapiro, Webster,* and *Lipman* left no indication as to the presence or absence of a compelling state interest. Effectively avoiding the latter issue the *Potts* court opined:

> By so holding, we need not consider plaintiff's contention that the residency requirements impermissibly penalize his constitutional rights to interstate travel or any other constitutional right.

Id. at 1398.

41. *See* Note, *Residence Requirements For Initial Admission To The Bar: A Compromise Proposal For Change,* 56 CORNELL L. REV. 831 (1971).