Vanderbilt Law Review

Volume 34
Issue 3 *Issue 3 - April 1981*

Article 4

4-1981

Admission to the Bar: A Constitutional Analysis

Ben C. Adams

Edward H. Benton

David A. Beyer

Harrison L. Marshall, Jr.

Carter R. Todd

See next page for additional authors

Admission to the Bar: A Constitutional Analysis

Authors

Ben C. Adams; Edward H. Benton; David A. Beyer; Harrison L. Marshall, Jr.; Carter R. Todd; and Jane G. Allen Special Projects Editor

SPECIAL PROJECT

Admission to the Bar: A Constitutional Analysis

I. INTRODUCTION

Attorneys may seek to practice law in a state on either a permanent or a temporary basis. An attorney's permanent admission to the bar may take two forms—first time or initial admission upon receiving a law degree and admission after having practiced in another state. In both of these cases, the applicant must comply with certain requirements before being admitted to the state's bar.[1] Among the requirements that may be mandated by a state are demonstration of good moral character, successful completion of a bar examination, some form of residency, payment of fees, and graduation from an accredited law school. Temporary admission or admission *pro hac vice* is permission to try a single lawsuit in a foreign jurisdiction.[2] An attorney seeking temporary admission must also comply with certain requirements before being granted permission to appear.[3]

Attorneys have a substantial interest in successfully complet-

1. A state can require bar applicants to possess certain qualifications in order to be eligible for admission as long as those qualifications are rationally related to fitness to practice law. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

2. *See* note 821 *infra* and accompanying text.

3. *See* note 828 *infra* and accompanying text.

ing the requirements for admission to the bar, particularly in the case of permanent admission. Obviously, obtaining a license to practice law is the *sine qua non* to an attorney's continuing career. Similarly, a state has a substantial interest in ensuring that its attorneys are both academically and morally competent to practice law. The state has a duty to protect prospective clients as well as a significant interest in safeguarding the efficient administration of justice.[4]

Considering the significant interests involved in bar admission decisions, it is not surprising that when a state denies admission to an applicant, litigation is likely to follow. Despite the inherently local nature of bar admission regulation,[5] states cannot deny admission to an applicant or lay down rules contrary to federal constitutional principles.[6] Often the foundation of claims by rejected bar applicants is that the state violated rights granted under the federal constitution. These claims focus on a number of constitutional provisions, ranging from the due process and equal protection clauses to the commerce and privileges and immunities clauses.

Recently, there has been a surge of publicity and comment directed toward the problems of attorneys who are denied either permanent or temporary admission to the bar.[7] Several factors have contributed to the recent interest in this problem. First, the number of people taking the bar examination has increased steadily over the past five years.[8] Second, the law practice of many attorneys has taken on an increasingly interstate character resulting in

---

4. *See* notes 50-52 *infra* and accompanying text.

5. Because attorneys are officers of the court, the power to admit, control, and disbar them inherently resides with the state's judiciary. Feldman v. Stata Bd. of Law Examiners, 438 F.2d 699, 702 (8th Cir. 1971).

6. Schware v. Board of Bar Examiners, 353 U.S. at 239.

7. *See, e.g.*, Rout, *Flunking the Bar Exam Frustrates Thousands of Law-School Grads*, Wall St. J., Apr. 1, 1981, at 1, col. 1; National L.J., Aug. 25, 1980, at 1, col. 4; 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); 79 COLUM. L. REV. 572 (1979).

8.

Year	Total Taking	Total Passing	Percent Passing
1975	46,414	34,144	74.0%
1976	49,099	34,951	70.0%
1977	51,970	36,514	70.0%
1978	53,980	36,434	67.4%
1979	57,676	39,631	68.8%

Source: BAR EXAMINER (1975-1979) (taken from the annual statistics compiled by the National Conference of Bar Examiners).

a need to appear and practice in more than one state.[9] Finally, more licensed attorneys are moving on a permanent basis from one state to another during their careers, and such mobility requires them to seek permanent admission in a second or third state.[10] Thus, because more attorneys are seeking various types of admission, states deny admission to a greater number of people.

This Special Project examines and analyzes selected constitutional challenges to requirements for permanent and temporary admission to the bar. In the area of permanent admission, the Special Project looks at constitutional challenges to three qualifications typically required of bar applicants by states: demonstration of good moral character, successful completion of a bar examination, and residency. In the area of admission *pro hac vice*, the Project examines constitutional challenges to the basis on which judges have denied temporary admission to an applicant.

One issue with which the Project does not deal in depth is federal jurisdiction in bar admission cases. A brief overview of this question, however, is necessary to a complete understanding of bar admission cases. Although state courts are competent to decide federal questions raised by unsuccessful bar applicants,[11] such individuals often seek federal court appellate[12] or original[13] involvement. The responsibility for regulation of the bar, including bar admissions, resides inherently with the state judiciary, usually the state supreme court.[14] In the exercise of this power, the state supreme court performs two types of functions: rulemaking[15] and adjudication.[16] The rulemaking function refers to promulgation of general regulations that apply to all applicants, such as residency requirements. The adjudicative function refers to a court's decision

---

9. *See* Part II, Section C, subsection 2.

10. *Id.*

11. *See, e.g.*, Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980) (invalidating bar residency requirement as violative of federal constitution).

12. *See, e.g., In re* Stoler, 401 U.S. 23 (1971); Baird v. State Bar, 401 U.S. 1 (1971); Konigsberg v. State Bar, 366 U.S. 36 (1961); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

13. *See, e.g.*, Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980); Woodard v. Virginia Bd. of Bar Examiners, 598 F.2d 1345 (4th Cir. 1979); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974).

14. *See* note 5 *supra*. The courts can properly delegate this authority to a body such as a board of bar examiners. Douglas v. Noble, 261 U.S. 165 (1923). *See* note 42 *infra* and accompanying text.

15. *See* note 34 *infra* and accompanying text.

16. *See* note 35 *infra* and accompanying text.

in an individual case—that is, whether a particular applicant should be admitted to the bar. These functions form the basis for determining what type of federal court intervention is appropriate in a given circumstance.

The Constitution limits the exercise of federal jurisdiction to cases and controversies within the meaning of Article III.[17] In a case involving appellate jurisdiction, *In re Summers*,[18] the Supreme Court held that "[a] claim of a present right to admission to the bar of a state and a denial of that right is a controversy" within the meaning of Article III.[19] Thus, the Court held that it could constitutionally review federal issues raised by the Illinois Supreme Court's decision to deny admission to the petitioner.[20]

When a state supreme court has rendered a decision in a given case, the only federal court involvement that is appropriate is appellate review of the federal issues by the United States Supreme Court.[21] Such review is discretionary except in limited circumstances.[22] Thus, when a state court renders a decision concerning a particular applicant's fitness for admission to the bar, the exclusive avenue of federal review is by the Supreme Court if federal issues

---

17. U.S. CONST. Art. III, § 2, cl. 1. This provision provides as follows:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the Same State claiming Lands under grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

18. 325 U.S. 561 (1945).

19. *Id.* at 568.

20. *Id.* at 568-69.

21. *See, e.g.*, Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1356 (E.D.N.C. 1970) ("a final judgment properly rendered by a state court in any proceeding is reviewable only by state appellate courts and the United States Supreme Court").

22. 28 U.S.C. § 1257 (1976). Section 1257 provides in part:
Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
(2) By appeal, where is drawn in question the validity of a statute of any stata on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States
. . . .

are raised.[23]

A different situation is presented by a constitutional challenge to the general rules that govern admission to the bar and to the administration of those rules. Federal district courts are competent to hear such challenges in an original action, generally filed pursuant to 42 U.S.C. § 1983.[24] In *Doe v. Pringle*[25] the Tenth Circuit stated that

> while federal courts do exercise jurisdiction over many constitutional claims which attack the state's power to license attorneys involving challenges to either the rule-making authority or administration of the rules . . . *such is not true where review of a state court's adjudication of a particular application is sought* . . . . [T]he latter claim may be heard, if at all, exclusively by the Supreme Court of the United States.[26]

Thus, federal court jurisdiction is appropriate in state bar admission cases in limited circumstances. It should be noted that while federal courts are competent to exercise jurisdiction as described, they are not required to do so.[27] Thus, principles of federalism and comity have resulted in great reluctance on the part of federal courts to become involved in bar admission cases.[28]

II. Permanent Admission To The Bar

The power to determine who shall be permanently admitted to the practice of law resides with the state.[29] Only if a bar applicant shows that the state has violated his constitutional rights can a

---

23.. Brown v. Board of Bar Examiners, 623 F.2d 605, 609-10 (9th Cir. 1980); Woodard v. Virginia Bd. of Bar Examiners, 598 F.2d 1345, 1346 (4th Cir. 1979); Doe v. Pringle, 550 F.2d 596, 597 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); MacKay v. Nesbett, 412 F.2d 846 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969).

24. 42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Jurisdiction to entertain such suits is given to federal district courts by 28 U.S.C. § 1343 (1976).

25. 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977).

26. *Id.* at 597 (emphasis in original).

27. A federal court may decline jurisdiction of a case that it is competent to hear on grounds of comity or abstention in deference to the involvement of a state in the matter. *See* Younger v. Harris, 401 U.S. 37 (1971); Samuels v. Mackell, 401 U.S. 66 (1971).

28. *See, e.g.*, Doe v. Pringle, 550 F.2d 596, 600-03 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969).

29. Konigsberg v. State Bar, 353 U.S. 252, 273 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 248 (1957) (Frankfurter, J., concurring); Martin-Trigona v. Underwood, 529 F.2d 33, 35 (7th Cir. 1975).

federal court interfere with this determination.[30] On the state level, the control of bar admissions rests inherently with the judiciary, although the state legislature may formulate general standards or guidelines.[31] Typically, the state supreme court acts as the general overseer of the bar and delegates the responsibility of daily administration to a board or committee of bar examiners.[32] The final power in this area, however, rests with the court, and it is the court that ultimately admits or rejects an individual applicant.[33]

In the process of admitting applicants to the bar, states exercise two types of functions. A framework of rules and regulations that apply to all applicants is set up by the state supreme court, the board of bar examiners, or the state legislature, and this constitutes a rulemaking function.[34] A quite different function is exercised by the courts that admit or reject a particular applicant on the basis of his individual circumstances by application of permissible standards. In such a situation, the court is exercising an adjudicative function.[35] This subtle but significant difference assumes major importance when courts must decide issues of federal jurisdiction[36] and due process.[37]

Consistent with due process, states can require bar applicants to possess "high standards of qualification, such as good moral character or proficiency in its law."[38] Common "qualifications" required by states include good moral character,[39] successful comple-

30. Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977). For a discussion of federal court jurisdiction in bar admission cases, see notes 11-28 *supra* and accompanying text.

31. Feldman v. Board of Law Examiners, 438 F.2d 669, 702 (8th Cir. 1971); *In re* Lavine, 2 Cal. 2d 324, 41 P.2d 161 (1935); Wallace v. Wallace, 225 Ga. 102, 166 S.E.2d 718, *cert. denied*, 396 U.S. 939 (1969).

32. Mavity, *State Rules Governing Admission to the Bar: Comparisons and Comments*, in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 8-9 (F. Klein ed. 1978). The bar examiners are assisted in some states by a committee on character and fitness. The bar examiners and the members of the committee on character and fitness are usually appointed by the state's highest court, but in some states statutes require their appointment by the governing body of the state bar. *Id.* at 9. For a discussion of the operation of the Committee on Character and Fitness of the New York Bar, see Schwartz, *What Is a Character and Fitness Committee?*, 49 N.Y. STATE B.J. 302, 302-06, 398-401, 440-42, 494-99 (1977).

33. *See* note 480 *infra* and accompanying text.

34. *See* Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970).

35. *See* Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969).

36. *See* notes 11-28 *supra*.

37. *See* notes 81-82 *infra*.

38. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

39. All states currently require an applicant to demonstrate good moral character.

tion of a bar examination,[40] and some form of residency.[41] In most states, after an investigation of the applicant and the administration of the bar examination, the bar examiners recommend to the state supreme court whether the applicant should be admitted.[42] Courts have varied in determining the conclusiveness of the bar examiners' decisions,[43] but in general the courts give considerable weight to these recommendations.[44] The applicant who is not recommended for admission may challenge the findings of the board, usually in an original action in the state's highest court.[45] Throughout the application process, the burden of proof is on the applicant.[46]

Unsuccessful bar applicants have mustered a wide variety of constitutional challenges to state requirements for permanent admission to the bar, utilizing the due process and equal protection clauses as well as the commerce clause and the privileges and immunities clause. This part of the Special Project examines the constitutional implications of three common requirements: good moral character, proficiency in law as demonstrated by successful completion of a bar examination, and residency.[47]

Mavity, *supra* note 4, at 8. For a complete discussion of the good moral character requirement, see Part II, Section A, *infra*.

40. Almost all states require an applicant to complete successfully a bar examination, the only exception being those states with "diploma privilege." *See* note 380 *infra*. For a discussion of the bar examination, see Part II, Section B *infra*.

41. A majority of the states have some form of residency requirements. *See* note 495 *infra*. For a discussion of residency requirements, see Part II, Section C *infra*.

42. The Supreme Court has held that the determination of which individuals have the requisite qualifications to be admitted into a profession may properly be committed to a body such as a board of bar examiners. *See* Douglas v. Noble, 261 U.S. 165 (1923).

43. *See generally* Annot., 64 A.L.R.2d 301, 314-17 (1959).

44. *See, e.g., In re* Feingold, 296 A.2d 492 (Maine 1972) (certification by board that a person was of good moral character is entitled to "great weight"). Despite this deference, courts generally are free to disregard the recommendations of the bar examiners. "The Board is an administrative aid to the court. It does not itself admit applicants to the bar . . . but merely makes recommendations to the court, which recommendations the court may or may not elect to follow." Feldman v. State Bd. of Law Examiners, 438 F.2d 699, 702 (8th Cir. 1971).

45. *See, e.g.*, Konigsberg v. State Bar, 353 U.S. 252, 254 (1957).

46. Placing the burden of proof on the applicant is not a violation of due process. Martin-Trigona v. Underwood, 529 F.2d 33 (7th Cir. 1975); *In re* Rogers, 297 N.C. 48, 253 S.E.2d 912 (1979).

47. Some states require their bar applicants to graduate from an accredited law school. This requirement has generated considerable controversy resulting in a number of lawsuits. Uniformly, courts have upheld this requirement as a reasonable qualification for admission to the bar. *See, e.g.*, Santos v. Alaska Bar Ass'n, 618 F.2d 575 (9th Cir. 1980) (upholding the Alaska requirement of graduation from an accredited law school); Brown v. Board of Bar Examiners, 623 F.2d 605 (9th Cir. 1980) (approving in dictum the Nevada requirement of

A. Good Moral Character

In *Schware v. Board of Bar Examiners*[48] the Supreme Court held that, consistent with due process, states may require bar applicants to demonstrate good moral character to qualify for admission to the bar. Historically, the requirement of good moral character stemmed from the peculiar nature of the practice of law in American society. As Justice Frankfurter stated,

> [A]ll the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional keeping of lawyers . . . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, through-out the centuries, been compendiously described as "moral character."[49]

In less noble terms, states have two legitimate goals in ensuring that their lawyers possess good moral character: the protection of prospective clients and the assurance of the orderly and efficient administration of justice.[50] Because of the law's technical nature, the unscrupulous lawyer, in his role as a counselor, could easily mislead a trusting client.[51] Similarly, the litigating attorney has access to a variety of devices that could be used to obstruct the judicial process.[52]

Currently, all states require bar applicants to make a showing

---

graduation from an accredited law school); Hackin v. Lockwood, 361 F.2d 490 (9th Cir. 1966) (upholding the Arizona requirement of graduation from an accredited law school).

48. 353 U.S. 232, 239 (1957).

49. *Id.* at 247 (Frankfurter, J., concurring).

50. Rosenthal v. State Bar Examining Comm., 116 Conn. 409, 415, 165 A. 211, 213 (1933) ("The ultimate purpose of all regulations of the admission of attorneys is to assure the courts the assistance of advocates of ability, learning, and sound character and to protect the public from incompetent and dishonest practitioners."). *See generally* Annot., 64 A.L.R.2d 301, 304-09 (1959); Note, *Admission to the Bar Following Conviction for Refusal of Induction,* 78 YALE L.J. 1352, 1355-62 (1969).

Because these goals fall within the proper exercise of the state's police power, they are legitimate state purposes. A third state purpose is sometimes suggested: the protection of the reputation of the bar. *E.g.*, State *ex rel* Nebraska State Bar Ass'n v. Wiebusch, 153 Neb. 583, 594-95, 45 N.W.2d 583, 586-87 (1951). This requirement has been rejected, however, by at least one commentator as superfluous and unconstitutionally vague. 65 YALE L.J. 873, 879 (1956).

51. *In re* Florida Bd. of Bar Examiners, 358 So. 2d 7, 9 (Fla. 1978); 65 YALE L.J. 873, 879 (1956).

52. Such devices include subornation of perjury, Paonessa v. State Bar, 43 Cal. 2d 222, 272 P.2d 510 (1954); intentionally deceiving opposing counsel, Coviello v. State Bar, 275 P.2d 482 (Cal. 1954); and bribery of jurors, *In re* Keenan, 313 Mass. 186, 47 N.E.2d 12 (1943).

of good moral character.[53] Generally, the investigation to determine if an applicant has satisfactorily demonstrated this requirement is conducted by the board of bar examiners or by a committee on character and fitness.[54] This investigative body is rarely provided with specific criteria of fitness[55] and is therefore free to consider a wide range of facts and circumstances. Typically, the applicant must fill out an extensive questionnaire for the committee, in which he is asked, among other things, whether he has ever been arrested, charged with, or questioned regarding the commission of a crime, and if so, the circumstances involved.[56] The applicant also is generally required to submit several letters of recommendation to the board or committee.[57] In some states, the investigative body relies almost entirely on information supplied by the applicant, but in other states, a thorough investigation is made by a local subcommittee in the applicant's county of residence.[58]

Because of the absence of specific guidelines and the large amount of discretion accorded to the investigative body, courts that review decisions of the bar examiners must be particularly careful in determining what character requirements may be constitutionally required of bar applicants. This section of the Special Project examines due process problems associated with the requirement of good moral character. First, the section sets forth the due process analysis that the Supreme Court has announced for reviewing two aspects of this requirement: rules of general application and determinations on an individual basis. The section next examines due process cases in which a decision has been made that

---

53. *See* note 39 *supra.*

54. Mavity, *supra* note 32, at 8-9.

55. Note, *Admission to the Bar Following Conviction for Refusal of Induction,* 78 YALE L.J. 1352, 1354 (1969).

56. *See* the suggested questionnaire of the National Conference of Bar Examiners, THE BAR EXAMINERS' HANDBOOK 70-74 (1968).

57. *See, e.g., id.* at 74. Because the burden of proof rests on the applicant, *see* note 46 *supra,* in close cases, many letters of recommendation may be submitted by the applicant. For example, in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the applicant introduced letters from all but one member of his law school class and all available law school professors.

58. Mavity, *supra* note 32, at 48. *Compare* RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, R. 1:25 (West 1981) ("It shall be the duty of the committee . . . on character to determine the fitness to practice law of each candidate . . . on the basis of and hy reviewing the personal record and reputation of each candidate . . . .") *with* RULES FOR ADMISSION TO THE BAR OF INDIANA, R. 12 (requiring, at a minimum, a committee on character and fitness to be convened in the applicant's home county and to interview the applicant personally).

a person's pattern of conduct justified a finding of bad character. Finally, this section explores due process/first amendment challenges to rules that require bar applicants to furnish information concerning their political beliefs and associations.

1. Due Process—The Analytical Framework

The fourteenth amendment mandates that no state shall deny to persons within its jurisdiction due process of law.[59] Under current due process analysis, courts initially look to the nature of the interest involved to determine whether it is "within the contemplation of the 'liberty or property' language of the fourteenth amendment."[60] Thus, a bar applicant receives due process protection only if he can prove a deprivation of a liberty or property interest encompassed by the fourteenth amendment.[61] In *Schware v. Board of Bar Examiners*[62] the Supreme Court recognized that bar applicants possess a protected interest in permanent admission to the bar, but the Court failed to state whether that interest was a property or a liberty interest. In order to understand the bar admission cases, it is necessary to explore further the nature of the interest involved.

Although the scope of protected property interests has been expanded far beyond personalty and real property to include such items as welfare benefits[63] and tenured public employment,[64] the Supreme Court has not defined property so broadly as to include an applicant's interest in being admitted to the bar. The Court consistently has stated that the Constitution does not create property interests; rather, such interests must be created and defined by an independent source such as state law.[65] Relying on the independent source, the claimant must demonstrate a "legitimate claim of entitlement."[66] Such an entitlement requires that an individual

---

59. U.S. CONST. amend. XIV, § 1.

60. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

61. Board of Regents v. Roth, 408 U.S. 564, 569 (1972). For a general discussion of liberty and property interest, see Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

62. 353 U.S. 232, 238-39 (1957). *See also* Willner v. Committee on Character & Fitness, 373 U.S. 96, 102 (1963); Konigsberg v. State Bar, 353 U.S. 252, 262 (1957).

63. Goldberg v. Kelly, 397 U.S. 254 (1970).

64. Slochower v. Board of Educ., 350 U.S. 551 (1956).

65. Leis v. Flynt, 439 U.S. 438 (1979); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 9 (1978); Paul v. Davis, 424 U.S. 693, 709 (1976); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

66. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

have "more than an abstract need or desire . . . [or] a unilateral expectation"[67] of receiving a benefit. Thus, in *Board of Regents v. Roth*,[68] when a teacher who was not rehired upon the expiration of a one year contract was unable to demonstrate more than an expectation of being rehired, the Court concluded that no property right existed. Similarly, an applicant for admission to the bar has no entitlement to practice law—he has only an expectation of being allowed to practice.[69] Therefore, bar applicants have no constitutionally recognizable property interest.[70]

A bar applicant, however, does have a liberty interest in being admitted to the bar. In contrast to its lack of involvement in the defining of property interests, the Supreme Court has recognized constitutionally based liberty interests. The Court has defined liberty so that the concept now encompasses much more than "mere freedom from bodily restraint"[71] and includes

> the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.[72]

Despite this seemingly broad definition of liberty, the Court in *Roth* refused to find a liberty interest in the teacher's continued employment. Citing *Schware*, the Court acknowledged that "a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene[s] . . . Due Process.' "[73] The Court, however, distinguished the situation of the teacher in *Roth* from that of the bar applicant in *Schware*, noting that the teacher's "record of nonretention . . . would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty' "[74] like that pre-

---

67. *Id.*

68. 408 U.S. 564 (1972).

69. "To disbar an attorney is to deprive him of what, within the meaning of our constitutions of government, may fairly be regarded as property. But one who asks the privilege of admission to the bar is simply seeking to obtain a right of property which he has not got." *In re* O'Brien's Petition, 79 Conn. 46, 55, 63 A. 777, 780 (1906) (citations omitted).

70. *But see* Reese v. Board of Comm'rs of Ala. State Bar, 379 So. 2d 564 (Ala. 1980), in which the Alabama Supreme Court held that "[t]he right to practice law is a valuable *property* right, which can be denied only by due process of law." *Id.* at 569 (emphasis added).

71. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

72. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

73. 408 U.S. at 574.

74. *Id.* at 574 n.13.

sent when a bar applicant is denied admission. Because a teacher who is dismissed still has the opportunity to seek employment with other public institutions in the state, the Court reasoned that the teacher had not been deprived of a liberty interest. "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another."[75] On the other hand, the unsuccessful bar applicant does not have the opportunity to seek alternative legal employment. Once excluded from the bar, a bar applicant is denied all opportunity to practice law within the state; furthermore, if the adverse determination is based upon a finding of bad character, other states may also deny him admission.[76] This "gross" foreclosure of opportunity elevates the applicant's interest to the status of a liberty and therefore triggers due process protection.[77]

Once a protected fourteenth amendment interest is found, the Court reviews the state's action to determine whether an unconstitutional deprivation has occurred. When a rule or regulation of general application is involved, principles of substantive due process apply. If a fundamental interest[78] is involved, then the compelling interest test applies: the individual's interest cannot be infringed unless the state's interest is compelling and the method used is the least restrictive alternative.[79] If the interest is not fundamental, then the rational basis test applies and the state's action will be justified if it bears a reasonable relation to a legitimate

---

75. *Id.* at 575.

76. *Inquiries into the Political Beliefs and Activities of Applicants for Admission to the Bar*, 1 COLUM. SURVEY OF HUMAN RIGHTS 33, 53 (1967-1968).

77. The special considerations involved in a bar admission case were also recognized by the Supreme Court in Konigsberg v. State Bar, 353 U.S. 252 (1957):

> While this is not a criminal case, its consequences for [the applicant] take it out of the ordinary run of civil cases. The Committee's action [in denying the applicant membership in the bar] prevents him from earning a living by practicing law. This deprivation has grave consequences for a man who has spent years of study and a great deal of money in preparing to be a lawyer.

Id. at 257-58.

78. Fundamental interests include freedom of association, *e.g.*, Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); freedom of speech, *e.g.*, Smith v. California, 361 U.S. 147 (1959); Grosjean v. American Press Co., 297 U.S. 233 (1936); free exercise of religion, *e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); School Dist. v. Schempp, 374 U.S. 203 (1963); Contwell v. Connecticut, 310 U.S. 296 (1940); personal privacy, *e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); freedom of travel, *e.g.*, Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

79. Roe v. Wade, 410 U.S. 113, 155 (1973). *See generally* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971 (1974).

state purpose.[80]

When the Court reviews an adjudicative proceeding or a determination on an individual basis, a different mode of analysis is employed. First, the state must satisfy procedural due process requirements—that is, some form of notice and an opportunity to be heard must be afforded to the individual.[81] Second, the decision rendered must rest on sufficient grounds—that is, based upon the evidence before the decisionmaker; the result must not be arbitrary.[82]

(a) Patterns of Conduct Resulting in a Finding of Bad Moral Character: Due Process Review of Individual Determinations

(1) Introduction

The Supreme Court has given extensive consideration to state applications of the good moral character requirement in two cases,

---

80. Nebbia v. New York, 291 U.S. 502, 537 (1934).

81. Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972). *See generally* Annot., 2 A.L.R.3d 1266 (1965).

In the bar admissions context, the procedural requirements are settled. In Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963), the applicant had passed the New York bar examination in 1936 but was denied admittance by the committee on character and fitness. In order to apply again, a New York applicant was required to obtain written consent of the Appellate Division. Such consent was repeatedly denied to Willner. At no time was the applicant given a hearing, allowed to confront witnesses against him, or informed of the specific reasons for the denial of his application. The Supreme Court reversed, holding that the requirements of procedural due process were not met. The Court found the applicant was "clearly entitled to notice of and a hearing on the grounds for his rejection." *Id.* at 105. *See also* Orr v. Trinter, 444 F.2d 128, 133 (6th Cir. 1971); *In re* Monaghan, 126 Vt. 53, 56, 222 A.2d 665, 669 (1966).

The four member plurality in *Willner* insisted on the need to allow the applicant to confront adverse witnesses, but the three concurring justices did not interpret the plurality decision to mean that cross-examination is automatically required in all cases. *Id.* at 107-08 (Goldberg, J., concurring). More recent cases, however, have found procedural due process violations when the applicants were denied the opportunity to confront and examine witnesses. Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964); Application of Dinan, 157 Conn. 67, 244 A.2d 608 (1968); *Ex parte* Kellar, 81 Nev. 240, 401 P.2d 616 (1965); Appeal of Incardi, 436 Pa. 364, 260 A.2d 782 (1970).

An applicant has the right to present evidence on his own behalf, including favorable witnesses and letters of recommendation. Application of Levine, 97 Ariz. 88, 397 P.2d 205 (1964); *Ex parte* Kellar, 81 Nev. 240, 401 P.2d 616 (1965). Unsuccessful applicants may challenge the decision of the bar examiners, usually by petitioning the state's highest court. Appeal from the state supreme court is only by writ of certiorari from the United States Supreme Court. Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), *cert. denied*, 431 U.S. 916 (1977).

82. Konigsberg v. State Bar, 353 U.S. 252, 262 (1957); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957). *See* notes 83-124 *infra*.

Schware v. Board of Bar Examiners[83] and *Konigsberg v. State Bar*,[84] finding on both occasions that the exclusion of the applicants constituted a violation of the due process clause. Despite strong evidence of good character submitted by both Schware[85] and Konigsberg,[86] the bar examiners of their respective states refused to certify their good character[87] and the state supreme courts upheld the bar examiners' determination.[88]

In *Schware* the New Mexico Supreme Court relied on three grounds in finding that Schware was not of good moral character. First, for a four year period ending over twenty years prior to his seeking admission to the bar, Schware had used aliases to avoid anti-Semitism in seeking employment and organizing non-Jewish workers.[89] Second, Schware was one of a large number of strikers arrested but not tried on charges of "suspicion of criminal syndicalism."[90] He was also arrested, indicted, but not tried for violating the Neutrality Act of 1917 by allegedly recruiting persons to fight for the Loyalists in the Spanish Civil War.[91] Finally, Schware was a member of the Communist Party during the depression.[92] Following New Mexico's refusal to admit him to the bar, Schware petitioned the Supreme Court for review, alleging that he had been denied the opportunity to practice law in violation of due process.[93] The Court began its analysis by stating that "[a] state cannot exclude a person from the practice of law . . . in a manner or

---

83. 353 U.S. 232 (1957).

84. 353 U.S. 252 (1957).

85. At the hearing before the New Mexico Board of Bar Examiners, Schware's wife, his rabbi, a local attorney, the secretary to the dean of the law school, and Schware himself testified as to his good character. Schware introduced letters from every member of his law school class except one and from all of his law school professors who were then available. Schware v. Board of Bar Examiners, 353 U.S. 232, 235 (1957).

86. Konigsberg submitted written statements from 42 individuals who had known him over the past 20 years and who attested to his excellent character. Konigsberg v. State Bar, 353 U.S. 252, 264 (1957).

87. Schware v. Board of Bar Examiners, 353 U.S. 232, 234-35 (1957); Konigsberg v. State Bar, 353 U.S. 252, 259 (1957).

88. Schware v. Board of Bar Examiners, 60 N.M. 304, 291 P.2d 607 (1955). The California Supreme Court, without opinion, denied Konigsberg's petition for review. Konigsberg v. State Bar, 353 U.S. 252, 254 (1957).

89. Schware v. Board of Bar Examiners, 353 U.S. 232, 240 (1957).

90. *Id.* at 241. Schware testified that approximately 2000 persons were arrested in connection with the strike. *Id.* at 241 n.7. Schware was arrested at least two times on suspicion of criminal syndicalism. *Id.* at 241.

91. *Id.* at 242.

92. *Id.* at 243.

93. *Id.* at 238.

for reasons that contravene . . . Due Process . . . ."[94] The Court then continued,

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, *but any qualification must have a rational connection with the applicant's fitness or capacity to practice law . . . . Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards . . . .*[95]

The Court then framed the issue in the case as "whether the Supreme Court of New Mexico on the record before us could reasonably find that he [Schware] had not shown good moral character."[96] Thus, the Court clearly distinguished between the type of due process review applied to a general requirement, such as good moral character, that is applicable to all candidates and the type of due process review applied to a finding that a single applicant does not meet this general standard. The Court concluded that "[t]here is no evidence in the record which rationally justifies a finding that Schware was morally unfit to practice law."[97]

In reaching this conclusion, the Court carefully combed the evidence in the record. The Court quickly dismissed the claim concerning the use of aliases, finding that no intent to cheat or defraud was involved.[98] Two important rules were established in the Court's consideration of Schware's arrest record. First, "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct."[99] Because formal charges were never brought against Schware in connection with the strike and because such a large number of strikers were arrested, the Court attached virtually no significance to his arrests on charges of criminal syndicalism.[100] The Court also delineated a second important rule: "In determining whether a person's character is good the nature of the offense which he has committed

---

94. *Id.*

95. *Id.* at 239 (citations omitted) (emphasis in original).

96. *Id.*

97. *Id.* at 246-47 (footnote omitted).

98. *Id.* at 240-41.

99. *Id.* at 241 (footnote omitted). "An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force the arrest may have had is normally dissipated." *Id.*

100. The significance of the arrests was further diminished in the eyes of the Court because of the large number of strikers arrested, *see* note 71 *supra*, and because of the broadness and vagueness of the California syndicalism statutes in effect at the time of Schware's arrest. 353 U.S. at 241-42 (1957).

must be taken into account."[101] Looking at Schware's alleged violation of the Neutrality Act, the Court noted the idealism of young men who, in the prelude to World War II, volunteered to fight for causes they believed right, and determined that even if it were shown that Schware had violated the Act, no moral turpitude was involved.[102] Finally, concerning Schware's past Communist affiliation, the Court emphasized the legality of the Communist Party at the time and concluded that the mere fact of past membership "does not justify an inference that he presently has bad moral character."[103] The Court carefully examined evidence in the record of the applicant's present moral character. After considering the oral and written testimony of those who knew Schware,[104] the Court evaluated him as "a man of religious conviction" with a demonstrated "solicitude for others."[105] Schware was said to be an industrious[106] and candid[107] person and "a man of high ideals with a deep sense of social justice."[108] Finding no substantial doubts as to Schware's present moral character, the Court concluded that no rational justification existed to exclude Schware from the bar.[109]

In *Konigsberg* the applicant was refused admission to the bar because he failed to prove that he was of good moral character and that he did not advocate the overthrow of the government by unconstitutional means.[110] The bar examiners based their conclusion about Konigsberg's character on the testimony of an ex-Communist who claimed to have witnessed him at meetings of the Communist Party in 1941, and on his editorials that criticized certain public officials.[111] The second conclusion was based upon Konigs-

---

101. *Id.* at 243 (footnote omitted).

102. *Id.* at 242-43.

103. *Id.* at 244. The Court attempted to justify Schware's membership in the party by pointing out that at the time when Schware joined the Communist Party, the United States was in the depression and that many people were, along with Schware, led to believe that the radical economic changes suggested by the Communists were necessary. *Id.*

104. *See* note 85 *supra.*

105. 353 U.S. at 240. In evaluating character, the Court demonstrated a willingness to take a wide variety of evidence into account. Evidence of Schware's solicitude for others was demonstrated by his practice of reading the Bible to an illiterate soldier while in the Army and law to a blind student while in law school. *Id.*

106. Schware's industry was demonstrated by his operation of a business to support his family while he studied law. *Id.*

107. Schware's full disclosure of his personal history to the dean of his law school demonstrated candor. *Id.*

108. *Id.*

109. *Id.* at 246-47.

110. Konigsberg v. State Bar, 353 U.S. 252, 253 (1957).

111. *Id.* at 266.

berg's refusal to answer questions about his political beliefs and associations.[112] The applicant petitioned the Supreme Court for review, claiming a violation of due process because the evidence in the record did not rationally support a finding of doubt about his character or loyalty.[113] The Court agreed with this contention, concluding that "the evidence does not rationally support the only two grounds upon which the Committee relied in rejecting his [Konigsberg's] application for admission to the California Bar."[114] In reaching this conclusion, the Court found the testimony of the ex-Communist to be unconvincing, and further stated that even if it were assumed that Konigsberg had been a Communist, his mere membership would not support a finding of lack of good moral character because the Communist Party had been a legal, recognized political party at the time.[115] The Court held that no inference of bad moral character could be drawn from the series of editorials in which Konigsberg severely criticized public officials and public policy, stating instead that such free expression is essential to a democratic society.[116] With respect to Konigsberg's refusal to answer questions about his relationship to the Communist Party, the Court held that bad character would not be inferred if such refusal was based upon a good faith belief that the Constitution prohibited such inquiries.[117] The Court engaged in an extensive discussion of the evidence of Konigsberg's "honest and upright" life,[118] quoting from four of the forty-two written recommendations and detailing his employment in "responsible professional

112. *Id.* at 271.

113. *Id.* at 262.

114. *Id.*

115. *Id.* at 266-68.

116. Konigsberg's editorials criticized, *inter alia*, American involvement in the Korean War, "the actions and policies of the leaders of the major political parties, the influence of 'big business' in American life, racial discrimination, and [the Supreme] Court's decisions in Dennis [v. United States, 341 U.S. 494 (1951)] and other cases." *Id.* at 268.

117. *Id.* at 270. The Court found it unnecessary to decide whether Konigsberg's constitutional objections to the inquiries were well founded. *Id.* After the case was remanded and Konigsberg again refused to answer questions about his membership in the Communist Party, however, the bar examiners and the state court again refused to certify his good character and, on appeal, the United States Supreme Court was forced to address the question directly. The Court held that Konigsberg was not constitutionally justified in refusing to answer the questions and that the refusal to admit him to the bar was not unconstitutionally arbitrary. Konigsberg v. State Bar, 366 U.S. 36 (1961). For a discussion of more recent cases on the subject of refusal to answer bar application questions, see text accompanying notes 245-63 *infra*.

118. 353 U.S. at 264-66.

positions."[119]

Acknowledging the usefulness of the good moral character requirement in regulating bar admissions, the Court cautioned that the term is "unusually ambiguous."[120] "Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law."[121] The Court observed that California case law defined good moral character in terms of an absence of moral turpitude,[122] but for the purposes of the instant case the Court adopted a broader standard: a person could justifiably be excluded from the bar if "a reasonable man could fairly find that there were substantial doubts about [the applicant's] 'honesty, fairness and respect for the rights of others and for the laws of the state and nation.' "[123] Finding no "authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him,"[124] the Supreme Court reversed and remanded the case for further consideration.

Schware and *Konigsberg* clearly indicate that the Supreme Court considers exclusion from the bar on character grounds a very serious determination that should not be made without sufficient justification. It appears that "sufficient" grounds means more than a showing that the record is devoid of any evidence to support the decisionmaker's conclusion.[125] For example, in *Schware* the Court held the applicant's indictment for violation of the Neutrality Act of 1917 and his other arrests were not sufficient evidence to support a rational conclusion of bad moral character. Yet, it seems that such evidence could produce different conclusions as to char-

---

119. *Id.*

120. *Id.* at 262-63. "[A]ny definition will necessarily reflect the attitudes, experiences, and prejudices of the definer." *Id.* at 263.

121. *Id. But see* Schware v. Board of Bar Examiners, 353 U.S. 232, 247-49 (1957) (Frankfurter, J., concurring). Justice Frankfurter argued that although good moral character is a rather imprecise standard, it is not so indefinite as te be an impermissible requirement. *See also* Law Students Research Council v. Wadmond, 401 U.S. 154, 159 (1971) ("Long usage [of the good moral charactor requirement] . . . has given well-defined contours to this requirement."). At least one commentator, however, has questioned whether the good moral character standard meets the standard of certainty required by the due process clause. 48 U. CIN. L. REV. 876 (1979).

122. Konigsberg v. State Bar, 353 U.S. at 263.

123. *Id.* at 264.

124. *Id.* at 273.

125. *See, e.g.*, Thompson v. City of Louisville, 362 U.S. 199, 199 (1960) ("The ultimate question presented to us is whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under tbe Due Process Clause of the Fourteenth Amendment.").

acter among reasonable people, and that the state court's opinion was not totally arbitrary. Thus, due process would seem to require a strong showing of bad character to support exclusion from the bar. The Court's concern is further demonstrated by the care it used in analyzing both the alleged offenses and the evidence of good character. In both cases the Court evaluated each indication of bad character individually and thoroughly. The Court examined a wide range of factors offered as indications of good moral character, seemingly finding no detail too trivial for its consideration.[126]

Schware and *Konigsberg* suggest a two-step process in determining whether a finding of bad character is rationally supported by the evidence in the record. First, a court must consider the nature of the acts offered as evidence of bad character. If the acts are insufficient to infer bad character, the analysis ends and the applicant is admitted. Second, if the acts are serious enough to indicate a lack of good moral character, the court, bearing in mind that the burden of persuasion remains on the applicant, must evaluate the applicant's evidence of his present good moral character in light of the evidence of bad character. The court may uphold the exclusion only if it determines that the evidence of the applicant's character, on balance, indicates that the bar examiners were justified in their decision and that therefore due process was not denied.

State courts do not usually discuss bar admission decisions in a constitutional context; often, the issue is stated as a factual question: Does the applicant possess good character? Implicit in all bar admission cases, however, must be a concern for whether the exclusion can withstand due process scrutiny. The two-step analysis suggested in this Special Project therefore provides a helpful framework for studying how state supreme courts determine whether bar applicants have been accorded due process protection in the assessment of their fitness to practice law.

(2) Criminal Conduct

Evidence of criminal conduct is a common reason to question

126. Justice Rehnquist, then a practicing attorney in Phoenix, severely criticized the *Schware* and *Konigsberg* cases, saying that "what the Supreme Court of the United States has done in each of these cases is to give the applicants a *de novo* trial on the basis of the printed record. It has chosen to believe every self-serving statement made by each applicant and on the basis of such 'facts' to hold that the findings below were not 'rationally justified.'" Rehnquist, *The Bar Admission Cases: A Strange Judicial Aberration*, 44 A.B.A. J. 229, 232 (1958).

the good moral character of an applicant.[127] Courts generally agree that the existence of a criminal record does not require an automatic rejection of an applicant; rather, this is a factor to be considered in evaluating his present moral character.[128] Thus, it has been held that proof of some independent act beyond the mere fact of a criminal conviction is necessary in order to demonstrate moral unfitness—the nature of the act and the circumstances surrounding its commission must be considered.[129] What the act reveals about the moral fitness of the applicant is more important than a technical determination of whether the act is, in fact, illegal.[130]

The seriousness of the crime is a primary consideration. Thus, courts have held that a shoplifting conviction within five years of the application was insufficient evidence of bad character to exclude the applicant.[131] Similarly, it has been held that, although a petty larceny conviction is relevant to an assessment of his character, it will not automatically disqualify a bar applicant.[132] The California Supreme Court has adopted the position that only acts so heinous as to constitute moral turpitude are permissible grounds

---

127. A discussion of all types of behavior that has been sufficient to justify the exclusion of bar applicants is beyond the scope of this Special Project. Rather, this Special Project will discuss the courts' method of analysis as that analysis has been used with respect to criminal conduct, homosexuality, cohabitation, and bankruptcy. The analytical framework suggested herein is equally applicable to other acts offered by bar examiners as evidence of bad conduct.

For a more thorough discussion of types of conduct that have been used as evidence of bad moral character, see Annot., 88 A.L.R.3d 192 (1978) (criminal conduct); 64 A.L.R.2d 301 (1959) (crimes and other specific acts of misconduct).

128. *See generally* Annot., 88 A.L.R.3d 192 § 3[a] (1978). The practical effect of the existence of a criminal conviction is to increase the burden of proof on the applicant to show his good moral character. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966); *In re* Davis, 38 Ohio St. 2d 273, 313 N.E.2d 363 (1974).

129. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966).

130. *See In re* Alpert, 269 Or. 508, 525 P.2d 1042 (1974) (applicant had engaged in dubious, though possibly legal, stock dealings). Applicants have also been excluded upon the basis of a finding that a record of arrests indicates bad character even though all charges were dropped. *E.g.*, Spears v. State Bar, 211 Cal. 183, 294 P. 697 (1930) (receiving stolen property, forgery, misappropriation of guardianship funds, violation of Mann Act); *In re* Stover, 65 Cal. App. 622, 224 P. 771 (1924) (cheating in dice game and attempting to short change a restaurant cashier); *In re* Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (1944) (conspiracy). *But see* Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957) ("mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct").

131. *In re* Howard C., 286 Md. 244, 407 A.2d 1124 (1979). *See also In re* Allan S., 282 Md. 683, 387 A.2d 271 (1978) (seven years since last shoplifting offense).

132. *In re* Florida Bd. of Bar Examiners, 183 So. 2d 688 (Fla. 1966).

for exclusion.[133] The court's definition of moral turpitude is broad enough to include "everything done contrary to justice, honesty, modesty, or good morals" and "act[s] of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."[134] The Florida Supreme Court has rejected the moral turpitude standard as too narrow. Instead, that court would permit the finding of a lack of good moral character when a person is found to have engaged in "acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation."[135] The distinction appears to be one of semantics rather than of substance. Regardless of whether the standard is labelled as moral turpitude, it is clear that the more heinous the offenses the more likely it is that the applicant will be found to lack good moral character.

At least two courts have shown sympathy to applicants who had a criminal record but whose crimes were considered the result of past conditions of drug addiction or alcoholism.[136] While suffering from alcoholism one applicant had, among other things, committed a battery on his wife and had pointed a firearm at his son.[137] Another applicant was arrested on a series of larceny and shoplifting offenses during a period when he was addicted to illegal drugs.[138] While the drug addiction and alcoholism did not excuse the applicant's behavior, they did change the weight given by the court to the offenses. Thus, the inferences of bad character drawn from those acts were not as great as would normally be the case.[139]

---

133. Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 452-53, 421 P.2d 76, 81, 55 Cal. Rptr. 228, 233 (1966).

134. *In re* Alkow, 64 Cal. 2d 838, 840-41, 415 P.2d 800, 802, 51 Cal. Rptr. 912, 914 (1966) (citations omitted).

135. Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454, 458 (Fla. 1978).

136. *In re* Application of A.T., 286 Md. 507, 408 A.2d 1023 (1979) (drug addiction); *In re* Monaghan, 126 Vt. 53, 222 A.2d 665 (1966) (alcoholism). In the absence of evidence of past addiction, the courts appear to treat drug offenses in the same manner as other criminal acts. *See, e.g., In re* Dileo, 307 So. 2d 362 (La. 1975); *In re* Estes, 580 P.2d 977 (Okla. 1978).

137. *In re* Monaghan, 126 Vt. 53, 222 A.2d 665 (1966).

138. Applicant used heroin, morphine, and dilaudid. *In re* Application of A.T., 286 Md. 507, 408 A.2d 1023 (1979).

139. Observing that the applicant's difficulties with the law ended concurrently with his overcoming alcoholism, the court reasoned that his difficulties were not an inherent part of his character. *In re* Monaghan, 126 Vt. 53, 60, 222 A.2d 665, 671 (1966).

Because evidence of criminal activity almost always provides some inference of bad moral character reflecting adversely on the applicant's fitness to practice law, courts require considerable evidence of present good moral character. The ultimate inquiry, of course, is the determination of whether the applicant has the *present* good moral character needed to be admitted to the bar.[140] The criminal record is therefore important only insofar as it provides a clue to the applicant's present character. Thus, the court's task is to determine if the applicant has demonstrated his rehabilitation from his former criminal nature.[141]

A broad spectrum of factors affect the court's finding of rehabilitation. Especially important are the absence of criminal conduct over a substantial period of time[142] and evidence that the applicant has been productive—either by being gainfully employed or by having pursued an education—during that time.[143] Also relevant is the applicant's renunciation of his past behavior[144] and his candor in completely informing the investigating body of his personal history.[145] If the applicant had been convicted of drug or alcohol related offenses, then it is extremely important that he show that he has abstained from their use for a significant period of time.[146] Finally, the granting of a pardon will have a positive influence on the good character determination, but the past criminal activity is still relevant.[147]

---

140. *E.g., In re* Dreier, 258 F.2d 68, 69-70 (3d Cir. 1958); *In re* Application of Allan S., 282 Md. 683, 690, 387 A.2d 271, 275 (1978); *In re* Monaghan, 126 Vt. 53, 57, 222 A.2d 665, 670 (1966).

141. *E.g., In re* Application of A.T., 286 Md. 507, 515, 408 A.2d 1023, 1027 (1979); *In re* Application of Allan S., 282 Md. 683, 690, 387 A.2d 271, 275 (1978).

142. *E.g., In re* Dileo, 307 So. 2d 362, 364-65 (La. 1975); *In re* Application of Allan S., 282 Md. 683, 692, 387 A.2d 271, 277 (1978).

143. *E.g., In re* Application of A.T., 286 Md. 507, 513, 408 A.2d 1023, 1027 (1979).

144. *E.g.*, March v. Committee of Bar Examiners, 67 Cal. 2d 718, 731-32, 433 P.2d 191, 200, 63 Cal. Rptr. 399, 408 (1967); *In re* Application of Allan S., 282 Md. 683, 691, 387 A.2d 271, 276 (1978).

145. *E.g., In re* Application of Allan S., 282 Md. 683, 691, 387 A.2d 271, 275 (1978).

146. *E.g., In re* Application of A.T., 286 Md. 507, 515, 408 A.2d 1023, 1028 (1979); *In re* Monaghan, 126 Vt. 53, 66, 222 A.2d 665, 675 (1966).

147. *E.g.*, Lark v. West, 289 F.2d 898 (D.C. Cir.), *cert. denied*, 368 U.S. 865 (1961); *In re* Florida Bd. of Bar Examiners, 361 So. 2d 424 (Fla. 1978); *In re* Dileo, 307 So. 2d 362 (La. 1975); *In re* Cassablanca, 30 P.R.R. 368 (1922). Some state statutes provide for the mandatory exclusion of convicted felons. For example, a Florida statute forbids anyone "who has been convicted of an infamous crime" from the practice of law. FLA. STAT. ANN. § 454.18 (West 1965). Restoration of civil rights will allow a convicted felon to be considered for the bar. *In re* Florida Bd. of Bar Examiners, 183 So. 2d 688 (Fla. 1966). In Florida, civil rights may be restored if the felon has received a full pardon, served the maximum term of his sentence, or been granted a final release by the parole and probation commission. FLA.

(3) Sexual Behavior

Recent applicants have not been denied admission to the bar on grounds of their homosexuality or cohabitation.[148] The homosexuality of bar applicants has been addressed in only two rather limited cases, one of which was not an initial admission case.[149] In *In re Application of Kimball*[150] the Court of Appeals of New York reversed for reconsideration the denial of admission of a homosexual applicant who had, sixteen years earlier, been disbarred in Florida following a sodomy conviction. While finding the applicant's status contrary to accepted norms, the court held that his homosexuality was relevant but not controlling in assessing moral character for purposes of admission to the bar.[151]

In response to a certified question from the Florida Board of Bar Examiners, the Florida Supreme Court held that an otherwise qualified applicant could not rationally be denied admission because of his sexual orientation or preference.[152] The court, however, reserved judgment on circumstances when evidence establishes that the applicant had engaged in homosexual acts.[153] The narrowness of the Florida holding is doubtless the result of the justices' concern about the applicant's violation of the state's sodomy law.[154] The technical illegality of homosexual acts has provided the

---

STAT. ANN. § 940.05 (West 1973).

148. *In re* Florida Bd. of Bar Examiners, 358 So. 2d 7 (Fla. 1978); *In re* Application of Kimball, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973); Cord v. Gibb, 219 Va. 1019, 254 S.E.2d 71 (1979).

149. *In re* Florida Bd. of Bar Examiners, 358 So. 2d 7 (Fla. 1978); *In re* Application of Kimball, 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973).

150. 33 N.Y.2d 586, 301 N.E.2d 436, 347 N.Y.S.2d 453 (1973).

151. *Id.*

152. *In re* Florida Bd. of Bar Examiners, 358 So. 2d 7, 10 (1978). The court repeated the reasoning of one of its judges on this issue in a related context:

> The present record contains no evidence—scientific, medical, pathological or otherwise—suggesting homosexual behavior among consenting adults is so indicative of character baseness as to warrant a condemnation per se of a participant's ability ever to live up to and perform other societal duties, including professional duties and responsibilities assigned to members of The Bar.

Id. (quoting with approval Florida Bar v. Kay, 232 So. 2d 378, 380 (Fla. 1970) (Ervin, C.J., specially concurring)).

153. 358 So. 2d at 8.

154. Florida law proscribes "any unnatural and lascivious act with another person." FLA. STAT. ANN. § 800.02 (West 1976). Citing this statute, one judge dissented: "There should not be admitted to The Florida Bar anyone whose sexual life style contemplates routine violation of a criminal statute." 358 So. 2d at 10 (Boyd, J., dissenting). A similar concern was expressed by the dissent in *Kimball*: "It cannot be denied that the Appellate Division has full and complete authority to deny admission to the Bar, to one who is an avowed and admitted persistent violator of any criminal statute." *In re* Application of Kim-

only significant argument against the admission of homosexuals.[155]

In *Cord v. Gibb*[156] the only reported case involving an applicant living with a person to whom she was not married, the court, considering the nature of the applicant's act, said, "While Cord's living arrangement may be unorthodox and unacceptable to some segments of society, this conduct bears no rational connection to her fitness to practice law."[157] Cord's living arrangements were described by the court in a carefully worded statement: "[Applicant] and a male to whom she was not married jointly owned and resided in the same dwelling."[158] This description of Cord's living arrangement enabled the court to avoid the troublesome issue of her apparent violation of Virginia's fornication statute.[159]

Recognizing that homosexuality and cohabitation are not significantly related to one's fitness to practice law,[160] courts have found no sufficient inference of bad moral character in the applicants' sexual preference or behavior that would prohibit admission to the bar. When the inference of bad character is insubstantial or nonexistent, the court need not make a thorough examination of the applicants' evidence of good moral character. One problem still unresolved in this context is the sodomy and fornication statutes that, though rarely enforced,[161] continue to exist on the books of many states.[162] Until such statutes are repealed, such applicants are likely to face continued challenges of bad moral character.

(4) Bankruptcy

Avoiding the repayment of student loans by filing a voluntary petition of bankruptcy is another type of behavior that has been

---

ball, 33 N.Y.2d 586, 588, 301 N.E.2d 436, 437, 347 N.Y.S.2d 453, 455 (1973) (Gabrielli, J., dissenting).

155. *See* 56 J. URB. L. 123, 138 (1978). An attorney, it is argued, cannot remain faithful to his oath and willfully violate the law at the same time. *Id.* Also advanced as reasons for excluding homosexuals is the protection of the reputation of the bar, *but see* note 50 *supra*, and the potential for blackmail that would jeopardize attorney-client confidences. 56 J. URB. L. at 138.

156. 219 Va. 1019, 254 S.E.2d 71 (1979).

157. *Id.* at 1022, 254 S.E.2d at 73.

158. *Id.*

159. "Any person, not being married, who voluntarily shall have sexual intercourse with any other person, shall be guilty of fornication . . . ." VA. CODE § 18.2-344.

160. *See* notes 151-52 & 157 *supra*.

161. *See* State v. Saunders, 75 N.J. 200, 206 n.3, 381 A.2d 333, 336 n.3 (1977); W. Barnett, SEXUAL FREEDOM AND THE CONSTITUTION 7 (1973).

162. *See* Note, *The Right of Privacy: A Renewed Challenge to Laws Regulating Private Consensual Behavior*, 25 WAYNE L. REV. 1067, 1069 (1979) (fornication statutes); 56 J. URB. L. 123, 129 (1978) (sodomy statutes).

considered strong evidence of bad moral character. The courts have confronted this issue on at least three occasions and twice have upheld the bar examiners' determination to exclude the applicant.[163] The courts have indicated that failure to repay student loans is strong evidence of bad character absent a showing that the applicant has suffered some unusual misfortune or financial catastrophe.[164]

In *Florida Board of Bar Examiners re G.W.L.*[165] the Florida Supreme Court set forth two issues: first, would a reasonable man have substantial doubts about the applicant's good moral character; and second, is the conduct involved rationally related to his fitness to practice law.[166] Defining lack of moral character to include "acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation,"[167] the court concluded that G.W.L.'s conduct in avoiding repayment of student loans was morally reprehensible.[168] The court based its decision on the circumstances surrounding the bankruptcy application, not on the act of filing bankruptcy.[169] The court considered significant the fact that G.W.L. had initiated the bankruptcy proceedings before he had exhausted the job market or given his creditors an opportunity to adjust repayment schedules.[170] The court determined that G.W.L. was motivated not by a need to straighten out insurmountable financial difficulties, but rather by a desire to defeat creditors who had substantially financed seven years of higher education. Such conduct, according to the court, indicated a disregard not only for the creditors, but also for future student loan applicants.[171] G.W.L.'s failure to act

163. Florida Bd. of Bar Examiners *re* Groot, 365 So. 2d 164 (Fla. 1978) (applicant admitted); Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454 (Fla. 1978) (applicant excluded); Application of Gahan, 279 N.W.2d 826 (Minn. 1979) (applicant excluded). For a discussion of the supremacy clause issues presented by these cases, see notes 308-59 *infra* and accompanying text.

164. Florida Bd. of Bar Examiners *re* Groot, 365 So. 2d 164 (Fla. 1978); Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454 (Fla. 1978); Application of Gahan, 279 N.W.2d 826 (Minn. 1979).

165. 364 So. 2d 454 (Fla. 1978). For a discussion of the facts of *G.W.L.*, see notes 308-21 *infra* and accompanying text.

166. Florida Bd. of Bar Examiners *re* G.W.L., 364 So. 2d 454, 459 (Fla. 1978).

167. *Id.*

168. *Id.* at 459.

169. *Id.* at 455.

170. *Id.* at 459. The bankruptcy petition was filed almost a year before the first installment became due. *Id.*

171. *Id.*

responsibly with respect to his own financial obligations caused the court to question "the propriety of his being a counselor to others in their legal affairs, and is rationally connected to his fitness to practice law."[172] The court affirmed the exclusion without examining evidence of G.W.L.'s good character—because he had declined an opportunity for a formal hearing, evidence of good character was not in the record.[173]

In a later case, the Florida Supreme Court concluded that the underlying circumstances in *Florida Board of Bar Examiners re Groot*[174] were different from those present in *G.W.L.* so that when Groot filed bankruptcy to avoid repaying student loans the nature of his conduct did not indicate bad moral character. Unlike in *G.W.L.*, the court in *Groot* found that the applicant had suffered unusual misfortune. During the period shortly before filing bankruptcy Groot's personal life was in disarray: he had become a father, divorced his wife, and been unable to secure reasonable employment.[175] In addition to his student loans, Groot's financial obligations included hospital debts for the birth of a child, continuing support for his two children in his custody, and alimony payments.[176] Although Groot was reasonably certain of obtaining employment at the time he filed bankruptcy, the court found the bankruptcy reasonable because Groot had a "valid present need to devote his entire employment income to his current, not past, financial responsibilities."[177] Finding the nature of Groot's conduct insufficient to justify exclusion, the court did not examine further the evidence of Groot's good moral character.

In *Application of Gahan*,[178] a case very similar to *G.W.L.*, the Minnesota Supreme Court upheld the exclusion of an applicant who, in the absence of unusual financial problems, filed a voluntary petition of bankruptcy in order to avoid repayment of student loans. The Minnesota court criticized the Florida court for considering the morality of G.W.L.'s motivations for filing bankruptcy as

---

172. *Id.*

173. The court upheld the exclusion without prejudice to the applicant to apply for a formal hearing before the bar examiners to present evidence of good moral character. *Id.* at 460.

174. 365 So. 2d 164 (Fla. 1978). For a discussion of the facts of *Groot*, see notes 322-39 *infra* and accompanying text.

175. 365 So. 2d at 167.

176. *Id.* at 166-68.

177. *Id.* at 168.

178. 279 N.W.2d 826 (Minn. 1979). For a discussion of the facts of *Gahan*, see notes 340-52 *infra* and accompanying text.

in violation of the supremacy clause.[179] The holding of the Minnesota court, however, was very similar to that of the Florida court:

> We hold that applicants who flagrantly disregard the rights of others and default on serious financial obligations, such as student loans, are lacking in good moral character if the default is neglectful, irresponsible, and cannot be excused by a compelling hardship that is reasonably beyond the control of the applicant.[180]

The court expressly refused to consider Gahan's present willingness or ability to pay the loans[181] and did not discuss other factors that might indicate good moral character. Such factors should have been considered even though it seems likely that, because of the short amount of time that had passed since the filing of bankruptcy,[182] evidence of good moral character would not, in the court's opinion, have outweighed the negative inferences of the applicant's conduct in avoiding repayment of the loans. Financial irresponsibility is an appropriate ground for exclusion; however, if courts are to exclude applicants who have exercised their legal right to declare bankruptcy, it is important that the judicial reasoning be clear and complete so that future applicants who are contemplating bankruptcy will have guidance about when the avoidance of student loans will be deemed evidence of bad character. The current standard—the existence of unusual misfortune or financial catastrophe—is, like the good moral character standard itself, susceptible to widely varying interpretations.[183] Therefore, clearly reasoned judicial opinions are needed to reduce much of the inherent ambiguity.

(b) Inquiries into Political Associations and Beliefs: Due Process Review of Rulemaking Determinations

(1) Introduction

The first amendment to the Constitution, as applied to the states through the fourteenth amendment,[184] provides that a state "shall make no law . . . abridging the freedom of speech . . . or

---

179. 279 N.W.2d at 831.

180. *Id.*

181. *Id.* at 829.

182. *Id.* at 827.

183. For a criticism of *G.W.L.* and *Groot* charging that the cases illustrate inconsistent results under the good moral character standard, see 48 U. CIN. L. REV. 876 (1979).

184. The first amendment applies to the states through the due process clause of the fourteenth amendment. *See* Stromberg v. California, 283 U.S. 359 (1931).

the right of the people peaceably to assemble."[185] From this language, the Supreme Court has implied the "freedom of association," which prohibits a state from "excluding a person from a profession or punishing him solely because he is a member of a particular political organization or because he holds certain beliefs."[186] Because freedom of association "lies at the foundation of a free society,"[187] the Court has declared it to be a fundamental right.[188] As such, state regulations may not infringe on rights of association absent a showing of a substantial state interest served through the least restrictive alternatives available.[189] Furthermore, the state may not indirectly infringe on the right of association by penalizing an individual for his associations by withholding or withdrawing state benefits.[190] Such an indirect infringement is impermissible unless the state can meet the same substantial interest test used in a direct infringement case.[191]

The Supreme Court has also recognized that the state has a legitimate interest in inquiring into some aspects of the political associations and beliefs of bar applicants to insure that they possess the requisite good moral character.[192] These inquiries almost always take the form of questions that appear on the application form to be completed by bar applicants; the answers to these questions are used as a basis for further investigation. Because these questions appear on standardized forms and must be answered by all candidates, they fall into the category of rules of general application.[193] Thus, these inquiries must constitute the least restrictive means available to serve a substantial state interest.

This section of the Special Project examines the intersection of the good moral character requirement and the first amendment to determine the scope of permissible state inquiry into political beliefs and associations. The section first examines two cases that set the foundation for first amendment analysis in the bar admis-

185. U.S. CONST. amend. I.

186. Baird v. State Bar, 401 U.S. 1, 6 (1971). *See also* Shelton v. Tucker, 364 U.S. 479, 485-87 (1960); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

187. Shelton v. Tucker, 364 U.S. 479, 486 (1960).

188. *Id.* at 488.

189. *Id. See also* Keyishian v. Board of Regents, 374 U.S. 398, 404 (1967); Elfbrandt v. Russell, 384 U.S. 11, 18 (1966).

190. Sherbert v. Verner, 374 U.S. 398, 404 (1963).

191. *Id.*

192. *In re* Anastaplo, 366 U.S. 82, 88-89 (1961); Konigsberg v. State Bar, 366 U.S. 36, 45-46 (1961); Shelton v. Tucker, 364 U.S. 479, 485 (1960).

193. *See* note 34 *supra* and accompanying text.

sion context. The section then reviews and analyzes three Supreme Court decisions rendered in 1971 that established the current Supreme Court position on state inquiries into the political beliefs and associations of bar applicants. Finally, this section examines and analyzes two recent cases in which bar applicants have challenged application questions about their political beliefs and associations.

(2) The 1961 Bar Admission Cases

Konigsberg v. State Bar (Konigsberg II)[194] and *In re Anastaplo*[195] were the first Supreme Court decisions to address expressly the first amendment issues presented by a bar applicant's refusal to answer questions about his political beliefs and associations. In *Konigsberg II* the applicant refused to answer questions concerning his membership in the Communist Party because he believed such inquiries violated his first amendment rights to freedom of speech and association.[196] California denied Konigsberg admission to the bar because his refusals to answer had obstructed a full investigation into his qualifications.[197] In upholding the exclusion, the Court carefully distinguished between exclusion for refusal to answer relevant questions and exclusion for substantive reasons.[198] Speaking for the majority, Justice Harlan reasoned that since the answers to these questions may serve as the basis for further investigation[199] the scope of inquiry is necessarily broader than the substantive grounds for denial.[200] The Court rejected Ko-

194. 366 U.S. 36 (1961).

195. 366 U.S. 82 (1961).

196. 366 U.S. at 40. In Konigsberg v. State Bar (Konigsberg I), 353 U.S. 252 (1957), the applicant refused to answer questions about his alleged affiliation with the Communist Party. California refused to admit him to the bar because he failed to show he was of good moral character. Relying on a companion case, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the Supreme Court reversed the California determination on due process grounds and remanded for further proceedings. The Court held that Konigsberg's refusal to answer could not give rise to an inference of bad moral character. Konigsberg v. State Bar, 353 U.S. at 261-62. Thus, the Court did not reach the first amendment issue. On remand Konigsberg again refused to answer. This time, however, California excluded him solely on the basis of a procedural rule providing for an applicant's automatic exclusion if he refused to answer questions. It is this issue that the Court faced in Konigsberg II.

197. 366 U.S. at 43.

198. *Id.* at 45-48.

199. *Id.* at 46. Justice Harlan noted the bar examiner's response to Konigsberg's refusal to answer: "You see, by failing to answer the initial question there certainly is no basis and no opportunity for us to investigate with respect to the other matters to which the initial question might very well be cousidered preliminary." *Id.* at 47.

200. *Id.* The Court reasoned that the associational question might be preliminary to

nigsberg's argument that any questions by the bar examiners about political affiliation violated the first amendment freedoms of speech and association.[201] Instead, the Court balanced the state's legitimate interest in ascertaining the fitness of bar candidates against the effect upon free association occasioned by compulsory disclosure in the circumstances.[202] The Court concluded that the state's interest in ensuring that attorneys are devoted to the process of orderly change outweighed the "minimal effect" on the candidate's right of free association.[203] In dissent[204] Justice Black disagreed with the majority's balancing analysis. In his opinion the Bill of Rights "put the freedoms protected there completely out of the area" of government control.[205]

In the companion case to *Konigsberg II, In re Anastaplo,*[206] the Court sustained an Illinois rule that required a denial of admission to bar applicants who refused to answer questions. Anastaplo refused to answer questions relating to membership in the Communist Party, and the bar examiners denied him admission.[207] Relying on *Konigsberg II,* the Court held that a state may deny admission to the bar solely on the ground that an applicant refused to answer relevant questions concerning political affiliations and that a state may inquire into an applicant's membership into the Communist Party consistent with the first amendment.[208] Further-

---

an investigation into whether Konigsberg "himself believed in violent overthrow or knowingly belonged to an organization advocating violent overthrow" of the government. *Id.* at 46.

201. *Id.* at 49. The Court explicitly rejected the view that any government regulation infringing on first amendment freedoms is void automatically.

> With more particular reference to the present context of a state decision as to character qualifications, it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically and without consideration of the extent of the deterrence of speech and association and of the importance of the state function, exclude all reference to prior speech or association on such issues as character, purpose, credibility, or intent.

Id. at 51.

202. *Id.* at 51-52.

203. *Id.* at 52.

> [W]e regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented.

Id.

204. *Id.* at 56 (Black, J., dissenting).

205. *Id.* at 61 (Black, J., dissenting).

206. 366 U.S. 82 (1961).

207. *Id.* at 85-86.

208. *Id.* at 88-90.

more, the Court expanded the scope of permissible state inquiry into political associations by concluding that the state's investigation into political associations is justified whether it is prompted by information already available to the bar examiners or "arises merely from a good faith belief in the need for . . . questioning of the applicant."[209] Justice Black again dissented, stating that the first amendment should be enforced to the "full extent of its express and unequivocal terms."[210]

(3) The 1971 Bar Admission Cases

In 1971 the Court decided three cases that reexamined the scope of the state's power to inquire into the political associations and beliefs of bar applicants. In *Baird v. State Bar*[211] Sara Baird refused to answer a question on the Arizona bar application that asked whether she had ever been a member of the Communist Party or any other organization that advocated the "overthrow of the United States government by force or violence."[212] Justice Black, writing for a plurality of the Court, admitted that prior decisions in similar association cases had produced "thousands of pages of confusing formulas, refined reasonings, and puzzling holdings."[213] Instead of attempting to reconcile these cases, however, Black proceeded to examine the facts and relate them to the first amendment.[214] He stated,

> The First Amendment's protection of association prohibits a State from excluding a person from a profession . . . solely because he is a member of a particular organization or because he holds certain beliefs . . . . Similarly, when a State attempts to make inquiries about a person's beliefs or associations, its power is limited by the First Amendment. Broad and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.[215]

Black noted that when a state seeks to inquire about an individual's beliefs and associations "a heavy burden lies upon it to show

---

209. *Id.* at 90. Note that in *Konigsberg II* California possessed testimonial evidence that Konigsberg had some previous affiliation with the Communist Party. Illinois had no similar evidence regarding Anastoplo. *Id.* at 85-86.

210. *Id.* at 98 (Black, J., dissenting).

211. 401 U.S. 1 (1971).

212. *Id.* at 4-5.

213. *Id.* at 4.

214. *Id.* Baird had already answered a prior question that asked her to list every organization with which she had been associated since she was 16. *Id.* The Court invalidated this type of blanket inquiry in the companion case to *Baird, In re* Stolar, 401 U.S. 23 (1971). *See* notes 227-31 *infra* and accompanying text.

215. 401 U.S. at 6.

that the inquiry is necessary to protect a legitimate state interest."[216] In the bar context, Black expressed no doubt that Arizona could require an applicant to demonstrate good moral character; however, in assessing character the state could not legitimately inquire into an applicant's views and associations.[217] "[W]e hold that views and beliefs are immune from bar association inquisitions designed to lay a foundation for barring an applicant from the practice of law."[218] In his concurring opinion[219] Justice Stewart stated that in past cases the Court had permitted "under some circumstances simple inquiry into present or past membership in the Communist Party."[220] Justice Stewart found the Arizona statute to be invalid not because it inquired into political associations but because it did not limit the inquiry to "knowing membership."[221] Justice Blackmun in dissent[222] stated that while the plurality opinion did not overrule either *Konigsberg II*[223] or *In re Anastaplo*,[224] the Court had seriously undermined both cases. In Blackmun's opinion, states could refuse to admit applicants solely because they refused to answer questions[225] and could legitimately inquire into an applicant's mere membership in some types of organizations.[226]

In a companion case to *Baird, In re Stolar*,[227] the Court similarly invalidated the use of three questions on the Ohio bar application. The application required the following information from the applicant: first, to state whether he had ever been a member of any organization that advocated the overthrow of the United States government by force; second, to list all organizations to

---

216. *Id.* at 6-7.

217. *Id.* at 7.

218. *Id.* at 8. Black specifically rejected Arizona's contention that it was entitled to an answer as a basis for determining whether further investigation was in order. *Id.* at n.8.

219. *Id.* at 9 (Stewart, J., concurring). Justice Stewart's concurring opinion here and in *In re Stolar*, notes 232-34 *infra*, are of particular importance because they are, in effect, the law that the lower courts must follow. Under the "lowest common denominator" rule, the common ground shared by the plurality opinion and any concurring opinions necessary to constitute a majority becomes the prevailing rule. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

220. Baird v. State Bar, 401 U.S. at 9.

221. *Id.*

222. *Id.* at 11 (Blackmun, J., dissenting). Chief Justice Burger and Justices Harlan and White joined in Blackmun's dissent. Additionally, Justice White wrote a separate opinion, as did Justice Harlan.

223. *See* notes 196-203 *supra* and accompanying text.

224. *See* notes 206-10 *supra* and accompanying text.

225. Baird v. State Bar, 401 U.S. at 13-14.

226. *Id.* at 22.

227. 401 U.S. 23 (1971).

which he currently belonged; and third, to list all organizations to which he had belonged since registering as a law student.[228] When Stolar refused to answer these questions, Ohio refused to admit him to the bar. Again writing for a plurality of the Court, Justice Black first addressed the requirements of listing "all" organizations to which the applicant belonged prior to or since registration as a law student. Black found that such a broad requirement chilled a law student's exercise of first amendment rights and thus was an impermissible question under the Court's decision in *Shelton v. Tucker*.[229] Furthermore, Black rejected the state's contention that such a listing served a legitimate state interest.[230] Relying on *Baird*, Black also invalidated the remaining inquiry because he could find "no legitimate state interest which is served by a question which sweeps so broadly into areas of belief and association."[231] Justice Stewart concurred in the result because the listing requirements were "plainly unconstitutional under *Shelton v. Tucker*"[232] and because the membership question did not require knowing membership.[233] In dissent Justice Blackmun again objected on the grounds that the applicant had obstructed the process and that the state had legitimate grounds for inquiry.[234]

Finally, in *Law Students Civil Rights Research Council, Inc. v. Wadmond*[235] various groups "seeking or planning to seek admission"[236] to the New York Bar requested declaratory and injunctive

---

228. *Id.* at 27.

229. *Id.* at 27-28. In Shelton v. Tucker, 364 U.S. 479 (1960), the Court invalidated an Arkansas statute that required every teacher, as a condition of employment in a state supported school or college, to file annually an affidavit listing every organization that he belonged to or contributed to within the preceding five years. *Id.* at 480. Although the state had a substantial interest in insuring the loyalty of its teachers, the Court found that this interest could be protected through less drastic alternatives than requiring a disclosure of all organizational affiliations. *Id.* at 488-90.

230. *In re* Stolar, 401 U.S. at 28-29.

231. *Id.* at 30. The Court also relied on Keyishian v. Board of Regents, 385 U.S. 589 (1967), a public employment case, in determining that the Ohio bar question was impermissibly "overbroad." In *Keyishian* the Court stated that "[w]here statutes have an overbroad sweep . . . 'the hazard of loss or substantial impairment of [first amendment] rights may be critical' . . . since those covered by the statute are bound to limit their behavior to that which is unquestionably safe." *Id.* at 609. For a full exploration of the overbreadth doctrine, see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

232. 401 U.S. at 31 (Stewart, J., concurring).

233. *Id.*

234. *Id.* at 33-34 (Blackmun, J., dissenting). Chief Justice Burger and Justices White and Harlan joined in this dissent. In addition, Justices Harlan and White wrote separate dissenting opinions.

235. 401 U.S. 154 (1971).

236. *Id.* at 157.

relief against the system used by New York to screen applicants for good moral character.[237] Petitioners claimed that the New York system worked a chilling effect upon the exercise of free speech and free association by future applicants to the New York Bar. They objected in particular to questions that inquired into an applicant's willingness to take a loyalty oath, his good faith in doing so, his knowing membership in organizations that advocate the violent overthrow of the government, and his specific intent to further such goals.[238] As to the loyalty questions, Justice Stewart, writing for the majority, concluded that they were valid because the New York construction of the rule only required an applicant to be willing to swear or affirm in good faith to uphold the Constitution.[239] As to the questions concerning organizations, the Court noted that the questions were "tailored to conform to the relevant decisions of this Court."[240] Since a state could legitimately deny admission to a candidate who was knowingly a member of an organization seeking to overthrow the government by force while specifically intending to further these aims, the Court reasoned that a state may specifically inquire about those attributes in evaluating the fitness of bar

---

237. *Id.*

238. *Id.* at 164-65. The questions were as follows:

26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any state or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? ___ If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any state or any political subdivision thereof by force, violence or any unlawful means?

27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States? ___

239. *Id.* at 166.

240. *Id.* at 165. The Court stated:

Our cases establish that inquiry into associations of the kind referred to is permissible under the limitations carefully observed here. We have held that knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals, may be criminally punishable. *Scales v. United States*, 367 U.S. 203, 228-230.

Citing *Konigsberg II*, the Court went on to state that "[b]ar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer." *Id.* at 165-66.

applicants.[241] Although these questions alone would be invalid as constitutionally overbroad, taken together, the inquiry was limited to an applicant's specific intent to further illegal goals—an area of legitimate state inquiry. In dissent, Justice Black stated that "[i]n my view, the First Amendment absolutely prohibits a State from penalizing a man because of his beliefs."[242] Thus, he found that a state could not require that an applicant believe in the American form of government before being admitted to the bar.[243] Furthermore, because the first amendment was intended to protect even "dangerous and unpopular" speech and associations, Black maintained that states could not, consistent with the first amendment, "exclude an applicant because he has belonged to organizations that advocate violent overthrow of the Government, even if his membership was 'knowing' and he shared the organization's aims."[244]

The 1971 bar admission cases represent a classic disagreement among the members of the Court concerning the viability of government regulation that touches first amendment rights. Justice Black, who dissented in *Konigsberg II* and *Anastaplo* but wrote the plurality opinion in *Baird* and *Stolar,* clearly articulates an absolutist view of the first amendment—that is, if government regulation infringes on first amendment rights, then it is not legitimate. On the other hand, Justice Stewart, who concurred in *Baird* and *Stolar* and wrote the majority opinion in *Wadmond,* obviously views such government regulation as valid in some cases if the means of regulation are narrowly drawn. Justice Blackmun, who dissented in *Baird* and *Stolar,* seems to accord the government even broader power to regulate in this area. Thus, these opinions represent a wide divergence of views concerning the proper result when bar applications inquire into political beliefs and associations of prospective lawyers.

These cases certainly limit the obstructionist doctrine announced in *Konigsberg II* and *Anastaplo* by finding some circumstances in which bar applicants may legitimately refuse to answer the questions of the bar examiners. This does not mean, however, that *Konigsberg II* and *Anastaplo* are overruled. As Justice Blackmun pointed out in *Baird,* the 1961 cases still stand albeit modi-

241. *Id.*

242. *Id.* at 174 (Black, J., dissenting). Justice Marshall wrote a separate dissenting opinion. *Id.* at 185 (Marshall, J., dissenting).

243. *Id.* at 177-79 (Black, J., dissenting).

244. *Id.* at 175-76.

fied to some degree. Furthermore, despite Justice Black's view, it is also clear that under some circumstances states may legitimately inquire into a bar applicant's political beliefs and associations. *Wadmond* provides an explicit example of such a legitimate inquiry, but it by no means defines the contours of such inquiries. Thus, at the "lowest common denominator," these 1971 cases stand for the proposition that in the area of political beliefs and associations sometimes bar applicants can legitimately refuse to answer questions (*i.e., Baird* and *Stolar*) and sometimes they cannot (*i.e., Wadmond*), and that sometimes bar examiners can legitimately ask questions (*i.e., Wadmond*) and sometimes they cannot (*i.e., Baird* and *Stolar*). The obvious problem is that such a diffusion of opinion gives little guidance to bar applicants, bar examiners, or lower courts. Two recent cases demonstrate the problems encountered in applying the holdings of the 1971 cases.

(4) Recent Applications of the 1971 Standard

In *Pushinsky v. West Virginia Board of Law Examiners*[245] the Supreme Court of West Virginia examined the constitutional validity of questions posed to bar applicants by the state's board of law examiners. The bar application presented the question whether the applicant advocated or knowingly belonged to an organization that advocated the violent overthrow of the government.[246] The applicant was required to check one of three answers—"yes," "no," or "decline to answer." Pushinsky checked "decline to answer," and subsequently the bar examiners informed him that his application would not be processed until he answered two additional questions.[247] The first question asked whether he advocated the violate overthrow of the government;[248] the second question asked whether he was a knowing member of any organization that advocated the violent overthrow of the government.[249]

---

245. 266 S.E.2d 444 (W. Va. 1980).

246. *Id.* at 445. The question read:

> 21. Do you advocate or knowingly belong to an organization or group which advocates the overthrow of the Government of the United States of America or the State of West Virginia? ____Yes ____No ____Decline to Answer
> If the answer is "yes" give details.

247. *Id.* at 445-46. Essentially, these additional questions broke the bar application inquiry into two parts and required the applicant to furnish a "yes" or "no" answer.

248. *Id.* at 445. The question read: "No. 1. Do you advocate the overthrow of the Government of the United States of America or the State of West Virginia by force or violence?"

249. *Id.* at 446. The question read: "No. 2. Do you knowingly belong to any organiza-

Pushinsky refused to answer these questions, claiming that the inquiry unconstitutionally infringed on his freedom of speech, association, and belief.[250] Based upon this refusal, the bar examiners excluded him from the bar on the ground that he had obstructed the admissions process and alternatively that the questions posed met the standards enunciated in *Wadmond*.[251] The court, however, held that all of these questions were impermissibly overbroad. As to the inquiry into the applicant's beliefs, the court stated that it impermissibly infringed on Pushinsky's first amendment rights because it encompassed all forms of advocacy.[252] Citing *Stolar* and *Baird*, the court noted that a bar applicant could not be penalized solely because he espoused illegal aims. Instead, advocacy could be punished only if it was "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[253] Thus, because the West Virginia bar examiners failed to distinguish between permissible and impermissible advocacy, the question was fatally overbroad.[254] The court also denied the use of the second question because it failed to inquire whether the applicant had the specific intent to further the illegal goals of the organizations involved. Again citing *Baird* and *Stolar*, the court concluded that Justice Stewart's concurrences required that questions probe both knowing membership and "specific intent to further the illegal goals of the organization."[255] Under this standard, the second question clearly failed. The bar examiners then argued that their two inquiries, when read together, met the *Wadmond* knowing membership/specific intent test. The court, however, rejected this contention, stating that the questions did not probe specific intent.[256]

In *Carfagno v. Harris*[257] plaintiffs filed suit in the United States District Court for the Eastern District of Arkansas, alleging that two questions on the Arkansas bar application unconstitution-

---

tion or group which advocates the overthrow of the Government of the United States of America or the State of West Virginia by force or violence?"

250. *Id.* at 446.

251. *Id.* at 446, 448. Note, however, that the *Wadmond* standard allows inquiry into "knowing membership" in an organization advocating the violent overthrow of the government and into "specific intent" to carry out that purpose.

252. *Id.* at 447-48.

253. *Id.* at 447 (citing Brandenburg v. Ohio, 395 U.S. 444 (1969)).

254. *Id.* at 448.

255. *Id.*

256. *Id.* at 448-49.

257. 470 F. Supp. 219 (E.D. Ark. 1979).

ally infringed on their first amendment freedoms. The first question asked whether the applicant had ever been a member of the Communist Party;[258] the second question asked whether the applicant had ever been a member of any organization that advocated the illegal overthrow of the government.[259] The court relied on *Konigsberg II*[260] and *Anastaplo*[261] in deciding that Arkansas' inquiry into an applicant's membership in the Communist Party was not unconstitutional given the state's legitimate purpose of regulating the bar.[262] Relying on *Wadmond*, however, the court invalidated the second question as unconstitutionally overbroad since it included neither a requirement of knowing membership nor a requirement of specific intent to further an organization's illegal goals.[263]

(5) Analysis

In *Pushinsky* the West Virginia Supreme Court correctly applied the first amendment standards announced in *Baird* and *Stolar* to invalidate the bar examiners' question dealing with personal advocacy. The plurality and concurring opinions in *Baird* and *Stolar* made clear that the first amendment bars a state from acting against any person merely because of his beliefs. Although *Wadmond* permitted a state to ask an applicant to affirm his loyalty to the Constitution, the Court indicated that it was only New York's "extremely narrow" construction of this question that rendered it constitutionally valid.[264] Thus, West Virginia's inquiry into mere advocacy of a bar applicant could not stand. The court also invalidated the second inquiry—a result that is less certain under the 1971 Supreme Court cases and that demonstrates the problems in applying *Baird, Stolar,* and *Wadmond.* The West Virginia Supreme Court cited *Baird* and *Stolar* for the proposition that, to be constitutionally valid, inquiries into an applicant's organizational memberships must probe both scienter and specific in-

258. *Id.* at 220. The question read: "Are you now, or have you at any time been, a member of the Communist Party?" *Id.*

259. *Id.* at 220-21. The question read: "Are you now, or have you at any time been, a member or supporter of any party, organization, or group that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods?" *Id.*

260. *See* notes 196-203 *supra* and accompanying text.

261. *See* notes 206-10 *supra* and accompanying text.

262. 470 F. Supp. at 222-23.

263. *Id.* at 223.

264. 401 U.S. at 163.

tent to further illegal goals. The *Baird* and *Stolar* opinions, however, do not clearly support this proposition. Justice Black's plurality opinions would void any infringement of first amendment freedoms, while Justice Stewart's critical concurring opinions are unclear about the specific intent requirement. In *Baird* Justice Stewart first cited *Konigsberg II* and *Anastaplo* for the proposition that "under some circumstances simple inquiry into . . . Communist Party membership . . . is not as such unconstitutional."[265] He then found the *Baird* inquiry impermissible because it did not probe "knowing membership." Finally, he cited *Wadmond* to support the statement that mere membership "can be quite different from knowing membership in an organization advocating the overthrow of the Government by force or violence, on the part of one sharing the specific intent to further the organization's illegal goals."[266] Thus, it is not clear whether *Baird* requires bar examiners to probe specific intent in order to pass constitutional muster. Furthermore, Justice Stewart's majority opinion in *Wadmond* does not totally resolve this question because it is unclear whether the New York form of inquiry establishes a constitutional minimum. Although the *Wadmond* Court stated that New York's two part inquiry was tailored to relevant case law, it also cited *Konigsberg II* with approval, stating that "[i]t is also well settled that Bar examiners may ask about Communist affiliations as a preliminary to further inquiry into the nature of the association and may exclude an applicant for refusal to answer."[267] In *Konigsberg II,* however, the initial question was preliminary to a determination whether the applicant "advocates the overthrow of the Government of the United States . . . by force, violence, or other unconstitutional means."[268]

The *Carfagno* decision further exemplifies the problems that courts face in applying the Supreme Court's 1971 bar admission cases. In *Carfagno* the court relied on *Konigsberg II* and *Anastaplo* to uphold the validity of the first question, which asked if the applicant was a member of the Communist Party. If there is any common ground between *Baird, Stolar,* and *Wadmond,* however, it is that questions probing mere membership alone are impermissible. Since the state did not employ a follow-up question in the event that the bar applicant either admitted membership or

265. 401 U.S. at 9.
266. *Id.*
267. 401 U.S. at 165-66.
268. 366 U.S. at 37.

refused to answer, the court should have struck this inquiry. As to the second question, which inquired into the applicant's organizational ties, the court correctly ruled that this inquiry was impermissible. The court, however, should not have based its decision upon the belief that *Wadmond* established a minimum level of permissible inquiry. Instead, the court should have invalidated the use of the question because it failed to inquire into knowing membership, which is the common requirement of *Baird, Stolar,* and *Wadmond.* By allowing the state to inquire into Communist membership but not other subversive organizations, the *Carfagno* court implied that membership in the Communist Party differs from other potentially subversive organizational memberships. Such a result clearly fails to follow logically, but it is not surprising in light of the confusing Supreme Court precedent in this area.

(6) Conclusion

Konigsberg II and *In re Anastaplo* set the foundation for the permissible scope of inquiry into the political beliefs and associations of bar applicants. The 1971 cases—*Baird, Stolar,* and *Wadmond*—modified these holdings but created much confusion concerning their ultimate meaning. Recent decisions applying the rationale of these 1971 cases demonstrate the confusion generated and the need for clear guidelines in this area. If this confusion is allowed to remain, it will have a "chilling effect" on bar applicants' exercise of political beliefs and associations—a result that should be avoided when dealing with first amendment freedoms.

2. The Supremacy Clause—Bankruptcy and the Good Moral Character Requirement

(a) Introduction

The supremacy clause is a constitutionally imposed limitation on the state's internal police power. Article VI of the Constitution provides,

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[269]

In *Gibbons v. Ogden*[270] Chief Justice Marshall interpreted the

269. U.S. CONST. art. VI, cl. 2.

270. 22 U.S. (9 Wheat.) 1 (1824). *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.)

supremacy clause to mean that any state action that either interferes with, or runs contrary to, federal law is invalid.[271] Furthermore, in *Hines v. Davidowitz*[272] the Court expanded the scope of the supremacy clause hy holding that state action standing "as an obstacle to the accomplishment and execution of the full purposes . . . of Congress" is invalid.[273]

The Constitution also gives Congress the power "to establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[274] In 1898 Congress enacted the first comprehensive bankruptcy statute[275] for the purpose of giving the debtor "a new opportunity in life and a clear field for future effort, unhampered by the pressure . . . of pre-existing debt."[276] More recently in an attempt to modernize bankruptcy law, Congress has enacted the Bankruptcy Reform Act of 1978.[277] To protect a debtor's "fresh start" after bankruptcy, Congress included a section in the new law providing that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license . . . to . . . a person that is or has been a debtor under this title or a bankrupt."[278] The legislative history of this provision statcs tliat Congress intended it to apply to "governmental or quasi-governmental organizations that perform licensing functions, such as a state bar association."[279]

As noted above, states may legitimately condition admission to the bar on an applicant's demonstration of good moral character.[280] In the past, bar examiners have determined on occasion that an applicant's motivations in seeking bankruptcy indicated a lack of good moral character and justified a denial of admission.[281] Such inquiries arguably interfere witli federal bankruptcy policy, rendering them susceptible to constitutional challenge under the

---

316, 436 (1819), in which the Court held that a state may not "retard, impede, burden, or in any manner control, the operation of the constitutional laws enacted by congress."

271. 22 U.S. (9 Wheat.) at 17.

272. 312 U.S. 52 (1941).

273. *Id.* at 67.

274. U.S. CONST. art. I, § 8, cl. 4.

275. Bankruptcy Act, ch. 541, 30 Stat. 544 (1898).

276. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

277. Pub. L. No. 95-598, 92 Stat. 2549 (codified in scattered sections of 11 U.S.C. (Supp. III 1979)).

278. 11 U.S.C. § 525 (Supp. III 1979).

279. S. REP. No. 989, 95th Cong., 2d Sess. 81, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5787, 5867.

280. Konigsberg v. State Bar, 353 U.S. 252 (1957).

281. *See* notes 306-59 *infra* and accompanying text.

supremacy clause.

This section of the Special Project analyzes the supremacy clause issue presented when bar examiners scrutinize an applicant's motivations in seeking bankruptcy. First, the section examines a series of cases beginning with *Perez v. Campbell*,[282] in which the Supreme Court developed the supremacy clause analysis in the bankruptcy context. Next, the section reviews three bar admission cases dealing with this issue and analyzes them in light of the new bankruptcy law's antidiscrimination and student loan provisions.

(b) Legal Background

In *Perez v. Campbell*[283] the Supreme Court announced a two-step process to determine whether a state statute conflicts with federal law and thus falls under the supremacy clause. The Court stated that first the two statutes must be construed, and then, they must be compared to determine whether they are in conflict.[284] In deciding whether the statutes conflict, the Court stated that both the purpose and the effect of the state law must be evaluated.[285]

Perez involved an Arizona automobile financial responsibility law, which provided for the suspension of a driver's license if he failed to pay a judgment resulting from an automobile accident. The law further provided that "[a] discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this article."[286] Perez claimed that the Arizona provision conflicted with the bankruptcy law, which stated that a discharge in bankruptcy fully relieved the debtor from all but certain specified judgments.[287] The Court found that the state designed the statute to protect the public from financially irresponsible drivers.[288] Although conceding the legitimacy of this purpose, the Court nevertheless concluded that the Arizona law compelled payment from a bankrupt in direct contravention of the federal policy. Consequently, the Court invalidated the Arizona statute, holding "that any state legislation which frus-

282. 402 U.S. 637 (1971).

283. *Id.*

284. *Id.* at 644.

285. *Id.* at 649-54. The Court overruled two prior decisions that looked only to "the purpose rather than the effect of state laws." *Id.* at 652.

286. *Id.* at 642 (quoting ARIZ. REV. STAT. ANN. § 28-1163(B) (1976)). To enforce the provision, Arizona withheld driving privileges from the adjudged bankrupt until he satisfied the judgment. *Id.*

287. *Id.* at 643.

288. *Id.* at 644-48.

trates the full effectiveness of federal law is rendered invalid by the Supremacy Clause."[289] Thus, a state law that conditions a privilege such as driving on the relinquishment of federally granted bankruptcy rights is unconstitutional under the supremacy clause.

It is important to note that *Perez* involved a direct frustration of federal bankruptcy policy since Arizona required payment of the discharged debts if a driver wished to retrieve his license. The question remaining after *Perez,* however, was whether a state could penalize an individual for filing bankruptcy if that penalty did not involve payment of the discharged debt. Two competing interests emerge from analysis of this issue. On the one hand, invalidation of such laws may prevent a state from regulating a broad area in which it possesses a substantial and legitimate interest. On the other hand, state imposed penalities may discourage individuals from exercising their federal rights. In resolving this conflict, several courts have held that even indirect state encroachments on the operation of federal policy are invalid under the supremacy clause.

In *Grimes v. Hoschler*[290] the Supreme Court of California invalidated a California law that threatened contractors with the loss of their licenses if their debts were discharged in bankruptcy.[291] Although the state claimed that the law was not designed to compel the payment of discharged debts, the court reasoned that the potential revocation of a contractor's license effectively denied certain debtors the benefits of federal bankruptcy.[292] Furthermore, the court found that the revocation of a contractor's license conflicted with the federal bankruptcy policy to "give debtors a new opportunity in life."[293]

Several other courts have adopted the *Grimes* rationale when confronted with a conflict between state law and federal bankruptcy policy.[294] For instance, in *Rutledge v. City of Shreveport*[295]

---

289. *Id.* at 652.

290. 12 Cal. 3d 305, 525 P.2d 65, 115 Cal. Rptr. 625, *cert. denied,* 420 U.S. 973 (1974).

291. *Id.* at 312, 525 P.2d at 69, 115 Cal. Rptr. at 629. The law provided that a license would not be reinstated unless the contractor repaid the discharged debt. The statute in *Grimes* did not automatically result in the loss of a contractor's license; instead, it merely provided that discharge of debts in bankruptcy could be taken into account in disciplinary proceedings. Nevertheless, the court found that the bankruptey was the sole cause for revocation of Grimes' contracting license. *Id.* at 313, 525 P.2d at 70, 115 Cal. Rptr. at 630.

292. *Id.*

293. *Id.*

294. *See, e.g.,* Handsome v. Rutgers Univ., 445 F. Supp. 1362 (D.N.J. 1978); Rutledge v. City of Shreveport, 387 F. Supp. 1277 (W.D. La. 1975); *In re* Loftin, 327 So. 2d 543 (La. Ct. App.), *cert. denied,* 331 So. 2d 851 (La. 1976). *But cf.* Marshall v. District of Columbia, 559 F.2d 726 (D.C. Cir. 1977) (police department could use bankruptcy as a factor in evalu-

the district court invalidated a police department rule that subjected a policeman to dismissal for filing a bankruptcy petition.[296] While recognizing the state's legitimate interest in achieving a "reliable and respected police force,"[297] the court found that the effect of the rule was to deny the policeman debtor "a clear field for future effort."[298] Therefore, the court held that the rule conflicted with the stated purpose of the Federal Bankruptcy Act in violation of the supremacy clause.[299] In *Handsome v. Rutgers University*[300] a university rule prevented students who had discharged previous student loans in bankruptcy to register or obtain transcripts.[301] The district court found that "the Supremacy Clause prevents a state from frustrating even the spirit of a federal law."[302] Hence, the court concluded that the state violated the supremacy clause by withholding Handsome's transcripts.[303]

The results in *Grimes, Rutledge,* and *Handsome* are consistent with the rationale underlying the Supreme Court's holding in *Perez v. Campbell.*[304] Although the cases subsequent to *Perez* clearly expand the scope of the supremacy clause, the results comport with the Supreme Court's focus on the effect of state law:

> We can no longer adhere to the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration . . . . [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply . . . articulating some state interest or policy . . . that would be tangentially furthered by the proposed state law . . . . [S]tate legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.[305]

These cases set standards for state legislatures to follow.

(c) The Bar Admission Cases

Several cases decided under the old bankruptcy law have examined issues arising when bar applicants who have discharged

---

ating applicant's fitness for employment).

295. 387 F. Supp. 1277 (W.D. La. 1975).
296. *Id.* at 1278.
297. *Id.* at 1280.
298. *Id.* (quoting Perez v. Campbell, 402 U.S. 637, 648 (1971)).
299. *Id.*
300. 445 F. Supp. 1362 (D.N.J. 1978).
301. *Id.* at 1363-64.
302. *Id.* at 1367.
303. *Id.*
304. 402 U.S. 637 (1971). *See* notes 283-89 *supra* and accompanying text.
305. Perez v. Campbell, 402 U.S. 637, 651-52 (1971).

student loan debts through bankruptcy are denied good moral character status by the bar examiners. A bar applicant's conduct in meeting his financial obligations is widely utilized as a relevant factor in assessing good moral character.[306] Furthermore, most states agree that the failure of an applicant to honor his legal commitments may evince a disregard for the rights of others and thus may indicate a lack of fitness for the practice of law.[307] Nevertheless, federal bankruptcy law allows certain individuals to avoid satisfying some financial obligations. Hence, there is a conflict between the state policy of ensuring the good moral character of the bar and federal bankruptcy policy of providing a new opportunity in life and a clear field for future effort. In three recent cases, courts attempting to sidestep this supremacy clause problem have carefully pointed out that they were focusing not on the applicant's act of filing bankruptcy but on the circumstances surrounding such actions. Three cases—two in Florida and one in Minnesota—illustrate how this approach results in arguably inconsistent decisions.

In *Florida Board of Bar Examiners re G.W.L.*[308] the Florida Supreme Court sustained the bar examiners' refusal to admit G.W.L. based upon a determination that the circumstances surrounding the discharge of his student loans in bankruptcy demonstrated a lack of moral character.[309] In detailing the facts of G.W.L.'s bankruptcy the court stressed "that it is not the act of filing for bankruptcy but the circumstances surrounding this particular bankruptcy application" that prompted its decision.[310] G.W.L. financed his undergraduate and legal education largely

306. *See In re* Heller, 333 A.2d 401 (D.C.), *cert. denied*, 423 U.S. 840 (1975).

307. *See In re* Connor, 265 Ind. 610, 358 N.E.2d 120 (1976). *See generally* Annot., 64 A.L.R.2d 301 (1959).

308. 364 So. 2d 454 (Fla. 1978).

309. *Id.* at 459. While an undergraduate, G.W.L. received approximately $1900 in 3 ½% interest student loans from the university, with repayment to be completed within 10 years after termination of his status as a full time student. After entering law school, G.W.L. financed his legal education by borrowing approximately $2500 per year from a private bank under the government guaranteed student loan program, which provided for a 10 year repayment schedule at 7% interest. At the time of his graduation from law school G.W.L.'s financial obligations totalled $9893; initial payments, however, were not due to commence for nine months, with the bulk of the payments scheduled to begin in three years. The court found that the financial "obligations appeared normal for any student attending undergraduate and graduate educational programs on student loans." *Id.* at 456. Most importantly, the court found "no exceptional financial problems or identified misfortunes" that would hinder G.W.L. from meeting his obligations. *Id.*

310. *Id.* at 455.

from government sponsored student loans.[311] For some months prior to his graduation, G.W.L. attempted unsuccessfully to obtain local legal employment.[312] On May 20, 1976, three days before he graduated, and nine months before student loan payments were to commence, G.W.L. executed a voluntary petition for bankruptcy.[313] In June 1976 G.W.L. made informal arrangements with his bankruptcy trustee to defer action on his petition so that if he did find a job he could begin repaying his creditors.[314] G.W.L. remained unemployed until December 20, 1976, when he found employment as a law clerk for $70 per week, and, coincidentally, received a discharge in bankruptcy from all his debts.[315] G.W.L. passed the Florida bar examination, but during the customary background investigation the board of bar examiners discovered the bankruptcy petition. G.W.L. appeared before the board at an informal hearing held in January 1977.[316] Immediately following the hearing G.W.L. arranged to repay the discharged debts and notified the board of his actions while declining a formal hearing on the matter.[317] The board, however, declined to admit G.W.L. to the Florida bar because he lacked good moral character.[318] On appeal to the Florida Supreme Court, G.W.L. argued that as a statutory right, bankruptcy cannot demonstrate lack of moral fitness, and that neither the board's charges nor the record demonstrated any fraud or taint to his transactions.[319] Addressing the first contention, the court recited the purposes of the Bankruptcy Act and

311. *Id.* at 456.

312. *Id.* The court found that the timing of G.W.L.'s filing for bankruptcy particularly evinced "absolutely no regard for his moral responsibility to his creditors . . . [and] indicate[d] a lack of the moral values upon which we have a right to insist for members of the legal profession." *Id.* at 459.

313. *Id.* at 456.

314. *Id.* The court took little notice of this fact, which mitigates against the finding that G.W.L. held "absolutely no regard for his moral responsibility to his creditors." *Id.* at 459.

315. *Id.* at 456.

316. *Id.* At the informal hearing G.W.L. asserted that "his motivation for bankruptcy was in part pressure from creditors" alleging the receipt of "dunning" letters. *Id.* at 457. G.W.L. could not produce copies of the "dunning" correspondence, but indicated that they had been destroyed. "The Board found his claim . . . unbelievable." *Id.* Justice Hatchett, in dissent, pointed out that G.W.L.'s failure to produce written evidence of correspondence at an informal hearing proved nothing. "The Referee in Bankruptcy found sufficient evidence to grant the applicant's petition in bankruptcy. This court is prohibited from further investigation into that finding." *Id.* at 461 (dissenting opinion).

317. *Id.* at 456-57.

318. *Id.* at 457.

319. *Id.*

noted that, although it discharged the legal obligation to pay, bankruptcy did not discharge the moral obligation to satisfy one's debts. The court also remarked that "[t]he filing of the bankruptcy petition was not illegal, but in our view it was done in such a morally reprehensible fashion that it directly affects his fitness to practice law."[320] The court dismissed the contention that this holding conflicted with the "fresh start" purpose of bankruptcy. Instead, the court claimed that G.W.L. had "obtained far more than the fresh start contemplated by the Bankruptcy Act . . . because [G.W.L.] . . . secured . . . a continuing, life-long economic benefit."[321]

In *Florida Board of Bar Examiners re Groot*[322] the Florida Supreme Court reversed a determination by the board of bar examiners that the circumstances surrounding a bar applicant's bankruptcy demonstrated a lack of requisite moral character for admission to the bar. Groot, who graduated from Florida State University Law School in June 1976, had financed his undergraduate and legal education through government guaranteed student loans.[323] Several months after passing a portion of the bar examination,[324] Groot quit his job[325] and moved to Montana.[326] Nine months later, however, Groot abruptly quit both jobs in Montana[327] and moved to North Carolina where he remained unem-

320. *Id.* at 459. Note, however, that the court approved the board's finding "without prejudice to G.W.L. to apply for a formal hearing before the Board to present evidence of his present good moral character." *Id.* at 460. Since G.W.L. waived his opportunity for a formal hearing previously, he could not present evidence of good moral character to offset the damaging circumstances. Perhaps the court felt that G.W.L.'s subsequent resurrection of his debts should have a bearing on the board's decision. If so, this would constitute compelled payment of discharged debts.

321. *Id.* at 460 (quoting Girardier v. Webster College, 563 F.2d 1267, 1278 (8th Cir. 1977)). The *Girardier* decision is inapplicable because it turned on the lack of state action; the court specifically ruled that *Perez* is inapplicable to private entities. Furthermore, the benefit of receiving a legal education is dubious if a law graduate is denied admission to the bar.

322. 365 So. 2d 164 (Fla. 1978).

323. *Id.* at 165. At the time of Groot's law school graduation, his student loan debts approximated $8530, with repayment scheduled to commence not later than one year after he ceased being a full time student. *Id.*

324. Groot passed the multistate portion, Part II of the Florida Bar Examination. *Id.*

325. In November 1976, Groot worked in the Office of the Speaker of the Florida House of Representatives at an annual salary of $14,000. *Id.*

326. In Helena, Montana, Groot took two jobs. First, Groot worked as a counselor with Tri-County DD (Developmentally Disabled) Inc., receiving compensation of $4800, plus living quarters, food, and utilities. Second, Groot secured employment with the Montana Legislative Council at a salary of approximately $13,000 per year. *Id.* at 165-66.

327. Groot left both jobs despite representations to the Council that he would remain

ployed, but incurred gasoline credit charges and hospital debts for the birth of a child.[328] In May and July Groot passed the other parts of the Florida bar examination and applied for admission to the Florida Bar.[329] In August Groot filed a petition for bankruptcy,[330] seeking the discharge of his medical, travel, and student loan debts. He also accepted an $18,000 per year job at this time.[331] After undertaking its customary investigation and an informal hearing,[332] the board denied Groot admission to the Florida Bar because the circumstances surrounding his bankruptcy indicated a lack of moral character, rendering Groot unfit for the practice of law.[333] In reversing the board's decision, the court first stated that Groot obviously "intended to unburden himself of accumulated debts," which is "precisely the reason that the bankruptcy laws exist."[334] In this regard, the court cited *G.W.L.* for the proposition that "[t]he filing of a petition for bankruptcy, standing alone, does not constitute sufficient cause to deny admission."[335] Instead, the court focused on whether Groot's conduct was morally reprehensible under the circumstances and concluded that it was not.[336] In making this determination, the court carefully distinguished *G.W.L.* on the facts, stressing especially that Groot supported two children and a former wife.[337] In the court's view, Groot's circum-

---

for at least one full year and to Tri-County that he would remain for nine months. Neither employer, however, expressed any dissatisfaction with Groot's early departure, and each indicated a willingness to rehire him. *Id.* at 166-67.

328. These debts were also discharged in bankruptcy. *Id.* at 166.

329. *Id.* Sometime in this period Groot divorced his wife. *Id.* at 167.

330. Groot filed for bankruptcy in the United States District Court, Eastern District of North Carolina. *Id.* at 166.

331. Groot accepted a position as staff director of the Florida House of Representatives' Committee on Standards and Conduct. *Id.*

332. Groot, like G.W.L., declined a formal hearing with the board. *Id.*

333. The board concluded that "Groot knowingly engagod in a course of conduct which (i) contributed to his inability to satisfy his debts in a timely and responsihle manner, and (ii) caused them to be discharged without any attempt on his part to pay or renegotiate them." *Id.*

334. *Id.* at 167.

335. *Id.*

336. *Id.* at 168.

337. *Id.* One may question the court's distinctions on the facts. Although there was evidence in the record of Groot's personal problems, he also twice left employment that would have provided a comfortable means to pay his debts. Furthermore, when Groot filed for bankruptcy he knew that his prospects were excellent for obtaining employment at $18,000 per year ($375/week). Although Groot had two dependent children and a former wife, one may contrast Groot's ahility to pay with that of G.W.L., who was clerking for $70 per week. The court found that Groot experienced "unusual misfortune," which justified his effort to devote current income to current needs. In contrast, the court maintained that G.W.L. did not have such misfortune, although G.W.L. could not find prosperous legal em-

stances "warranted his turning to the remedy provided by federal law . . . ."[338] Accordingly, the court directed the board to admit Groot to the Florida Bar.[339]

The Minnesota Supreme Court confronted the issue of the effect of bankruptcy upon denial of admission to the bar in *In re Gahan,*[340] and it seemed to adopt an approach similar to the Florida Supreme Court in *G.W.L.* Gahan financed his legal education at the University of San Francisco under a federally guaranteed student loan program with repayment to commence about nine months after his graduation in 1976.[341] Having passed the California bar, Gahan began work in an Oakland law firm in December 1976 at an annual salary of $15,000. In August 1977, however, after working without pay for two months, Gahan terminated the employment.[342] After two months of unemployment, Gahan began work at another California law firm at $18,000 per year.[343] Nevertheless, during his unemployment Gahan defaulted on his student loan obligations[344] and filed a voluntary petition for bankruptcy.[345] Immediately prior to filing for bankruptcy Gahan engaged in several financial transactions,[346] which resulted in the bankruptcy court discharging ouly his student loans.[347] Although nothing in the record suggested fraud or deceit, the Board of Law Examiners found that Gahan lacked good moral character and denied him admission to the Minnesota Bar.[348] On appeal, the Minnesota Supreme Court affirmed the board's finding. Initially, the court acknowledged that a refusal to admit Gahan based solely upon his

---

ployment. *Id.*

338. *Id.*

339. *Id.*

340. 279 N.W.2d 826 (Minn. 1979).

341. Gahan's student loan obligations totalled about $14,000, requiring a monthly payment of approximately $175. *Id.* at 827.

342. *Id.* Gahan subsequently received his unpaid wages. *Id.*

343. *Id.*

344. *Id.* Gahan claimed that he made some initial payments on tbe loan. *Id.*

345. Gahan filed in the United States District Court of the Northern District of California. *Id.*

346. Gahan mortgaged his 1959 Jaguar to a friend for $2500 and deposited the proceeds, the maximum allowable, in exempt bank accounts. At the time he filed for bankruptcy, Gahan owed the balance on his student loans, and a $1600 loan from a private bank. After regaining employment, but before his discharge in bankruptcy, Gahan paid tlie bank loan in full, reasoning that he might need an additional loan in the future. Following his discharge in bankruptcy, Gahan used the balance in the exempt account to pay back his friend and release the mortgage. *Id.* at 827-28.

347. *Id.* at 828.

348. *Id.*

filing for bankruptcy would frustrate federal bankruptcy policy and violate the supremacy clause.[349] Citing *Perez v. Campbell*,[350] the court stated that both the purpose and effect of the state action must be examined to determine whether it interferes with the federal bankruptcy policy of giving debtors a "new opportunity in life and a clear field for future effort."[351] The court specifically rejected the holding of *Marshall v. District of Columbia*,[352] in which the circuit court sustained a city policy that denied employment on the police force to adjudicated bankrupts. Reasoning that "state law may not chill the exercise" of federal bankruptcy rights, the court concluded that the rule frustrated bankruptcy policy.[353] Furthermore, the court criticized the *Groot* and *G.W.L.* cases,[354] stating that:

> [T]he Florida court failed to squarely address the constitutional issue of denying employment licenses on the basis of bankruptcy. We have reservations as to whether it was constitutional . . . to consider the morality of any motivations for filing bankruptcy when the Federal Government has declared the bankruptcy proceeding to be legal . . . .[355]

Nevertheless, the court decided it could constitutionally consider Gahan's financial conduct *prior* to filing bankruptcy in assessing his moral character as long as it did not label his bankruptcy "immoral" or "irresponsible" and deny admission for that reason.[356] The court then held that the circumstances surrounding Gahan's default on his student loan obligations "demonstrate[d] lack of good moral character and reflect[ed] adversely on his ability to perform the duties of a lawyer."[357] The court reasoned that it could prevent future problems[358] arising from "such irresponsibility by denying admission, rather than seek to remedy the problem after it occurs and victimizes a client."[359]

---

349. *Id.* at 828-29.

350. 402 U.S. 637 (1971). *See* notes 283-89 *supra* and accompanying text.

351. *In re* Gahan, 279 N.W.2d 826, 829 (Minn. 1979).

352. 559 F.2d 726 (D.C. Cir. 1977). *See* note 294 *supra*.

353. *In re* Gahan, 279 N.W.2d 826, 831 (Minn. 1979).

354. *See* notes 308-39 *supra* and accompanying text.

355. 279 N.W.2d at 831.

356. *Id.* at 829-30.

357. *Id.* at 831-32.

358. According to the court, these problems concerned the applicant's lack of fitness demonstrated by his disregard of the rights of creditors and of other students by defaulting on student loans. *Id.* at 831.

359. *Id.*

(d) *The Bankruptcy Reform Act of 1978*

Congress enacted the Bankruptcy Reform Act of 1978 "to modernize the bankruptcy law."[360] In doing so, Congress did not alter the "fresh start" policy underlying the old law, and, in fact, enacted certain provisions to enhance this policy.[361]

Two provisions of the new law are pertinent to the bar admission situation. Congress designed section 525 to protect bankrupts against discriminatory treatment. This section provides that

> [A] governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case . . . or during the case . . . or has not paid a debt that is dischargeable . . . or that was discharged . . . .[362]

The legislative history reveals that this provision codified the result of *Perez v. Campbell*.[363] Although the enumeration of various forms of discrimination is extensive, Congress did not intend for this list to be exhaustive.[364] Instead, the legislative history reveals that Congress designed this provision to permit further development of case law "to prohibit actions by governmental or quasi-governmental organizations that perform licensing functions, such as a State bar association or a medical society . . . that can seriously affect the debtors' livelihood or fresh start."[365] This new section, however, does not prohibit consideration by a governmental unit of other factors, "such as future financial responsibility or ability."[366]

A second pertinent provision of the new law deals with the discharge of student loans. Section 523(a)(8) prevents the discharge of student loans for the first five years of the loan repay-

---

360. S. REP. No. 989, *supra* note 279, at 1.

361. The new code contains an express policy against reaffirmation of debts previously discharged in bankruptcy, 11 U.S.C. §§ 524(c), (d) (Supp. III 1979), as well as an antidiscrimination provision to protect those individuals declaring bankruptcy, 11 U.S.C. § 525 (Supp. III 1979).

362. 11 U.S.C. § 525 (Supp. III 1979).

363. S. REP. No. 989, *supra* note 279, at 81.

364. *Id.*

365. *Id.* Congress also designed this section to strengthen the policy against reaffirmation of discharged debts found in § 524(b). *Id.*

366. *Id.*

ment period unless survival of the obligation would impose undue hardship on the debtor.[367] This law follows a startling increase in the number of student loans discharged in bankruptcy over the past several years.[368]

(e) *Analysis and Conclusion*

The Minnesota and Florida positions on bankruptcy and good moral character discourages bar applicants from exercising their federal bankruptcy rights because of the possibility of denial of admission. In each of these cases the courts were careful to point out that the mere fact of a discharge of debts in bankruptcy did not by itself render an applicant unfit for the practice of law. Instead, in *G.W.L.* and *Groot* the court focused on the applicants' motives in seeking bankruptcy, while in *Gahan* the court looked to the circumstances surrounding the applicant's default prior to filing for bankruptcy. The use of such reasoning, however, permits the courts to avoid the supremacy clause issue that arises because of an interference with federal bankruptcy policy. Clearly, the state's denial of bar admission to the applicants in *G.W.L.* and *Gahan* interfered with the federal bankruptcy policy of providing them a new opportunity in life. Furthermore, although the *Groot* court eventually admitted the applicant to the bar, the court's unsatisfactory reasons for distinguishing *G.W.L.* offer future applicants no guidance in this area. Thus, a bar applicant, aware that the circumstances of his bankruptcy will be heavily scrutinized, might hesitate to discharge debts in bankruptcy; consequently, the congressional intent behind the bankruptcy law is thwarted.

Although the Supreme Court in *Perez v. Campbell*[369] did not confront the question of whether indirect frustration of federal bankruptcy policy by a state law is invalid under the supremacy

---

367. 11 U.S.C. § 523(a)(8) (Supp. III 1979). This section provides that:

(a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt—

. . .

for an educational loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or a nonprofit institution of higher education, unless—

(A) such loan first became due before five years . . . before the date of the filing of the petition; or

(B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . .

368. *See* Note, *Skipping out on Alma Mater: Some Problems Involving the Collection of Federal Student Loans*, 15 COLUM. J. L. & SOC. PROB. 317, 323-24 (1980).

369. *See* notes 283-89 *supra* and accompanying text.

clause, the Court did state the "controlling principle" in supremacy clause cases is whether the state law "frustrates the full effectiveness of federal law."[370] Indeed, in areas other than bankruptcy, the Supreme Court has invalidated state law on supremacy clause grounds even when the federal law was not directly contravened.[371] Additionally, following the *Perez* rationale, *Grimes*,[372] *Rutledge*,[373] and *Handsome*[374] held that state legislation indirectly interfering with federal bankruptcy policy is unconstitutional under the supremacy clause. The *Grimes* and *Rutledge* courts invalidated state attempts to deprive citizens of their livelihood because of their exercise of federal bankruptcy rights. In *G.W.L.* and *Gahan* the bar applicants were denied the chance to earn their livelihood because of the states' refusal to admit them to the bar based upon their exercise of federal bankruptcy rights. Clearly, preventing a bar applicant from practicing law constitutes an infringement of federal policy that is as substantial as the withholding of a driver's license or college transcript, the revocation of a contractor's license, or the termination from a police force. Therefore, because in the bar admission cases the state has penalized the bar applicant's right to declare bankruptcy, the state interference should be unconstitutional under the supremacy clause.

The provisions of the new bankruptcy law do not eliminate the supremacy clause problem created by decisions like *Gahan*, *Groot*, and *G.W.L.* First as to the new student loan provision, there is no indication that bar examiners are concerned only with the discharge of student loans in bankruptcy. Since the articulated character defect demonstrated by *G.W.L.* and *Gahan* was irresponsibility in dealing with creditors, the type of loan involved in discharge makes no difference. Those applicants who do receive a discharge in bankruptcy under the undue hardship exception have no guarantee that the bar examiners will agree with the bankruptcy judge's determination on this issue. As evidenced by the Florida and Minnesota decisions, the bankruptcy judge's decision on an applicant's good faith in seeking bankruptcy does not bind the bar examiners. As one commentator has noted, these courts

370. Perez v. Campbell, 402 U.S. 637, 652 (1971). *See* text accompanying note 305 *supra*.

371. *See, e.g.*, Jones v. Rath Packing Co., 430 U.S. 519 (1977); Huron Cement Co. v. City of Detroit, 362 U.S. 440 (1960).

372. *See* notes 290-94 *supra* and accompanying text.

373. *See* notes 295-99 *supra* and accompanying text.

374. *See* notes 300-03 *supra* and accompanying text.

"had few qualms about undertaking, in effect, a determination of whether the bar applicants ought to have received a discharge at all."[375]

Second, as to the new antidiscrimination provision, even though the legislative history expressly refers to licensing by "a State bar association," state courts may continue to draw a distinction between the circumstances surrounding bankruptcy and the bankruptcy itself.[376] The possibility that a bar applicant might receive a discharge of student loans in recognition of "undue hardship" only to have this issue relitigated is particularly distressing. The federal policy that persons who have received discharges in bankruptcy ought to receive a "fresh start" and that such individuals ought not to be discriminated against by governmental units clearly is infringed by cases such as *G.W.L.*, *Groot*, and *Gahan*. Thus, courts should "mark the contours of the antidiscrimination provision"[377] by invalidating such state bar admission practices as violative of the supremacy clause.

B. The Bar Examination

In *Schware v. Board of Bar Examiners*[378] the Supreme Court held that a state could constitutionally require a demonstration of "proficiency in its law" before admitting an applicant to the bar.[379] With few exceptions, this demonstration takes the form of a passing grade on a bar examination.[380] The most commonly articulated purpose for the bar examination is to insure that applicants possess "minimum competence" to practice law.[381] Theoretically, the requirement of minimum competence provides protection to the

375. Note, *supra* note 368, at 348.

376. With regard to this provision, it is the view of two commentators that "[t]he prohibition of discriminatory treatment . . . does not prevent a bar association character committee from investigating and considering the circumstances surrounding an applicant's bankruptcy to determine whether there is independent evidence of bad moral character." B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 3.06, at 3-23 (1980).

377. S. REP. No. 989, *supra* note 279, at 81.

378. 353 U.S. 232 (1957).

379. *Id.* at 239.

380. The exception to this rule is admission by "diploma privilege." In a few states, graduates of an accredited law school within the state are not required to take the bar examination. Instead, these applicants automatically are admitted if they satisfy all other general eligibility requirements. *See, e.g.*, MONT. REV. CODES ANN. § 37-61-204 (1979); S.D. CODIFIED LAWS ANN. § 16-16-6.1 (1979); W. VA. CODE § 30-2-1 (1980); WIS. SUP. CT. R. 40.02(1) (1980).

381. Richardson v. McFadden, 540 F.2d 744, 748 (4th Cir. 1976), *modified*, 563 F.2d 1130 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 968 (1978); Tyler v. Vickery, 517 F.2d 1089, 1101 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976).

public and integrity to the judicial system.[382] The examination typically consists of two sections—multiple choice questions and essay questions.[383] A few states add a third area pertaining exclusively to ethics or professional responsibility.[384] In a recent attempt to provide greater uniformity among state bar examinations, the National Conference of Bar Examiners prepared the Multistate Bar Examination (MBE). Currently, forty-three states have adopted the MBE,[385] supplemented in each case by the examiners' own essay questions.

Although constitutional challenges to the bar examination are not as numerous as challenges to good moral character determinations, three topics merit analysis. This section of the Special Project first explores the procedural due process protections that must be afforded to an applicant who fails the bar examination. Next, the section examines the substantive due process issue associated with limitations on the number of times an applicant may take the bar examination. Finally, the section analyzes equal protection challenges to bar examinations by failing minority candidates in particular and by failing candidates in general.

1. Procedural Due Process—Challenges to Post-examination Procedures

(a) Introduction

In a number of jurisdictions, bar examiners provide no opportunity for failing applicants either to review their tests or to chal-

---

382. Rosenthal v. State Bar Examining Comm., 116 Conn. 409, 415, 165 A. 211, 213 (1933). *See generally* Annot., 64 A.L.R.2d 301, 304-09 (1959).

383. Generally the applicant writes the test although some states allow oral examinations at the discretion of the examiners. State statutes or court rules usually set forth the range of subjects covered. A typical list includes the following: Civil Procedure, Criminal Law and Procedure, Torts, Contracts, Personal Property, Real Property, Future Interests in Real and Personal Property, Trusts, Secured Transactions, Public and Private Corporations, Agency and Partnership, Creditor's Rights, Administrative Law, Taxation, Constitutional Law, and Legal Ethics. A few states include additional subjects peculiarly relevant to their own economic interest—for example, Mining Law and Water Rights in Montana. *See generally* F. KLEIN, S. LELEIKO & J. MAVITY, BAR ADMISSION RULES AND STUDENT PRACTICE RULES 29-42 (1978).

384. Alabama, Arizona, California, Delaware, Florida, and Georgia are among the states that require a separate examination on ethics. In those states a candidate must pass the ethics section for an overall passing score, regardless of performance on the remainder of the test. F. KLEIN, S. LELEIKO & J. MAVITY, *supra* note 383, at 38-39.

385. NATIONAL BAR EXAMINATION DIGEST 2 (1980). If an applicant has received a passing MBE score from another jurisdiction, 16 states will admit him without further examination. *Id.*

lenge the results.[386] This situation has given rise to several procedural due process challenges by failing bar applicants.[387] The fourteenth amendment requires procedural due process safeguards if the state deprives an individual of a protected liberty or property interest.[388] Thus, a reviewing court initially must ask whether the state action in question infringes on an individual's protected fourteenth amendment interest. Once a court determines that an individual possesses such an interest, the remaining inquiry focuses on the type of procedure required. The essential elements of procedural due process are notice of the impending state action[389] and an opportunity for the affected party to be heard.[390] Because due process is a flexible concept, the specific procedures required will depend upon the nature of the individual interest affected, the risk of erroneous deprivation of that interest through the procedures used, the benefit of additional procedural safeguards, and the nature of the government's interest.[391]

In *Schware v. Board of Bar Examiners*[392] the Supreme Court held that bar applicants have a protected fourteenth amendment interest in admission to the bar.[393] Thus, procedural due process safeguards are constitutionally required.[394] This section of the Special Project discusses the forms of review generally available to the

386. *See* 52 B.U. L. REV. 286, 297 (1972).

387. *See, e.g.*, Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976), *modified*, 563 F.2d 1130 (4th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 968 (1978); Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974); Feldman v. State Bd. of Bar Examiners, 438 F.2d 699 (8th Cir. 1971).

388. *See* Board of Regents v. Roth, 408 U.S. 564 (1972).

389. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

390. *See, e.g.*, Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

391. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). Thus, depending on the circumstances, in addition to notice and an opportunity to be heard, procedural due process may require confrontation and cross-examination of witnesses, Willner v. Committee on Character & Fitness, 373 U.S. 96, 103 (1963); presence of counsel if desired, Goldberg v. Kelly, 397 U.S. 254, 270 (1970); or a specified burden of proof, *In re* Winship, 397 U.S. 358 (1970).

392. 353 U.S. 232 (1957). For a discussion of the due process issues presented by *Schware*, see notes 83-109 *supra* and the accompanying text.

393. 353 U.S. at 238-39. In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court identified this interest as a liberty interest. *See* notes 68-69 *supra* and accompanying text. Most courts accord broad discretion to the bar examiners in carrying out their duties and place a heavy burden on unsuccessful applicants who attempt to prove wrongful conduct on the part of the examiners. *See Ex parte* Ross, 196 Ga. 499, 26 S.E.2d 880 (1943); *In re* Hughey, 62 Nev. 498, 156 P.2d 733 (1945).

394. *See, e.g.*, Whitfield v. Illinois Bd. of Law Examiners, 504 F.2d 474 (7th Cir. 1974).

failing bar examinee and whether those procedures satisfy the requirements of procedural due process.

(b) *Judicial Developments*

Most procedural due process challenges by failing bar examinees to the lack of post-examination review have been unsuccessful. The recent case of *Tyler v. Vickery*[395] illustrates this point. *Tyler* was a class action on behalf of all black persons who had taken and failed the Georgia bar examination. The complaint alleged that the exam violated both the equal protection[396] and due process clauses of the fourteenth amendment. In the due process count, plaintiffs claimed that the state violated consitutionally mandated procedure by failing to provide a review of the examination for failing applicants.[397] Traditionally, blacks have experienced difficulty in passing the Georgia bar examination. In July 1972, none of the forty black examinees passed, and in February and July 1973, slightly more than fifty percent of the black applicants failed as compared to a failure rate of twenty-five to thirty-three percent among white examinees.[398] The district court ruled that the Constitution did not require a procedure to review a failing grade because "an unqualified right to retake the examination at its next regularly scheduled administration both satisfies the purposes of a hearing and affords its protection."[399] On appeal, the Fifth Circuit affirmed the court below. Initially, the court found that "the safeguards of the due process clause are of course available to a failing bar applicant."[400] Having concluded this, the court stated that the procedures required must be determined by balancing the applicant's interest in achieving a level of competency through additional procedure against the state's interest in denying the procedure.[401]

While acknowledging the significant interest of the examinee in pursuing his chosen profession, the court nevertheless stated that due process required a hearing only if the petitioners demonstrated that hearings provided greater protection than the *unqualified* right of reexamination offered by Georgia. The court reasoned

---

395. 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976).

396. For discussion of the equal protection claim in *Tyler*, see notes 453-66 *infra* and accompanying text.

397. 517 F.2d at 1093.

398. *Id.* at 1092.

399. *Id.* at 1103.

400. *Id.* The court cited *Schware* as support for this conclusion.

401. *Id.* at 1104 (citing Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970)).

that the opportunity to take the next scheduled examination provided significantly quicker relief to an applicant erroneously failed and that a hearing entailed too great an administrative burden on the state. Thus, the Fifth Circuit concluded that failure to provide for a review procedure did not violate due process.[402]

Like *Tyler*, the decision reached in *Whitfield v. Illinois Board of Law Examiners*[403] indicates that post-examination hearings are not constitutionally mandated if reexamination is available. After failing the Illinois bar examination five times, Whitfield filed a civil rights action alleging, among other things, that he had a procedural due process right to review his examination and to compare it with model answers. The Seventh Circuit rejected this allegation and affirmed the district court's dismissal of the case for failure to state a cause of action.[404] The court pointed out that Whitfield had taken the bar five times and that "there is no allegation that in the future, he will be denied the same opportunity."[405] Thus, the court reasoned that the Illinois provisions for reexamination adequately protected an applicant from grading errors, and that hearings were

---

402. 517 F.2d at 1104. In reaching its decision, the Fifth Circuit also rejected the contention that a hearing provided a superior remedy to reexamination in removing whatever stigma attaches to a failing examinee when such failure is unjustified. The court carefully noted and distinguished Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963), in making this conclusion. In *Willner* the Supreme Court held that an individual's interest in pursuing his livelihood required that he be afforded a hearing, including the opportunity to confront and cross-examine witnesses, when the bar examiners denied him admission for failure to demonstrate good moral character. *Id.* at 103. The Fifth Circuit stated that the instant case presented "entirely different issues" than presented in *Willner*:

> While an adverse determination on character and fitness tends to exert a continuing detrimental effect on an individual's opportunity to be admitted to practice, unless and until rebutted, failure on a bar examination does not stigmatize an individual as "incompetent," but merely indicates that he did not demonstrate minimal competence on a particular examination. Upon reexamination, such an individual is entitled to have his paper graded by the same standards as those of everyone else, and if he passes, to be admitted on precisely the same basis as an applicant who had not previously taken the examination. For these reasons, we consider the "liberty interest" a failing examinee has at stake to be a minor, if not a nonexistent one.

517 F.2d at 1104-05.

Thus, an applicant must be afforded a hearing when denied admission for lack of good moral character but not for failure to pass the bar examination. For a discussion of procedural due process requirements in the good moral character context, see note 81 *supra*. *See also* 52 B.U. L. REV. 286 (1972).

403. 504 F.2d 474 (7th Cir. 1974) (per curiam).

404. *Id.* at 476.

405. *Id.* at 478. The Illinois Supreme Court Rules provided an applicant the unqualified right to retake the bar exam five times. Upon failing the fifth retake, an applicant could sit again for the exam only if granted permission by the bar examiners or by the state supreme court. The sixth retake could be conditioned upon a requirement of further law study. *Id.* n.11.

not constitutionally mandated because of the "intolerable burden" that they would place on the bar examiners.[406]

One panel of the Fourth Circuit has disagreed expressly with the idea that procedural due process does not require a hearing for a failing bar examinee. In *Richardson v. McFadden*[407] plaintiffs, four black law school graduates who had failed the South Carolina bar examination, brought suit alleging that the examination violated their rights under the federal due process and equal protection clauses.[408] Specifically, petitioners claimed that South Carolina's lack of post-examination review violated their procedural due process rights. The district court rejected most of petitioners' arguments, but abstained from ruling on the procedural due process claim until plaintiffs presented it to the state supreme court.[409] On appeal, the bar examiners argued that the right of reexamination satisfied procedural due process and that the district court had therefore erred in failing to dismiss this claim. The Fourth Circuit panel rejected this argument, stating that a person need not repeatedly demonstrate his competence to practice law because it took work, effort, and money to prepare for the examination. The court further noted that because of the value of a license to practice law, "delay in getting it is an injury."[410] Specifically referring to *Tyler* and *Whitfield,* the court stated that "[i]t is true that some courts have held that reexamination is a more effective remedy than review because the administrative burden of al-

406. A number of courts have rendered decisions similar to the *Tyler* and *Whitfield* holdings that federal procedural due process does not require a hearing for a failing bar examinee. *See, e.g.,* Sutton v. Lionel, 585 F.2d 400, 403 (9th Cir. 1978); Feldman v. State Bd. of Law Examiners, 438 F.2d 699, 703 n.6 (8th Cir. 1971); Chaney v. State Bar, 386 F.2d 962, 967 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968); *In re* Mead, 372 Mass. 253, 361 N.E.2d 403, *cert. denied,* 434 U.S. 858 (1977); *In re* Pacheco, 85 N.M. 600, 514 P.2d 1297 (1973).

407. 540 F.2d 744 (4th Cir. 1976), *modified,* 563 F.2d 1130 (1977) (en banc), *cert. denied,* 435 U.S. 968 (1978).

408. For a discussion of the equal protection issues presented by *Richardson,* see notes 474-79 *infra* and accompanying text.

409. The bar examiners, in cross-appealing this decision, claimed that the Fourth Circuit had no jurisdiction as to the procedural due process issue since only the Supreme Court can review state court decisions. Furthermore, the examiners claimed that in grading the examinations, they exercised a judicial function, which rendered them immune from suit. The Fourth Circuit panel rejected this argument, stating that "[w]hile both propositions are correct in principle, it is crystal clear that in giving and grading examinations and certifying passing scores the Board of Bar Examiners neither renders judicial decisions nor exercises judicial functions." 540 F.2d at 746 n.2. This jurisdictional issue is more fully discussed at notes 11-28 *supra* and accompanying text.

410. 540 F.2d at 752.

lowing challenges was perceived to be too great. We are not persuaded."[411] The court did note a distinction in the cases—in *Tyler* and *Whitfield* the applicants had an *unlimited* opportunity to retake the bar, while in the instant case the applicants were limited to three reexaminations.[412] On rehearing en banc, the full panel did not address this issue but did affirm all aspects of the district court decision.[413]

A number of jurisdictions have relied upon nonconstitutional grounds in permitting an unsuccessful bar applicant to invoke an adversary proceeding with the right to review his exam paper.[414] For example, in *In re Peterson*[415] the Alaska Supreme Court ordered that a failing examinee be allowed to review his examination, despite the absence of such a requirement in the bar rules and the availability of reexamination. The court based its decision solely upon state law and did not reach the federal due process issue.[416]

(c) *Analysis*

Tyler, Whitfield, and *Richardson* present a somewhat confusing picture concerning the procedural due process requirements that must be afforded an applicant who fails the bar examination.

---

411. *Id.*

412. *Id.* n.20. For a discussion of the substantive due process issues presented when a state limits the number of times an applicant may retake the bar, see notes 426-40 *infra* and accompanying text. The court also considered it significant that the state voluntarily established review procedures after the initiation of this suit. 540 F.2d at 752 n.19.

413. 563 F.2d 1130, 1132 (4th Cir. 1977), *cert. denied,* 435 U.S. 968 (1978). The Fourth Circuit panel granted relief to two plaintiffs who claimed that their tests were arbitrarily and capriciously graded by the bar examiners. 540 F.2d at 750-52. The full court rejected this aspect of the panel's decision, reinstating the district court's decision in full. 563 F.2d at 1132. It should be noted that the full panel was divided concerning whether the district court had jurisdiction to hear plaintiffs' individual claims regarding the results on their particular tests. The court did not decide this issue because a clear majority felt that in any event these plaintiffs were not entitled to relief. *Id.* at 1131.

414. *See* 52 B.U. L. REV. 286, 296-97 (1972), stating that

> A survey and tabulation of the pamphlets and circulars given out by the board of bar examiners in forty-eight jurisdictions demonstrate that twenty-eight make no mention of specific review procedures for failing examinees nor do they prescribe a general proceeding that might cover review of an examination grade. Six, like Alaska, have provisions so vague that it is unclear whether review of examination grades is permitted. . . . Georgia and Missouri expressly provide that an applicant shall have no view or review of his examination paper. Pennsylvania and Tennessee expressly exclude review of the examination from the procedure provided for appealing denial of bar admission. Finally, eight states provide for review similar to that required by the *Peterson* court.

415. 459 P.2d 703 (Alaska 1969).

416. *Id.* at 709.

Tyler and *Whitfield* suggest that reexamination is enough, but the extent of these holdings is unclear because the states in question provided unlimited reexamination. In *Whitfield* the Seventh Circuit carefully noted that there was no evidence that the applicant would be denied an *opportunity* to take the exam again, even though additional education might be required after five examinations.[417] In *Tyler* the Fifth Circuit stressed that Georgia provided an "unqualified" right of reexamination, even though after three failures the applicant could take additional exams only if he submitted "evidence of having attended law school for one additional school year."[418] Both of these comments indicate that the case would be different if at some point the state imposed an absolute barrier to reexamination.

The Fourth Circuit's decision in *Richardson* strengthens the argument that absent reexamination opportunities a state must provide some form of procedural review to a failing bar applicant. On its face, the *Richardson* court's admonition that an applicant must demonstrate his competence only once in light of the work, effort, and money required to take the bar examination indicated that the basis for its decision was, unlike *Tyler* and *Whitfield,* its belief that procedural hearings would not impose upon the state an undue administrative burden. An equally viable proposition, however, is that the Fourth Circuit's concern rested upon the fact that the state had imposed an absolute barrier to reexamination. In this regard, the court distinguished *Tyler* and *Whitfield* because in those cases the applicants had "unlimited opportunity to take the bar," while in South Carolina an applicant had "only three opportunities to take the examination."[419] If this latter interpretation is correct, then the Fifth, Seventh, and Fourth Circuits seem to agree that absolute barriers to reexamination create a troublesome procedural due process issue. The state obviously has a legitimate interest in erecting some barriers to unlimited reexamination; since an applicant's repeated failures may signal incompetency, the state may decide that, at some point, absolute limitations are needed to protect the public and the judicial system. In fact, in the substan-

417. *See* note 405 *supra* and accompanying text.

418. At the time that the *Tyler* applicants took the bar, the following Supreme Court rule was in effect: "Any applicant who fails to make a grade of 70 percent on three examinations . . . shall be eligible to take additional examinations only after submitting evidence of having attended law school for one additional school year." GA. CODE ANN. § 9-122 (1973) (repealed Aug. 1, 1977).

419. Richardson v. McFadden, 540 F.2d 744, 752 n.20 (4th Cir. 1976).

tive due process context, the Tenth Circuit[420] recently upheld Colorado's limitation on reexamination as a "rational policy adopted in the exercise of the State's recognized authority to assure a competent bar."[421] On the other hand, an individual obviously has an important and legitimate interest in pursuing his chosen career.[422] Completion of law school represents a significant outlay of time, effort, and money, and the applicant's future livelihood and reputation hinge on obtaining a law license. Thus, the issue becomes what does procedural due process require if a state limits reexamination opportunities. In view of the reasoning articulated in *Tyler, Whitfield,* and *Richardson,* and upon a weighing of the interests involved, the scales tip in favor of the applicant.[423] Thus, a state choosing to limit opportunities for reexamination should be required to provide failing applicants with some form of post-examination review.[424]

Another question that arises from the relevant case law is whether a state may *qualify* or *condition* reexamination on further education without providing an examination review procedure. One commentator has suggested that such qualification absent review would violate due process.[425] The courts in *Tyler* and *Whitfield,* however, reached a contrary conclusion. In both of those cases the applicable supreme court rules contained conditions requiring further education after a specified number of failures. Nevertheless, both courts ruled that the available reexamination provisions satisfied due process. An applicant might fare better than this in the Fourth Circuit. In *Richardson* the court specifically rejected the contention that the administrative burdens of review outweighed the applicant's interest in a hearing. Of course, the court relied upon the absolute barrier to reexamination after three failures to distinguish *Tyler* and *Whitfield,* but the opinion still shows sympathy for the applicant's position. Thus, a different rule on conditions to reexamination might prevail in the Fourth Circuit.

---

420. Younger v. Colorado Stata Bd. of Law Examiners, 625 F.2d 372 (10th Cir. 1980).

421. *Id.* at 378.

422. *See* Tyler v. Vickery, 517 F.2d 1089, 1104 (5th Cir. 1975), *cert. denied,* 426 U.S. 940 (1976).

423. A similar conclusion was reached in 52 B.U. L. REV. 286, 301 (1972).

424. Review might take the form of a comparison of the applicant's answers to model answers or a meeting with the bar examiners to discuss the applicant's answers.

425. *See* 52 B.U. L. REV. 286, 302 (1972).

(d) Conclusion

When an applicant fails the bar examination, he is entitled to procedural due process protections. Most courts deciding this issue agree that if an applicant has an *unlimited* opportunity for reexamination then no hearing is required. If, however, reexamination is limited, then an applicant must be afforded some form of review. Requirements that reexamination be premised on further education have been upheld in both the Seventh and Fifth Circuits. In the Fourth Circuit, however, it is less clear that such conditions would withstand procedural due process scrutiny.

2. Substantive Due Process—Challenges to Limited Reexamination Rules

(a) Introduction

As noted earlier, states may require a demonstration of an applicant's proficiency in law through performance on a bar examination.[426] Although no state limits an applicant to one examination, a majority of the states have adopted rules that limit the number of times an applicant may take the bar examination.[427] Because a limited reexamination rule is a general rule that applies to all bar applicants, it falls into the category of a rulemaking determination.[428] Thus, to pass substantive due process review, such a classification must bear a rational relationship to fitness to practice law.[429] This section of the Special Project examines a recent Tenth Circuit decision that analyzes this substantive due process question. The section concludes that states can limit opportunities for reexamination consistent with substantive due process.

(b) The Tenth Circuit Decision

In the recent case of *Younger v. Colorado State Board of Bar Examiners*[430] Colorado's Rule 214,[431] which allows applicants to

426. *See* notes 379-80 *supra* and accompanying text.

427. Younger v. Colorado State Bd. of Bar Examiners, 625 F.2d 372, 374 (10th Cir. 1980) ("[a]t least 31 other states limit the number of times an applicant may take a bar examination . . . .").

428. *See* note 34 *supra* and accompanying text.

429. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

430. 625 F.2d 372 (10th Cir. 1980).

431. COLO. R. CIV. P. 214 provides that an applicant who fails to obtain a passing grade on the bar examination may take the succeeding examination. "If he then fails he will be reexamined only by special permission of the Court en banc and for good cause shown." *Id.*

take the bar examination three times and occasionally a fourth time, came under constitutional challenge. The plaintiff, Gleim F. Younger, failed the Colorado bar examination twice. Pursuant to Rule 214, he then petitioned the Colorado Supreme Court and obtained permission to take the test a third time. After failing the third examination, the supreme court denied Younger permission to take the test a fourth time. Plaintiff then filed suit alleging deprivations of due process and equal protection.[432] The United States District Court for the District of Colorado granted plaintiff relief,[433] ruling that the final preclusion of any opportunity for reexamination, regardless of requirements for further study, work experience, or development, violated the fourteenth amendment. Applying the rational basis test,[434] the district court concluded that the Colorado rule bore no rational relation to the state's interest in insuring the professional competence of the bar. Instead the court ruled that because the examination tests professional competence, the number of times an applicant takes the examination before passing is irrelevant.

On appeal, the Tenth Circuit reversed.[435] Although the parties agreed that the examination validly measured minimum legal competency, the court concluded that success on the test did not constitute an absolute determinant of that capacity. Instead, the court held that a state could legitimately take into account concerns generated by an applicant's repeated failures on the bar examination in assessing competence, despite the fact that an applicant might eventually pass.[436] Applying the rational basis test, the Tenth Circuit concluded that the Colorado rule "is a rational policy adopted in the exercise of the State's recognized authority to assure a competent bar."[437] The court further held that the rule did not invalidly create a conclusive and irrebuttable presumption of incompetence; instead, the court found that the rule was based upon a general classification policy.[438]

---

432. 625 F.2d at 375-76.

433. Younger v. Colorado State Bd. of Bar Examiners, 482 F. Supp. 1244 (D. Colo. 1980).

434. *Id.* at 1246 (citing Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957)).

435. Younger v. Colorado State Bd. of Bar Examiners, 625 F.2d 372 (10th Cir. 1980).

436. *Id.* at 377. The court reasoned that three failures might well he indicative of an individual's lack of competence te practice law. In support of this view, the court noted that statistics show a very low pass rate for those taking the exam a fourth time. *Id.*

437. *Id.* at 378.

438. *Id.*

(c) Analysis and Conclusion

In *Younger* plaintiff presented the court with an infringement of a nonfundamental interest. Thus, as dictated by *Schware v. Board of Bar Examiners*,[439] Colorado needed only to show that Rule 214, which limited an applicant's opportunity to retake the bar, bore a rational relationship to an applicant's capacity to practice law. Although the district court found the rule to be irrational, the Tenth Circuit had little trouble reversing this determination. The Tenth Circuit readily agreed that repeated failures could legitimately be considered in an assessment of an applicant's ultimate capacity to practice law. Given the deferential standard of review, which the court correctly utilized, this result is not surprising. In this regard, it seems unlikely that bar applicants can successfully challenge rules that limit an applicant's opportunity to take the bar.[440]

3. Equal Protection—Challenges to the Bar Examination by Minority Candidates

(a) Introduction

The equal protection clause of the fourteenth amendment mandates that no state shall deny to persons within its jurisdiction the equal protection of the laws.[441] Thus, an equal protection problem arises whenever the state employs classifications that treat similarly situated persons unequally. The appropriate degree of scrutiny required when a court reviews such a classification varies with the type of interest at stake and with the basis used to draw the classification. If the interest involved is mere economics, then the classification must only bear a rational relationship to some legitimate governmental objective.[442] Under this deferential approach, courts almost always uphold the governmental classification.[443] When the classification disadvantages persons within a

---

439. 353 U.S. 232, 239 (1957).

440. The more interesting aspect of this decision is its relationship to procedural due process. *See* notes 417-24 *supra* and accompanying text.

441. U.S. CONST. amend. XIV, § 1.

442. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

443. Gunther, *The Supreme Court 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-20 (1972). The rational basis test rests on the theory that legislaters, as elected representatives, should be given great latitude by the courts in drawing classifications that touch economic and social interests.

"suspect class"[444] or impinges on a "fundamental interest,"[445] the compelling interest test applies, and the government must show that the classification serves a compelling state interest through the least restrictive means available.[446] States rarely succeed in carrying this difficult burden; thus, such classifications consistently fall under the equal protection clause.[447] During the last decade, courts have expanded this traditional two-tiered approach to encompass a middle level of review for classifications involving important noneconomic individual interests.[448] Under this approach, the classification must bear a *substantial* relation to a legitimate state objective.[449] Thus, depending upon the interest at stake and the classification at issue, courts apply three different levels of scrutiny to review governmental actions challenged under the equal protection clause.

While classifications based upon race clearly call for the strictest judicial scrutiny under current equal protection analysis, recent bar examination cases have presented the courts with facially neutral actions that disproportionately affect minorities. In these cases, the challenged classifications are not drawn on racial lines, and they disadvantage both whites and nonwhites. These classifications, however, proportionately burden minorities significantly more than they do whites. In particular, there have been several challenges to state bar examinations that disproportionately exclude minorities from the practice of law.[450] Almost all states re-

---

444. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Korematsu v. United States, 323 U.S. 214 (1944) (race).

445. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (access to appeal in criminal cases); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

446. *See, e.g.*, Loving v. Virginia, 338 U.S. 1 (1967).

447. *See* Ginsburg, *Gender in the Supreme Court, the 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 11-12.

448. This strand of equal protection analysis has developed over the past ten years and provides heightened judicial scrutiny for important noneconomic interests that the court has not declared fundamental and for "semi-suspect" classes. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972) (invalidating a state statute that provided for the commitment of incompetent criminal defendants on terms different from all other individuals); Reed v. Reed, 404 U.S. 71 (1971) (invalidating a gender based classification); Williams v. Illinois, 399 U.S. 235 (1970) (invalidating a state statute that exposed indigents to incarceration beyond the statutory maximum to "work off" their fines). *See also* Gunther, *supra* note 443, at 17-18; Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143.

449. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (quoting Reyster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

450. *See, e.g.*, Richardson v. McFadden, 540 F.2d 744 (4th Cir. 1976), *modified en*

quire a passing score on the bar examination as a condition for practicing law;[451] consequently, states classify bar applicants by excluding from the practice of law those that fail the examinations while admitting those that pass. Since minority applicants fail the bar examinations at a strikingly higher rate than do white candidates,[452] these classifications disproportionately exclude minorities from the practice of law. The crucial issue in these challenges thus becomes what level of scrutiny the courts should apply to facially neutral classifications that disproportionately affect minorities.

This section of the Special Project first examines recent case law in which failing minority candidates have challenged various state bar examinations on equal protection grounds and concludes that these cases essentially foreclose traditional equal protection challenges by minority candidates. This section then explores a possible alternative avenue for minority candidates to challenge the bar examination.

(b) Review and Analysis of Applicable Case Law

The Fifth Circuit addressed the equal protection problem presented by disproportionately high minority failure rates on state bar examinations in *Tyler v. Vickery*.[453] In *Tyler* the court reviewed a constitutional challenge on behalf of all black persons who had failed the Georgia bar examination. The challenge followed the July 1972 test, in which all forty of the minority candidates received a failing grade.[454] Since the standard of review is crucial to the success of any equal protection challenge, plaintiffs in *Tyler* first argued that Title VII,[455] not traditional constitutional

---

banc, 563 F.2d 1130 (1977), *cert. denied*, 435 U.S. 968 (1978); Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); Pettit v. Gingerich, 427 F. Supp. 282 (D. Md. 1977).

451. *See* notes 379-80 *supra* and accompanying text.

452. There is general agreement that a significantly higher percentage of minority candidates fail the state bar examinations than do white candidates. For some instructive statistical data, see *Symposium—The Minority Candidate and the Bar Examination*, 5 BLACK L.J. 119, 123-29 (1976). *See also Bias in the Bar Exam?*, STUDENT LAW., Jan. 1980, at 14.

453. 517 F.2d 1089 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976). *Accord*, Parrish v. Board of Comm'rs of Alabama State Bar, 533 F.2d 942 (5th Cir. 1976). For a full discussion of the procedural due process issues presented in *Tyler*, see notes 395-402 *supra* and accompanying text.

454. 517 F.2d at 1092. "On the February and July, 1973, examinations, slightly more than one-half of the black applicants were unsuccessful, as compared to a failure rate of roughly one-fourth to one-third among white examinees." *Id.*

455. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to e-17 (1976). Title VII was enacted to combat sex and race discrimination in hiring and promotion for employment generally. As construed by the Supreme Court in Griggs v. Duke Power Co., 401 U.S.

standards, should apply by analogy.[456] The court found that *Geduldig v. Aiello*,[457] in which the Supreme Court declined the opportunity to equate the equal protection clause with Title VII in an analogous situation, controlled the question of the proper relationship between the two.[458] Thus, the Fifth Circuit rejected plaintiffs' contention and instead employed a traditional constitutional analysis to the equal protection claim. Plaintiffs then argued that because the disproportionately high minority failure rate constituted a classification based upon race, it should be subject to strict judicial scrutiny.[459] The court, however, rejected the use of a compelling interest test. It relied upon two Supreme Court decisions, *Jefferson v. Hackney*[460] and *James v. Valtierra*,[461] for the proposi-

---

424 (1971), Title VII precludes the use of testing procedures that disproportionately exclude protected minorities, regardless of intent or motivation, unless they are "demonstrably a reasonable measure of job performance." *Id.* at 436. Under the relevant Equal Employment Opportunity Commission (EEOC) guidelines in effect for the *Tyler* court,

> [t]he use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by Title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

29 C.F.R. § 1607.3 (1974). The present regulations are essentially the same. 29 C.F.R. § 1607.3 (1980).

456. Several of the bar examination cases have expressly held that bar examinations are not covered under Title VII. *See* Tyler v. Vickery, 517 F.2d 1089, 1096 (5th Cir. 1975), *cert. denied*, 426 U.S. 940 (1976); Delgado v. McTighe, 442 F. Supp. 725, 730 (E.D. Pa. 1977); Woodard v. Virginia Bd. of Bar Examiners, 420 F. Supp. 211, 212 (E.D. Va. 1976), *aff'd per curiam*, 598 F.2d 1345 (4th Cir. 1979); EEOC v. Supreme Court of N.M., 19 Fair Empl. Prac. Cas. 448 (D.N.M. 1977); Lewis v. Hartsock, 18 Fair Empl. Prac. Cas. 831 (S.D. Ohio 1976).

457. 417 U.S. 484 (1974). In *Geduldig* the Supreme Court dealt with the question of whether the California Unemployment Compensation Disability Fund's exclusion of disabilities associated with normal pregnancy from the fund's coverage violated the equal protection clause. Although this plan fell outside the literal scope of Title VII, the pertinent regulations promulgated by the EEOC under Title VII stated that payments under any temporary disability plan must apply to disabilities due to preguancy on the same terms and conditions as to other disabilities covered. The Supreme Court applied a rational basis test, sustained the state plan, and failed to distinguish or mention the EEOC's contrary view under Title VII. The *Tyler* court inferred from this decision that Title VII standards have no application to equal protection challenges, which instead must be decided under traditional constitutional analysis.

458. The Fifth Circuit had previously refused to apply Title VII standards to public employment testing in Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972). *Allen* provided further support for the result in *Tyler*. 517 F.2d at 1097.

459. 517 F.2d at 1099.

460. 406 U.S. 535 (1972). In *Jefferson* the Supreme Court rejected the contention that an Aid to Families with Dependent Children (AFDC) program violated the equal protection clause because Congress funded it at a lower percentage of recognized need than other cate-

tion that an otherwise legitimate classification does not become constitutionally suspect simply because greater numbers of a racial minority fall in the disadvantaged group.[462]

Plaintiffs then contended that the district court erred in failing to apply a middle tier of heightened judicial scrutiny. Although in its discussion of the appropraite level of review[463] the Fifth Circuit cited *Reed v. Reed*,[464] in which the Supreme Court utilized this intermediate approach, the court nevertheless rejected plaintiffs' contention.[465] Instead, the court applied a traditional rational basis test and readily found that Georgia had a legitimate interest in requiring its bar candidates to demonstrate minimal competence to practice law and that the Georgia bar examination bore a rational relationship to that state interest.[466]

A year later in *Washington v. Davis*[467] the Supreme Court held for the first time that absent proof of discriminatory purpose the rational basis test applies to disproportionate impact cases. In *Davis* applicants for positions as police officers challenged the validity of a qualifying test that excluded a disproportionately higher number of blacks than whites.[468] The Court held that disproportionate impact alone does not trigger strict scrutiny review under the equal protection clause; instead, proof of a racially discriminatory purpose must also be demonstrated.[469] The Court expressed

---

gories of assistance. Plaintiffs argued that AFDC recipients were a suspect class because of the higher percentage of minority recipients in the AFDC category. The Court maintained that such an approach would render suspect each difference in treatment among grant classes and would therefore trigger strict scrutiny review and jeopardize many rational welfare programs despite the total lack of racial motivation in drawing the classification. *Id.* at 548-49.

461. 402 U.S. 137 (1971). *James* concerned the constitutionality of a California constitutional provision that required approval by referendum for low income housing projects. Plaintiffs argued that the provision created a racial classification because of the high correlation between the poor and racial minorities. The Supreme Court rejected this argument, reasoning that the provision required referendum approval for all low rent housing projects, not just for projects that would be occupied by racial minorities. The Court further held that the evidence did not support an inference that the facially neutral provision served as a pretext for racial discrimination. *Id.* at 141-43.

462. 517 F.2d at 1099.

463. *Id.*

464. 404 U.S. 71 (1971).

465. 517 F.2d at 1101.

466. *Id.* at 1101-03.

467. 426 U.S. 229 (1976).

468. *Id.* at 232-36.

469. The Court stated:

> Nevertheless, we have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection

concern that the application of strict scrutiny upon the mere showing of disparate impact "would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white."[470] Furthermore, the Court reaffirmed the principle that Title VII standards do not apply to equal protection cases that challenge classifications resulting in disparate impact.[471] Consequently, the Court applied the rational basis test and sustained the police qualifying tests.[472] Thus, the *Davis* approach[473] confirmed the position taken by the Fifth Circuit in *Tyler* and guaranteed a deferential level of review for equal protection challenges to state bar examinations, absent proof of discriminatory intent.

Richardson v. McFadden[474] is illustrative of the results in these later bar examination decisions. In *Richardson* four black law school graduates who had failed the South Carolina bar exami-

---

Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Id. at 242.

Of course, if some form of purposeful discrimination in the bar examination grading process can be inferred from the evidence, then a court will undoubtedly uphold the equal protection challenge. The Court stated in *Davis* that "discriminatory purpose may often be inferred from the totality of the relevant facts," including disproportionate impact. *Id.* The Court noted that under special circumstances the disparate impact "may for all practical purposes demonstrate unconstitutionality because . . . the discrimination is very difficult to explain on nonracial grounds." *Id.* The Court has reaffirmed and explained its requirement of discriminatory purpose in subsequent disproportionate impact cases. *See* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979) (disparate impact upon women); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (disparate impact upon racial minorities).

It should be noted that the goal of this section is not to analyze the requirement of discriminatory purpose, but rather to illustrate how courts have decided cases that involve disparate minority failure rate on the bar examination and to explore alternative avenues for these challenges.

470. 426 U.S. at 248.

471. *Id.* at 238-39, 246-47. The Supreme Court left open the possibility that Title VII standards could be used in lieu of a strict scrutiny review if discriminatory purpose was proven. *Id.* at 246-47.

472. *Id.* at 249-52.

473. The Supreme Court has subsequently reaffirmed its holding in *Davis*. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). *See also* City of Memphis v. Greene, 49 U.S.L.W. 4389 (April 21, 1981).

474. 540 F.2d 744 (4th Cir. 1976), *modified en banc*, 563 F.2d 1130 (1977), *cert. denied*, 435 U.S. 968 (1978).

nation challenged the test on equal protection grounds. Plaintiffs argued that the bar examination was not job related and that the examiners had arbitrarily and capriciously applied their own standards in grading the exams of two plaintiffs.[475] Citing *Washington v. Davis*, the *Richardson* court concluded that since purposeful discrimination had not been demonstrated, a rigorous judicial review under either constitutional or Title VII standards was not appropriate.[476] Consequently, the Fourth Circuit followed the *Tyler* approach and applied the rational basis test to the examination scheme.[477] After concluding that the test design and passing score were rationally related to fitness to practice law, the court sustained the test's validity.[478] Equal protection challenges to bar examinations in other states having disproportionately high minority failure rates have been similarly resolved.[479]

(c) An Alternative Approach

The uniqueness of the state bar admission process presents a possible method for challenging the disproportionate impact of state bar examinations. Since attorneys are officers of the courts, the responsibility of admitting attorneys to the practice of law ultimately rests with the courts and not the legislature.[480] Furthermore, in a majority of states, jurisdiction over the bar admission selection process vests exclusively in the judiciary, usually the state supreme court.[481] The methods employed by states to select the

---

475. *Id.* at 746.

476. *Id.* at 746-48.

477. *Id.* at 748-50. *See* note 466 *supra* and accompanying text.

478. 540 F.2d at 749-50. The Fourth Circuit did hold that the South Carolina bar examiners acted arbitrarily and capriciously in violation of both the due process and equal protection rights of two of the failing applicants because there was no consistently applied distinction between the scores of failing applicants and passing applicants. *Id.* at 750-52. Sitting en banc, the Fourth Circuit later overruled the panel's decision on this issue. 563 F.2d 1130, 1130-32 (4th Cir. 1977).

479. *See, e.g.*, Pettit v. Gingerich, 427 F. Supp. 282 (D. Md. 1977) (challenge to Maryland bar examination); Harper v. District of Columbia Comm. on Admissions, 375 A.2d 25 (D.C. 1977) (challenge to District of Columbia bar examination); Lewis v. Hartsock, 18 Fair Empl. Prac. Cas. 831 (S.D. Ohio 1976) (challenge to Ohio bar examination).

480. *See, e.g.*, Wallace v. Wallace, 225 Ga. 102, 166 S.E.2d 718, *cert. denied*, 396 U.S. 939 (1969); Detroit Bar Ass'n v. Union Guardian Trust Co., 282 Mich. 707, 712-13, 281 N.W. 432, 433-34 (1938); *In re* Bruen, 102 Wash. 472, 476-77, 172 P. 1152, 1153 (1918); Jacobson v. Avestruz, 81 Wis. 2d 240, 245-46, 260 N.W.2d 267, 269 (1977). *See generally* Steele, *Cleaning Up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413 (1978).

481. Power to admit applicants to the bar inherently resides with the courts. Feldman v. State Bd. of Law Examiners, 438 F.2d 699 (8th Cir. 1971); Wallace v. Wallace, 225 Ga.

judges of their highest courts vary widely, but they essentially fall into one of three categories. Approximately twenty-five states use popular elections,[482] in which campaign activities are severely restricted. For instance, the Code of Judicial Conduct, adopted in virtually all the states, provides,

> A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election . . . *should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues;* or misrepresent his identity, qualifications, present position, or other fact.[483]

With such campaign restrictions on judicial candidates, the selection process clearly precludes popular political input on such issues as bar admission examinations. Furthermore, approximately fifteen states use the "Missouri plan,"[484] in which a candidate initially is appointed and after a specified term is subjected to approval or disapproval by popular vote. If disapproved, the candidate leaves office and another individual is *appointed* to take his place.[485] Candidates under this sytem are also subject to the same ethical constraints concerning campaigning as are popularly elected judges.[486] Thus, there is even less popular political input in this system. Finally, in the remaining states,[487] judges are simply appointed—a system placing them clearly outside the realm of popular political input. The rational basis standard of review rests on

---

102, 166 S.E.2d 718, *cert. denied*, 396 U.S. 939 (1969); *In re* Daniel, 153 W.Va. 839, 173 S.E.2d 153 (1970). Eleven states specifically delegate responsibility for admission to the bar to the judiciary. ARK. CONST. amend. 28; FLA. CONST. art. V, § 15; IND. CONST. art. VII, § 4; LA. CONST. art. V, § 5(B); MONT. CONST. art VII, § 2; N.J. CONST. art. VI, § 2, cl. 3; N.D. CONST. art. IV, § 87; OHIO CONST. art. IV, § 2(B); PA. CONST. art. V, § 10(e); S.C. CONST. art. V, § 4; VT. CONST. § 30. Thirty-eight states do not expressly delegate the authority for regulating admission to the bar. In some of these states, the state legislatures do pass general regulations concerning bar admission. *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.91-600.949 (1981). In the majority, however, the judiciary controls the admission process in exercise of their inherent powers. *See, e.g.*, WIS. SUP. CT. R. 40.01-40.16 (1980).

In one state, South Dakota, the state supreme court is given the power to govern bar admissions, however, the legislature is given the power to change these rules. S.D. CONST. art. V, § 12. *See* Note, *An Inevitable Clash of Power? Determining the Proper Role of the Legislature in the Administration of Justice*, 22 S.D. L. REV. 387 (1977).

482. *See* Flango & Ducat, *What Difference Does Method of Judicial Selection Make? Selection Procedures in State Courts of Last Resort*, 5 JUST. SYS. J. 25, 29 (1979); Note, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267, 342-53 (1976).

483. A.B.A. CODE OF JUDICIAL CONDUCT, Canon 7 B(1)(c).

484. *See* Flango & Ducat, *supra* note 482, at 26-29.

485. *See, e.g.*, COLO. CONST. art. 6, §§ 20, 24-26.

486. *See* text accompanying note 483 *supra*.

487. *See* Flango & Ducat, *supra* note 482, at 29.

the theory that, if a legislative classification is rationally related to a legitimate state purpose, then the courts should defer to that judgment because it reflects the wishes of the majority through their representatives.[488] In the case of the bar admission selection process, however, the safeguard of popular input is missing. Instead, this process presents a unique situation in which those affected by the classifications have little or no opportunity to change the situation through the political process. In other words, a bar applicant cannot lobby his local board of bar examiners to make sure that the bar examination, in fact, tests minimum competence. Thus, an individual's only recourse is through the adjudicative process. Because of this situation, courts reviewing such classifications in the equal protection context should apply a heightened degree of scrutiny. This "middle level" of review would require the bar examination to be *substantially* related to the state's legitimate goal of insuring that bar applicants are minimally competent to practice law.[489]

Under this heightened level of judicial scrutiny, a state should be required to demonstrate that the bar examination is a valid indicator of an applicant's fitness to practice law. This requirement takes into account the fact that failure to pass the bar after several years of law school disqualifies an applicant not only from a specific job but also from a general livelihood. Although it has been definitely resolved that Title VII standards of review do not apply to equal protection cases,[490] the test validation requirements in the Title VII area still present an analogous and instructive means for courts to utilize in determining whether a state has shown a substantial relationship between the bar examination and a finding of minimum competence. As interpreted in *Griggs v. Duke Power Co.*,[491] an employer subject to Title VII proscriptions must show, by professionally acceptable methods, that his employment test is "predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[492] Applying this method of validation to the bar examination area, a state should be required to demonstrate by professional validation studies that the bar examination tests minimum competence to practice law. This

488. *See* note 443 *supra*.
489. *See* note 448 *supra* and accompanying text.
490. *See* note 456 *supra*.
491. 401 U.S. 424 (1971).
492. *Id.* at 433 n.9.

approach, if accepted by the courts, would give new life to state bar examination challenges since it is unlikely that these tests have ever been factually correlated to minimal competence to practice law.[493]

The use of an intermediate level of review in bar examination cases would represent only a narrow exception to the use of a rational basis standard and would not be applicable to areas in which the safeguard of popular input into the legislative process is present. Thus, this analytical approach overcomes the problem that the Court foresaw in *Washington v. Davis*[494] concerning the application of strict scrutiny review to disproportionate impact challenges generally. Furthermore, although all challenges to the bar examination would receive heightened scrutiny, minority candidates would benefit to a greater degree because of the disproportionately high failure rate of minorities. Given the long-standing exclusion of minorities from the legal profession as with other areas of employment, the use of an intermediate level of review would demonstrate greater sensitivity to the frustrations of minority bar applicants by requiring proof that bar examinations test minimal competence to practice law.

(d) Conclusion

The disproportionately high failure rate of minority candidates on the bar examination has been the subject of several equal protection challenges. In all of these cases, however, courts have applied a traditional rational basis standard of review and have upheld application of the bar examination. Thus, relevant case law clearly discourages such challenges. Nevertheless, the failing bar examinee might still be able to mount a successful equal protection challenge against his state's bar examination. Because the bar admission process does not comport with the political reality underlying the rational basis test, it can be argued that equal protection challenges to bar examinations should receive heightened judicial scrutiny. Under such increased scrutiny, states should be required to demonstrate by professional validation studies that the bar examination tests minimal competence to practice law.

---

493. Both the *Tyler* and *Richardson* courts noted that the bar examinations at issue could not withstand a Title VII analysis since they had not been professionally validated. 517 F.2d at 1096; 540 F.2d at 746-47.

494. *See* note 470 *supra* and accompanying text.

C. Residency Requirements

A majority of the states maintain some type of residency requirements for applicants that seek admission to the bar.[495] The forms of residency mandated by states vary, but they generally fall into one of three categories: durational, simple, and continuing. Durational residency requires an applicant to reside in the state for a fixed period of time prior to a specified event, such as the administration of the bar examination.[496] Simple residency requires an applicant to reside in the state at the time of an event, such as admission.[497] Finally, continuing residency requires that an applicant declare his intent to reside in the state after admission to the bar.[498]

Attorneys are increasingly engaged in interstate practice and in interstate movement. With this increased interstate mobility, residency requirements have been challenged in a number of cases.[499] This section of the Special Project examines three types of constitutional challenges to bar admission residency requirements. First, the section analyzes equal protection challenges that have been advanced based on the applicant's right to travel. Next the section explores a more theoretical challenge based on the commerce clause. Finally, the section analyzes perhaps the newest basis for challenging residency requirements, the privileges and immunities clause of Article IV.

---

495. Thirty-nine states presently maintain residency requirements for admission to the bar. National Bar Examination Digest, Harcourt Brace Jovanovich Legal and Professional Publications, Inc. (1980).

496. The time periods vary from ten days to six months prior to either the date of application deadline, examination, or admission. *Id.*

497. Approximately twenty states have some form of simple residency requirements. These involve establishing residency in a state at the time of application, examination, or admission, or within a certain period before or after admission. Several states require only some indication of intent to establish residency rather than actual residency by a specified date. *Id.*

498. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.934 (1981) (an applicant must intend "in good faith to practice or teach law in this state"); MONT. CODE ANN. § 37-61-202 (1979) (an applicant must be a resident who has declared his or her bona fide intent to become a citizen).

499. *See, e.g.*, Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980) (challenging Alaska's requirement that an applicant reside in state at least 30 days prior to the bar examination); Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979) (challenging New York's requirement that an applicant reside in state for six months prior to admission); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) (challenging North Carolina's requirement that an applicant reside in state for one year prior to the bar examination).

1. Equal Protection—The Right to Travel

(a) Introduction

As stated above,[500] the equal protection clause provides that no state shall deny persons within its jurisdiction the equal protection of the laws.[501] Courts reviewing classifications challenged under the equal protection clause apply one of three standards of review. If the classification involves mere economics, then the state must show that the classification bears a rational relation to a legitimate state interest.[502] When the classification involves a suspect class[503] or fundamental interest,[504] the state must show that the classification serves a compelling interest through the least restrictive means available.[505] Finally, if the classification involves a significant noneconomic interest, then the state must show that the classification bears a substantial relationship to an important state interest.[506]

Bar admission residency requirements have many different time periods, which in some cases present a significant obstacle for nonresidents to overcome.[507] In the last decade, dissatisfaction with these residency requirements has resulted in numerous equal protection challenges.[508] While the challenges to durational residency requirements of one year or more have been consistently successful,[509] the courts have generally upheld simple residency requirements and durational requirements of less than one year.[510]

---

500. For a more complete discussion of current equal protection analysis, see notes 411-49 *supra* and accompanying test.

501. U.S. CONST. amend. XIV, § 1.

502. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

503. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Korematsu v. United States, 323 U.S. 214 (1944) (race).

504. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting).

505. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

506. *See, e.g.*, Reed v. Reed, 404 U.S. 71 (1971). *See also* note 448 *supra* and accompanying text.

507. *See* note 495 *supra*.

508. *See* notes 544, 555, 556, 563, & 564 *infra* and accompanying text.

509. *See* notes 544-55 *infra* and accompanying text.

510. *See* notes 556-65 *infra* and accompanying text. In one case, however, a six month residency requirement that could be satisfied at any time after reaching the age of fifteen was invalidated as being arbitrary and capricious under a rational basis analysis. *See* Potts v. Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971). Since the residency requirement could be fulfilled at anytime after attaining the age of fifteen, the justification successfully argued by other states, that the bar examiners need a reasonable period in which to investigate and certify moral character, was inappropriate. *Id.* at 1398. Consequently, the court correctly invalidated this requirement as having no relationship to fitness to practice law. *Id.*

The purpose of this section is to discuss briefly the rationale behind these decisions and to analyze the present status of state bar residency requirements under the equal protection clause.

(b) The Right to Travel as a Fundamental Interest

(1) Foundation Cases

In *Shapiro v. Thompson*[511] the Supreme Court caused considerable uncertainty over the proper standard of review to be utilized in equal protection challenges to state residency requirements by invalidating various statutory schemes that conditioned eligibility for welfare benefits upon one year's residency in the jurisdiction.[512] The Court held that any classification that penalized an individual's right to travel by discriminating between residents solely on the basis of the length of residency would trigger the compelling interest test.[513] Although this holding appeared broad on its face, the *Shapiro* Court went on to limit its decision by stating that it expressed "no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth."[514] Furthermore, the Court intimated that some residency requirements "may not be penalties upon the exercise of the constitutional right of interstate travel."[515]

Subsequent to *Shapiro,* the Court has attempted to delineate the scope of the right to travel in several decisions. For example, in *Dunn v. Blumstein*[516] the Court struck down Tennessee's one year residency requirement for voting eligibility,[517] relying in part upon the *Shapiro* right to travel analysis.[518] The Court held that Tennessee's durational residency requirement "directly impinge[d] on

---

511. 394 U.S. 618 (1969).

512. *Id.* at 642.

513. *Id.* at 634. Justice Brennan, writing for the majority, stated that

> [t]he waiting-period provision denies welfare benefits to otherwise eligible applicants solely because they have recently moved into the jurisdiction. But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

Id. at 634 (emphasis in original).

514. *Id.* at 638 n.21 (emphasis in original).

515. *Id.*

516. 405 U.S. 330 (1972).

517. *Id.* at 353-54, 360.

518. *Id.* at 338-42.

the exercise of a second fundamental personal right, the right to travel."[519] Consequently, the Court subjected the residency requirement to the compelling interest test[520] and concluded that Tennessee did not offer an adequate justification for the durational residence law. Thus, the Court declared the law to be unconstitutional.[521]

Similarly, in *Memorial Hospital v. Maricopa County*[522] the Supreme Court further extended the *Shapiro* rationale to medical benefits.[523] In *Maricopa County* an Arizona statute denied free medical assistance to indigent residents who had not resided in the county for twelve months.[524] Finding that the residency requirement penalized an individual's fundamental right to travel, the Court followed *Shapiro* in applying strict scrutiny and invalidated the statute.[525] Despite its holding, the Court again cautioned that some residency requirements may not be penalties and cited its affirmance of durational residency requirements for in-state tuition benefits.[526] In fact, the Court has summarily affirmed several types[527] of residency requirements since *Maricopa County*, including a residency requirement for bar admission.[528]

One year after *Maricopa County*, in *Sosna v. Iowa*,[529] the Supreme Court indicated that not all durational residency requirements were subject to strict scrutiny under equal protection analysis. In *Sosna* an Iowa court had denied a bona fide resident the right to file for a divorce because she failed to meet the state's one

519. *Id.* at 338.

520. *Id.* at 342.

521. *Id.* at 360.

522. 415 U.S. 250 (1974).

523. *Id.* at 254-62.

524. *Id.* at 252.

525. *Id.* at 269-70.

526. *Id.* at 258-59. The Court upheld a durational residency requirement for tuition benefits in Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g mem.*, 326 F. Supp. 234 (D. Minn. 1970).

527. Sununu v. Stark, 420 U.S. 958 (1975), *aff'g mem.*, 383 F. Supp. 1287 (D.N.H. 1974) (candidacy for political office); Kanapaux v. Ellisor, 419 U.S. 891, *aff'g mem.*, Civil No. 74-1356 (D.S.C. Nov. 3, 1974) (candidacy for political office); Sturgis v. Washington, 414 U.S. 1057-58, *aff'g mem.*, 368 F. Supp. 38 (W.D. Wash. 1973) (tuition); Chimento v. Stark, 414 U.S. 802, *aff'g mem.*, 353 F. Supp. 1211 (D.N.H. 1973) (candidacy for political office); Starns v. Malkerson, 401 U.S. 985 (1971), *aff'g mem.*, 326 F. Supp. 234 (D. Minn. 1970) (tuition).

528. Rose v. Bondurant, 409 U.S. 1020, *aff'g mem. sub nom.* Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972). *See* notes 556-64 *infra* and accompanying text.

529. 419 U.S. 393 (1975).

year durational residency requirement.[530] Appellant argued that the residency requirement violated equal protection because it penalized her recently exercised fundamental right to travel.[531] The Court rejected this claim, distinguishing *Shapiro, Dunn,* and *Maricopa County* from the instant case.[532] The Court maintained that *Sosna* required a different result from the *Shapiro* line of cases because of Iowa's special interest in "avoiding officious intermeddling in matters in which another State has a paramount interest, and in minimizing the susceptibility of its own divorce decrees to collateral attack."[533] According to the Court, these state interests, in comparison with the budgetary and administrative convenience considerations argued unsuccessfully in *Shapiro, Dunn,* and *Maricopa County,* required "a different resolution of the constitutional issue presented . . . ."[534]

(2) Analysis

On its face, the holding in *Shapiro* would seem to dictate the application of strict scrutiny to bar admission residency requirements.[535] The Court, however, did not clearly delineate the scope of its decision because it expressly refused to comment on the validity of state residency requirements in connection with obtaining a professional license. Although the Court reiterated the fundamental nature of the right to travel in *Dunn,* that decision did little to clarify whether bar admission residency requirements would trigger strict scrutiny. *Dunn* involved not only the right to travel but also the right to vote, which had also been declared fundamental.[536] While reconciling these Supreme Court right to travel decisions poses a difficult task, it seems reasonably clear that residency requirements for bar admission do not penalize the right to travel

530. *Id.* at 395.

531. *Id.* at 405.

532. *Id.* at 406-09.

533. *Id.* at 407.

534. *Id.* at 409. The Court further distinguished *Sosna* on the grounds that the *Shapiro* line of cases involved persons being irretrievably foreclosed from obtaining some part of what they sought whereas the Iowa divorce requirement merely delayed a person from ultimately obtaining the same opportunity. *Id.* at 406.

535. In *Shapiro* the Court declared the right to travel to be a fundamental interest triggering strict scrutiny. Since bar admission residency requirements penalize a migrant's right to travel just as much as the welfare rule in *Shapiro,* the literal holding of *Shapiro* compels strict scrutiny in bar admission cases. *See* note 513 *supra.*

536. *See* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

in such a way as to invoke strict scrutiny.[537] The limiting language in *Shapiro*[538] and *Maricopa County*,[539] the summary affirmances of various state durational residency requirements[540] including bar admission,[541] *Sosna's* refusal to extend *Shapiro* to a divorce context,[542] and the recognized strong state interest in regulating admission to the bar[543] all compel the conclusion that state bar residency requirements need only be rationally related to a legitimate state interest in order to withstand equal protection challenge. With the evolution of Supreme Court treatment of residency requirements as a backdrop, the various lower courts' treatment of specific challenges to bar admission residency requirements can now be considered.

(c) The Bar Admission Cases

In *Keenan v. Board of Law Examiners*[544] the District Court for North Carolina invalidated that state's durational residency requirements for admission to the state bar. Plaintiffs in *Keenan* challenged the requirement that an applicant must reside in North Carolina for a period of at least twelve months prior to the date of the bar examination.[545] Since the bar examiners administered the test only once a year, the requirement effectively forced an applicant to wait from twelve to twenty-four months after establishing residency before taking the examination.[546] The *Keenan* court maintained that, while a state can require high standards of qualification in licensing attorneys, such qualifications must bear a rational connection to the applicant's fitness or capacity to practice law.[547] The court found that North Carolina's one year residency

537. *See* note 513 *supra*.

538. *See* notes 514-15 *supra* and accompanying text.

539. *See* note 526 *supra* and accompanying text.

540. *See* note 527 *supra* and accompanying text.

541. *See* note 528 *supra* and accompanying text.

542. *See* notes 532-34 *supra* and accompanying text.

543. *See, e.g.*, Baird v. State Bar, 401 U.S. 1, 7 (1971) ("[o]f course Arizona has a legitimate interest in determining whether petitioner has the qualities of character and the professional competence requisite to the practice of law"); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) ("[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar . . . .").

544. 317 F. Supp. 1350 (E.D.N.C. 1970).

545. *Id.* at 1352.

546. *Id.*

547. *Id.* at 1359. The *Keenan* court relied on language from Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

requirement had no rational connection with the state's interest in admitting only morally and professionally fit applicants.[548] The state contended that out-of-state investigations of an applicant's background would be unduly expensive and burdensome, but the court stated that administrative inconvenience did not justify an arbitrary classification.[549] Although the court conceded that a reasonable residency requirement might withstand constitutional scrutiny, it refused to express a definite opinion on such a requirement.[550] After invalidating the North Carolina law under a rational relationship analysis, the *Keenan* court also applied a more stringent review based on *Shapiro's* right to travel approach[551] and easily found that the requirement failed this stiffer test.[552] No other court has applied *Shapiro's* rigorous review in a bar admission residency challenge,[553] and *Keenan's* partial reliance on *Shapiro* now appears misplaced given the post-*Shapiro* and *Keenan* developments discussed above.[554] Several courts, however, have followed the *Keenan* rationale in voiding one year residency requirements because they are not rationally related to fitness to practice law.[555]

Under equal protection analysis, courts generally have upheld both durational residency requirements of six months or less and simple residency requirements as rational means of serving the legitimate state interest in licensing attorneys. For example, in *Suf-*

---

548. 317 F. Supp. at 1359-60. The Board argued that its residency requirement would provide the applicant with knowledge of state government and its customs, allow an applicant to develop a permanent stake in the community, and give the community an opportunity to observe the applicant's moral character. The court summarily rejected the first two reasons as bearing no relation to minimum competence. The court agreed that investigating moral character was a proper state concern, but found that a one year residency requirement was irrationally suited for that purpose. *Id.*

549. *Id.*

550. *Id.* at 1362 n.17.

551. *See* notes 511-13 *supra* and accompanying text.

552. 317 F. Supp. at 1361-62. Obviously, any rule that fails under a rational relationship review would clearly fail under the compelling interest analysis of *Shapiro.*

553. In fact, courts that have specifically addressed *Shapiro* in bar admission cases have rejected that approach. *See* Kline v. Rankin, 352 F. Supp. 292, 294-95 (N.D. Miss. 1972); Suffling v. Bondurant, 339 F. Supp. 257, 259 (D.N.M.), *aff'd mem. sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972); Lipman v. Van Zant, 329 F. Supp. 391, 403-04 (N.D. Miss. 1971).

554. *See* notes 538-43 *supra* and accompanying text.

555. Smith v. Davis, 350 F. Supp. 1225 (S.D. W. Va. 1972) (one year residency requirement for admission); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (one year residency requirement before application for admission); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970) (one year residency requirement for admission). Similarly, one court invalidated as irrational a six month residency requirement that could be satisfied anytime after attaining age fifteen. Potts v. Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971).

fling v. Bondurant[556] a federal district court sustained a New Mexico Supreme Court rule that required six months residency before admission to the bar.[557] In *Suffling* the six month period could begin as late as the day of the bar examination, although regulations required that the bar examiners had to make a finding of good moral character prior to the examination.[558] The court expressly rejected the strict scrutiny approach, noting that the *Shapiro* Court left open the possibility of exceptions to its decision.[559] It concluded that the six month requirement provided a reasonable period for the bar examiners to investigate and to certify the good character of bar applicants.[560] Despite the dissent's persuasive argument that this particular requirement was in fact arbitrary since good moral character had to be certified prior to the examination, whereas residency could commence on the day of examination,[561] the Supreme Court affirmed the decision per curiam.[562]

In sustaining similar durational residency requirements, other courts have also emphasized the state's interest in assuring good moral character.[563] Furthermore, in approving simple residency requirements, courts have accepted the state's contention that such regulations protect its citizens from misconduct by itinerant or nonresident practitioners.[564] Thus, while courts have invalidated

---

556. 339 F. Supp. 257 (D.N.M.), *aff'd mem. sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972).

557. 339 F. Supp. at 260.

558. *Id.* at 259. The court dismissed this apparent inconsistency by stating that the regulations were ignored in those cases in which time did not permit the finding of good moral character until after the examination. *Id.*

559. *Id.* at 258-60. *See also* note 553 *supra* and accompanying text.

560. 339 F. Supp. at 260.

561. *Id.* at 261-62.

562. Rose v. Bondurant, 409 U.S. 1020, *aff'g mem. sub nom.* Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972).

563. Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978) (required to be domiciliary twenty days prior to examination), *dismissed as moot*, 614 F.2d 943 (4th Cir. 1980); Tang v. Appellate Div., 373 F. Supp. 800 (S.D.N.Y.) (requiring six month residency prior to application for admission and continuous residency until final disposition of application), *aff'd on other grounds*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Kline v. Rankin, 352 F. Supp. 292 (N.D. Miss. 1972) (requiring residency ninety days prior to examination), *vacated and remanded for convention of three judge court*, 489 F.2d 387 (5th Cir. 1974) (no reported subsequent history); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (requiring residency ninety days prior to the examination); *In re* Gordon, 67 A.D.2d 215, 414 N.Y.S.2d 692 (1979) (requiring six months residency prior to application for admission), *rev'd on other grounds*, 48 N.Y.2d 266, 422 N.Y.S.2d 641 (1979). *See also* Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970) (approving reasonable durational residency requirements in dicta).

564. *See* Aronson v. Ambrose, 479 F.2d 75, 77-78 (3d Cir.), *cert. denied*, 414 U.S. 1162 (1973) (requiring statement in application of intention to reside in Virgin Islands if admit-

some residency requirements for being arbitrarily long,[565] both simple residency requirements and durational requirements of up to six months have met judicial approval under the rational basis test.

(d) Conclusion

Presently, no state bar residency requirements exceed the six month borderline established by court decisions;[566] there are, however, numerous state residency requirements within the six month benchmark.[567] Since reasonable residency requirements clearly have a rational connection[568] with the state's interest in insuring a competent bar, these remaining residency requirements should withstand an equal protection challenge under traditional rational basis analysis. In all probability, the only chance for these requirements to be invalidated on equal protection grounds would be an application of strict scrutiny under a *Shapiro* right to travel approach. This, however, appears to be unlikely.[569] As others have correctly pointed out,[570] the right to travel is touched by so many types of state action that a literal application of *Shapiro* is untenable.[571] Consequently, the existing residency requirements for bar

---

ted); Tang v. Appellate Div., 373 F. Supp. 800, 801 (S.D.N.Y. 1972) (requiring actual residency at admission), *aff'd on other grounds*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Lipman v. Van Zant, 329 F. Supp. 391, 403 (N.D. Miss. 1971) (requiring residency at time application submitted, which in effect required residency at least ninety days prior to the examination). Simple residency was approved in dicta in Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977).

565. *See* notes 544-55 *supra* and accompanying text.

566. National Bar Examination Digest, Harcourt Brace Jovanovich Legal and Professional Publications, Inc. (1980).

567. *Id.*

568. Reasonable durational residency requirements may not be the most effective or least restrictive means of assuring a morally and professionally qualified bar, but under the deferential standard of review ordinarily given to such governmental action, these requirements clearly bear a rational relation to this legitimate state concern. *See* notes 527-28 *supra* and accompanying text.

569. *See* notes 538-43 *supra* and accompanying text.

570. Chief Justice Warren, in his dissent in *Shapiro*, made the following comment:

> The Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which States have imposed residency requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university. Although the Court takes pains to avoid acknowledging the ramifications of its decision, its implications cannot be ignored.

394 U.S. at 655.

571. The Court's refusal to extend *Shapiro* to other types of residency requirements demonstrates the unwillingness of courts to accept the undesirable results that a strict application of *Shapiro* would produce.

admission should be permissible under a rational basis analysis.[572]

2. The Commerce Clause

(a) Introduction

A prominent criticism of the Articles of Confederation was the lack of a provision guaranteeing free trade between citizens of the several states.[573] Each state, with its differing agricultural and industrial production, is now vitally dependent upon its sister states for its economic survival. The nation is one economic unit, and state borders ought to play an insignificant role in the functioning of that unit. With this obvious interdependence and the related dangers of economic protectionism and discriminatory state legislation[574] in view, the framers of the Constitution drafted the commerce clause[575] to provide the national government with the means to safeguard "the free flow of interstate commerce and its freedom from local restraints."[576]

The courts have developed two lines of commerce clause cases in their efforts to protect these interdependent states and their citizenry by ensuring a national market for goods and services. One

---

572. Other avenues of constitutional challenge, however, remain open. *See* Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979), *rev'g*, 67 A.D.2d 215, 414 N.Y.S.2d 692. Gordon involved a challenge to New York's requirement of six months' residency prior to application for the bar. The lower court found that the requirement was rationally related to a legitimate state interest and rejected the equal protection challenge. On appeal, the requirement was stricken under the more rigorous review of the privileges and immunities clause. For a discussion of this privileges and immunities challenge, see Part II, Section C, subsection 3, *infra* and accompanying text. For a discussion of commerce clause challenges to bar residency requirements, see Part II, Section C, subsection 2 *infra* and accompanying text.

573. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: THE POWERS OF GOVERNMENT 7-8, 178 (1963); C. WARREN, THE MAKING OF THE CONSTITUTION 567-86 (1937).

574. *See* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949). *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938).

575. U.S. CONST. art. I, § 8 provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ."

576. Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945). The Supreme Court first interpreted and defined the national commerce power in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824), in which Chief Justice John Marshall used his strong federalist ideals to support a broad definition of congressional commerce authority. *See* notes 580-81 *infra* and accompanying text. One scholar stated that "Marshall's use of the commerce clause [in *Gibbons*] greatly furthered the idea that though we are a federation of states we are also a nation, and gave momentum to the doctrine that state authority must be subject to such limitations as the Court finds it necessary to apply for the protection of the national community." F. FRANKFURTER, THE COMMERCE CLAUSE 18-19 (1937).

line has focused upon the limits on the affirmative grant of congressional power to define and regulate interstate commerce.[577] Another group of commerce clause cases concentrates on the negative implications of the clause by determining the validity, in the absence of congressional regulation, of state regulations that impact on interstate commerce.[578] The United States Supreme Court has never focused upon the commerce clause in its resolution of cases challenging state bar admission requirements. Recent cases in the antitrust area, however, indicate that Congress possesses the authority to regulate some aspects of the practice of law, and the evolving nature of the interstate practice of law suggests that the area merits closer commerce clause examination. This section of the Special Project examines congressional authority to regulate admission to the state bars, pursuant to the commerce clause's affirmative grant of power. Recognizing that Congress has not exercised that regulatory power, this section of the Special Project also discusses the validity of state residency requirements in light of the dormant side of the commerce clause.

(b) Congressional Authority to Regulate Bar Admission Requirements

(1) Legal Background

The commerce clause affirmatively grants Congress the power to regulate commerce between the states.[579] Chief Justice Marshall outlined the broad scope of the congressional commerce power in *Gibbons v. Ogden*:[580]

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.[581]

The validity of congressional action, however, is limited by constitutional restraints upon congressional regulation of *interstate* commerce. The Supreme Court has established that "interstate com-

---

577. *See* notes 579-97 *infra* and accompanying text.

578. *See* notes 632-50 *infra* and accompanying text.

579. U.S. CONST. art. I, § 8.

580. 22 U.S. (9 Wheat.) 1 (1824).

581. *Id.* at 196 (dictum). Although dictum, the Chief Justice's standards have survived as concrete foundations for the modern commerce clause power. Justice Clark, writing for the Court in Katzenbach v. McClung, 379 U.S. 294, 302 (1964), stated that "[t]his rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago."

merce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."[582] Accordingly, the Court has approved of congressional regulation of navigable rivers that are accessible from other states,[583] bridges that span navigable waters between two states,[584] coastal traffic between two states,[585] actual shipment of goods from one state to another,[586] interstate shipment of noxious or harmful items,[587] and related instrumentalities of interstate commerce.[588] Furthermore, the mere buying and selling of goods may be a part of the stream of interstate commerce, if the goods have been transported into or out of another state.[589]

Under the modern interpretation of the commerce clause, Congress may regulate not only those activities that are actually *in* interstate commerce, but also those activities that substantially *affect* interstate commerce.[590] Justice Stone, writing for the Court in *United States v. Darby*,[591] declared that "[t]he power of Congress

582. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 (1899).

583. *See* United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) (regulation approved to maintain rivers free from obstructions to interstate navigation); United States v. Bellingham Bay Boom Co., 176 U.S. 211 (1900).

584. *See* Luxton v. North River Bridge Co., 153 U.S. 525, 532 (1894) ("to meet the demands of interstate commerce by land"); The Clinton Bridge, 77 U.S. (10 Wall.) 454 (1870).

585. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (federal license to engage in coast-trade between New York and New Jersey held valid).

586. *See* Louisville & N. R.R. v. Mottley, 219 U.S. 467 (1911) (federal act prohibiting issuance of railroad passes found valid); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (railroad company engaged in interstate transportation of goods); Cincinnati, N.O. & Tex. Pac. Ry. v. ICC, 162 U.S. 184 (1896) (regulation of shipment rates imposed by railway carrier on goods between Cincinnati, Ohio and Georgia).

587. *See* Brooks v. United States, 267 U.S. 432 (1925) (federal act prohibiting interstate transportation of stolen automobiles held valid); Hipolite Egg Co. v. United States, 220 U.S. 45 (1911) (prohibition of interstate shipment of adulterated foods); Champion v. Ames (Lottery Case), 188 U.S. 321 (1903) (prohibition of interstate shipment of lottery tickets).

588. *See* ICC v. Illinois Cent. R.R., 215 U.S. 452 (1910) (coal cars used for company coal are instruments of commerce and thus subject to congressional power).

589. *See* Stafford v. Wallace, 258 U.S. 495 (1922) (buying and selling are only steps between transportation of live stock in and transportation out as meat and are a sufficient part of the stream of interstato commerce to authorize congressional regulation).

590. *See* Perez v. United States, 402 U.S. 146, 150 (1971). "The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce." McLain v. Real Estate Bd., Inc., 444 U.S. 232, 241 (1980) (application of the Sherman Act to real estate brokerage activities) (emphasis in original).

591. 312 U.S. 100 (1941).

over interstate commerce . . . extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power . . . ."[592] Thus, if an activity "affects" commerce, then it comes within the ambit of congressional power. The Court will also focus on the *aggregate* effects upon commerce of all similarly situated activities, rather than on the effects of a single isolated activity.[593] Furthermore, in *Heart of Atlanta Motel, Inc. v. United*

---

592. *Id.* at 118. The *Darby* Court attempted to answer two issues:

> *[F]irst,* whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, *second,* whether it has power to prohibit the employment of workmen in the production of goods "for interstate commerce" at other than prescribed wages and hours.

Id. at 108. Justice Stone left no doubt that Congress possessed the power under the Fair Labor Standards Act of 1938 to prohibit the interstate shipment of such lumber when he concluded that "[w]hatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Id.* at 115. That manufacturing or production por se was not interstate commerce complicated Justice Stene's treatment of the second issue. Conceding that the congressional attempt to regulata production employment was an attempt to regulate a wholly intrastate activity, Justice Stone concluded that the Act was a reasonable means by which Congress could exclude from interstate commerce all goods not conforming to specified labor standards. *Id.* at 123. "The means adopted by [Congress] for the protection of interstate commerce by the suppression of the production of the condemned goods for interstate commerce is so related to the commerce and so affects it as to be within the reach of the commerce power." *Id.*

593. In Wickard v. Filburn, 317 U.S. 111 (1942), the Court held that under the commerce clause Congress could reach any individual activity that, when combined with other similar activities, created a "substantial economic effect on interstate commerce." *Id.* at 125. The *Wickard* Court considered the question of congressional power under the Agricultural Adjustment Act of 1938 to regulata the production and price of wheat via acreage quotas and penalties. In ruling that the Act, as applied "to production not intended in any part for commerce but wholly for consumption on the farm," constituted a valid exercise of power, *id.* at 118, the Court rejected earlier characterizations of manufacturing and held that actual effects upon commerce were determinative. The Court stated that "questions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." *Id.* at 120. The Court's examination of the wheat industry revealed that a substantial portion of the nation's average annual wheat crop remained on the farms on which it was grown. Because this home-grown wheat competed with wheat sold in commerce, changes in home consumption influenced substantially the price and the market conditions of wheat. Defendant's home consumption itself was inconsequential. Defendant's demand "contribution, taken together with that of many others similarly situated," *id.* at 128, however, was sufficient to exert substantial pressure on the wheat market. Since "[o]ne of the primary purposes of the Act . . . was to increase the market price of wheat," *id.*, regulation of home-grown wheat was appropriate to secure that intended price.

States[594] Justice Clark placed the judgment of congressional motives beyond the competence of the Court[595] when he affirmed the validity of the Civil Rights Act of 1964[596] as applied to local racially discriminatory activities. Whether congressional authority to regulate an activity can withstand a commerce clause challenge now depends largely upon the existence of a rational basis for a congressional determination that the activity sought to be regulated affects interstate commerce.[597]

(2) Practice of Law as Commerce

Until recently, the majority of courts held that, because the practice of law involved no personal effort that "related to production"[598] of commodities, the provision of legal as well as other professional services was not a subject of commerce.[599] Thus, the courts excluded the provision of such services from those activities properly regulated by Congress. Although the Supreme Court expanded the meaning of "trade or commerce" to encompass the sale of personal services,[600] the practice of law, apparently because of

---

594. 379 U.S. 241 (1964).

595. *See* notes 587, 591 *supra.*

596. Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 18, 42 U.S.C.). In Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), the government sought to prohibit a motel's refusal to accept blacks as guests. The motel admittedly engaged in interstate commerce by soliciting and accepting patronage from out-of-state visitors. *Id.* at 243.

597. The *Heart of Atlanta* Court limited its examination by stating that "[t]he only questions are: (1) whether Congress had a *rational basis* for finding that [the local activity] affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate." *Id.* at 258-59 (emphasis added). The Court searched the legislative history of the Act and found that Congress determined that racially discriminatory treatment of guests by motels affected the interstate movement of people. The Court found this determination rational and therefore upheld the validity of the congressional regulation. *See also* Katzenbach v. McClung, 379 U.S. 294 (1964).

598. Federal Baseball Club v. National League of Professional Baseball Clubs, 259 U.S. 200, 209 (1922). In *National League* plaintiff alleged a conspiracy to monopolize the professional baseball business in violation of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1-7 (1976). Holding that the Court lacked jurisdiction because the baseball business did not affect interstate commerce, Justice Holmes commented that "the exhibition [of baseball], although made for money would not be called trade or commerce in the commonly accepted use of those words." *Id.* at 209. According to Justice Holmes, the sale of personal services was simply not commercial in nature, and he illustrated his view by concluding that "a firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another State." *Id.*

599. *See* Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. 512, 84 L.R.R.M. 1321 (1973).

600. *See* United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950) (business of a real estate broker involving sale of personal services is "trade" within the

its noncommercial nature, fell within the "learned professions" exception to Sherman Act[601] antitrust regulation. The Supreme Court refused to settle the issue of the commercial nature of the practice of law[602] until it applied the Sherman Act to a state bar association in 1975. In *Goldfarb v. Virginia State Bar*[603] a husband and wife contracted to purchase residential property in Fairfax County, Virginia, and the lender, who financed the purchase, required the couple to obtain title insurance. Only a member of the defendant Virginia State Bar could legally perform the requisite title examination. After attempting unsuccessfully to find an attorney who would provide a title examination for a fee less than that prescribed by defendant's minimum fee schedule, the couple brought suit against the Virginia State Bar alleging a per se price-fixing violation of section one of the Sherman Act.[604] The Bar Association argued that the noncommercial practice of law, as a "learned profession," was not trade or commerce and was therefore outside the scope of the Sherman Act.[605] The Supreme Court unanimously rejected this argument and concluded that "[w]hatever else it may be . . . the exchange of such a [legal] service for money is 'commerce' in the most common usage of that word."[606] Two years later in *Bates v. State Bar*[607] the Court again

---

meaning of the Sherman Act).

601. 15 U.S.C. §§ 1-7 (1976). The Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *Id.* at § 1. The "learned professions" exception to the application of the Sherman Act apparently originated in dictum in FTC v. Raladam Co., 283 U.S. 643 (1931). Writing for the majority, Justice Sutherland stated that "medical practitioners . . . follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them." *Id.* at 653. More recently, the District of Columbia Circuit recognized a "learned profession" exemption when it commented that "the proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the non-commercial aspects of the liberal arts and the learned professions." Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools, Inc., 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970) (holding that a voluntary, nonprofit educational corporation that denied accreditation to a junior college could not be enjoined from denying the accreditation under the group boycott proscriptions of the Sherman Act).

602. Justice Douglas, writing for the majority in United States v. National Ass'n of Real Estate Bds., 339 U.S. 485 (1950), concluded, "we do not intimate an opinion on the correctness of the application of the term [trade or commerce] to the professions." *Id.* at 491-92.

603. 421 U.S. 773 (1975).

604. *Id.* at 778.

605. *Id.* at 786. The Bar Association argued that the "learned profession" exception implies that noncommercial activity cannot restrain interstate commerce and thus lies outside the purview of the commerce power of Congress. *Id.*

606. *Id.* at 787-88.

607. 433 U.S. 350 (1977).

supported a commercial characterization of the practice of law and concluded that "the belief that lawyers are somehow 'above' trade has become an anachronism."[608]

Although *Goldfarb* and *Bates* provide support for the characterization of the practice of law as commerce in general,[609] neither opinion supports the view that the practice of law is interstate commerce.[610] In *Goldfarb,* the Bar Association argued that its activities were neither in interstate commerce nor affecting interstate commerce.[611] The Court narrowly restricted its holding to the particular legal services at issue, title examinations, and stated,

> Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes. Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.[612]

Clearly, some local activities of the legal profession are free from congressional regulation under the commerce power, at least in the minds of the *Goldfarb* majority.[613] This Special Project, however, limits its analysis to *admission* to the bar rather than to the broad, general practice of law.

(3) Admission to the Bar as Interstate Commerce

Bar admissions that result in the provision of legal services are interstate in character, and thus subject to congressional authority, if they entail commerce among two or more states.[614] The *Goldfarb*

---

608. *Id.* at 371-72. In 1977 the National Labor Relations Board also overruled its prior decision that the provision of legal services was not commercial activity, *see* note 599 *supra,* and asserted jurisdiction over a law firm pursuant to the National Labor Relations Act, 29 U.S.C. § 151-69 (1976 & Supp. III 1979). Foley, Hoag & Eliot, 229 N.L.R.B. 456, 95 L.R.R.M. 1041 (1977).

609. *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, 1474 (1979).

610. In *Bates* the Court invalidated a ban on advertising by legal clinic attorneys, but did not base its holding upon the Sherman Act. The implication, however, is that the ban would have violated the Sherman Act but for the applicable state action exemption to Sherman Act violations.

611. 421 U.S. at 783. The Bar Association urged the Court to view the legal services as local in nature since they were performed wholly intrastate, and since any effects on interstate commerce were incidental and remote. *Id.*

612. *Id.* at 785-86.

613. *See also* Bain v. Henderson, 621 F.2d 959 (9th Cir. 1980) (local selection of local attorneys for a list from which to choose counsel for indigent criminal defendants free of Sherman Act regulation).

614. *See* notes 582-89 *supra* and accompanying text.

Court based its characterization of certain legal services upon the "ground that the activities of the attorneys were within the stream of interstate commerce."[615] The Court approached this issue by focusing initially on the nature of the entire transaction—obtaining financing of Virginia residential property.[616] A substantial amount of the monies used to finance residential property purchases in Fairfax County, Virginia, originated in other states, and government agencies in the District of Columbia guaranteed "significant amounts of [home] loans."[617] On the basis of these relationships, the Supreme Court viewed the entire process of obtaining financing for the purchase of residential property as an interstate transaction.[618] Turning its focus to the particular legal services involved, the Court noted that "a title examination is an *integral* part of an interstate transaction," because "in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower."[619] Thus, in general terms, the *Goldfarb* Court focused first on the nature of the entire transaction, and second on whether the activity in question was an essential, integral part of the entire transaction. If the entire transaction is interstate in nature, and if the activity in question is an essential, integral part of the entire transaction, then the activity is in the stream of interstate commerce and therefore subject to congressional authority.[620]

Because admission to the bar is necessary for an attorney to practice law within the jurisdiction of that bar, admission arguably is an essential, integral part of the provision of legal services by a

---

615. McLain v. Real Estate Bd., Inc., 444 U.S. 232, 244 (1980) (dictum interpreting *Goldfarb* opinion).

616. 421 U.S. at 783.

617. *Id.*

618. *Id.* at 783-84. The Court stated, "Thus in this class action the transactions which create the need for the particular legal services in question frequently are interstate transactions." *Id.*

619. *Id.* at 784 (emphasis supplied).

620. The Ninth Circuit recently applied *Goldfarb* to the selection of attorneys for a list from which the court made appointments to represent indigent criminal defendants. Bain v. Henderson, 621 F.2d 959 (9th Cir. 1980). The *Bain* court recognized the interstate commerce element of criminal activity, but held that the process of selecting local attorneys was not "an 'integral part' of the interstate commerce of crime" and therefore not subject to federal antitrust penalties. *Id.* at 960-61. The court based its reasoning upon a comparison of the legal services of *Goldfarb* with those in *Bain*. In *Goldfarb* every real estate financing transaction required a title examination *during* the course of obtaining the financing. On the other hand, the selection of an attorney to defend a criminal defendant *after* the alleged criminal act has no impact on either the planning or the implementation of interstate criminal activities. *Id.* at 961.

potential practitioner.[621] By restating and applying the *Goldfarb* test, one can argue that admission to the bar is in the stream of interstate commerce if the nature of the entire transaction (the provision of legal services) is interstate. Of course, admission to the bar has a direct effect on two groups of potential practitioners: out-of-state attorneys and recent law school graduates who seek initial admission to a state bar. The provision of legal services in one state by an attorney from another state is clearly an interstate commercial transaction that is subject to congressional authority.[622] Furthermore, authorization of the attorney's practice of law, whether on a limited or on an on-going basis, is an important part of this interstate transaction; indeed, it is as essential to the practice of law in the new state as a title examination is to residential property financing in Virginia. Courts should therefore view admission to the bar, either by motion *pro hac vice* or by reciprocal agreements,[623] as an activity in the stream of interstate commerce and thus subject to regulation by Congress. The interstate relocation of a practitioner also necessitates bar admission considerations. Whether the potential practitioner is an experienced attorney contemplating a change in residence or a law school graduate moving to another state to begin practice, admission to the new state's bar will be an essential part of the practitioner's professional relocation. Here again, admission to the bar, arguably in the stream of interstate commerce under *Goldfarb*, is a proper subject of congressional regulation. On the other hand, admission to the bar may be an integral part of an *intrastate* transaction if a recent law school graduate enters the practice of law without changing his residence.

It is important to note that Congress can regulate bar admission requirements only if they substantially affect interstate commerce.[624] Thus, the search in a commerce clause analysis must be for possible impacts of bar admission requirements upon interstate commerce or for a rational basis for a congressional determination of the same.[625] Bar admission requirements effectively operate as a

---

621. Applying the reasoning of the *Bain* court, *see* note 620 *supra*, interstate legal services require admission to the bar of the state before, and not after, the provision of those services. Therefore, bar admission requirements have a vital impact upon the planning and the implementation of interstate legal services.

622. *See* notes 580-89 *supra* and accompanying text.

623. See Part III, Section A.

624. *See* notes 590-97 *supra* and accompanying text.

625. The Supreme Court recently employed the "effect on commerce" test to assert jurisdiction over real estate brokerage activity in McLain v. Real Estate Bd., Inc., 444 U.S.

regulation of the number of practicing attorneys. While more restrictive admission requirements reduce the supply of attorneys, less restrictive requirements tend to increase the number of legal practitioners. With this basic relationship in mind, one could argue that bar admissions affect several aspects of interstate commerce.

That legal services "play an important part in commercial intercourse" is clear from their impact on business operations.[626] Assuming that bar admission requirements, by regulating the supply of practicing attorneys, affect both the cost and the availability of important legal services, Congress could reasonably conclude that licensing restrictions on legal practitioners affect interstate commerce. Whatever influences the availability or price of these important legal services affects the demand for and the desirability of many other business goods and services.[627] For example, the cost or availability of competent legal counsel may preclude a corporation from entering into new business areas, merging with other businesses, or taking advantage of the most beneficial tax structures.[628] These and many other business decisions may have interstate im-

---

232 (1980). Although the Court agreed that real estate brokers were not "necessary or integral participants in the interstate aspects of residential real estate financing," *id.* at 244, inability to characterize brokerage activity as interstate commerce under *Goldfarb* did not preclude an analysis of the impacts of brokerage on interstate real estate financing. The Court concluded that "[b]rokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce." *Id.* at 246.

626. Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 (1975). The National Labor Relations Board, following this *Goldfarb* language, asserted jurisdiction over law firms as a class and cited approvingly the dissent in Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. 512, 84 L.R.R.M. 1321 (1973) (Fanning & Pennello, dissenting):

> The legal profession plays a *vital role at all stages* from the act of incorporation through the obtaining of licenses or certificates which might be needed, governmental approval of rates and/or routes, the issuance and sale of stocks and bonds, the negotiations and preparation of legal contracts necessary for the holding of property, and the purchase and sale of materials and products, to name but a few aspects, and all these have their impact on how, where, and when a business may operate.

Foley, Hoag & Eliot, 229 N.L.R.B. 456, 457, 95 L.R.R.M. 1041, 1042 (1977) (emphasis added).

627. A change in the demand for articles flowing in interstate commerce constituted a sufficient impact on interstate commerce for the Supreme Court to apply the Sherman Act to otherwise local activities. In McLain v. Real Estate Bd., Inc., 444 U.S. 232 (1980), the Court failed to find that real estate brokers were necessary or integral participants in interstate commerce, but noted a sufficient effect because of the brokers' control over the volume of real estate transactions and the purchase price of real estate properties, two factors that affect the demand for interstate financing. *Id.* at 246. *See* note 625 *supra.*

628. *See* note 626 *supra.*

plications. On the other hand, consumers may be unable to purchase certain interstate goods and services, because the cost and availability constraints on legal services affect either the price or the quality of the final products.[629]

Alternatively, assuming that bar admission requirements—again by regulation of the number of practicing attorneys—affect the legal profession's demand for interstate goods and services, Congress could reasonably conclude that bar admission requirements affect interstate commerce and subject them to its regulatory power. Attorneys regularly purchase goods and services that flow in the stream of interstate commerce.[630] If the demand for these goods and services is responsive to the number of attorneys, then it is likely that the interstate flow of goods and services would decline if the overall supply of lawyers declines because of more restrictive bar admission requirements.[631]

---

629. In addition to the impact on a business' ability to offer and a consumer's ability to purchase interstate goods and services, bar admissions requirements, by influencing the cost and the availability of legal services, affect the demand for legal services, many of which are themselves in the stream of interstate commerce. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

630. Attorneys purchase office supplies for the daily operation of their practice, and it is quite likely that more than a de minimus amount of those purchases are from out-of-state companies. The practice of law also often involves interstate services such as telephone services, airline transportation, and, more recently, computer-aided research services such as Lexis.

631. A decline in the purchases of interstate goods was a factor in one Supreme Court finding of Sherman Act jurisdiction. In Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738 (1976), the Court noted that "petitioner's purchases of out-of-state medicines and supplies . . . would be thousands and perhaps hundreds of thousands of dollars less than they would otherwise be," in the absence of the alleged conspiracy to monopelize hospital services. *Id.* at 744. *See also* United States v. Azzarelli Constr. Co., 612 F.2d 292 (7th Cir. 1979) (diminished funding for highway construction caused by alleged conspiracy to submit noncompetitive construction bids affected interstate commerce in highway construction material); Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 (3d Cir. 1973) (necessary effect of regulation of third party hospital services payer market was to close hospital that purchased supplies from out-of-state companies and therefore reduce the flow of goods in interstate commerce).

The Supreme Court also recognized this type of effect on interstate commerce in Katzenbach v. McClung, 379 U.S. 294 (1964), a commerce clause case. The Court found that a local restaurant that bought 46% of its food supplies from interstate suppliers sold, and therefore bought, less of those interstate supplies because of its racially discriminatory practices.

(c) *Limits on State Authority to Regulate Bar Admission Requirements*

(1) Legal Background

If Congress fails to exercise its regulatory authority in a given area, appropriate state police power legislation may fill the resultant vacuum.[632] The commerce clause, however, by its negative implication, functions as a bar to certain state legislation that affects interstate commerce.[633] Furthermore, the nonexistence of federal legislation in the area is not determinative of the validity of state legislation.[634] The Supreme Court enunciated the modern test for the validity of state legislation in *Pike v. Bruce Church, Inc.*:[635] "Where the statute regulates even-handedly 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."[636] Application of the *Pike* rule necessitates an analysis that addresses three issues: first, whether the state legislation serves a legitimate local public interest; second, whether the state regulation discriminates against interstate commerce in order to serve the legitimate local public interest; and last, whether an undue burden on interstate commerce clearly exceeds the putative local benefits of the regulation.

As an absolute minimum, a state regulation that burdens interstate commerce must further a legitimate local interest, such as

---

632. Chief Justice Marshall interpreted the commerce clause as authority for *exclusive* congressional power over interstate commerce. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 209 (1824) (dictum). Chief Justice Taney, however, in License Cases, 46 U.S. (5 How.) 504, 579 (1847), stated that the individual states could regulate interstate commerce if there were no conflict with some existing congressional regulation: "[f]or if the mere grant of power to the general government was in itself a prohibition to the States, there would seem to be no necessity for providing for the supremacy of the laws of Congress . . . ." *Id.*

The Court established the existence of concurrent state power to regulate commerce in Cooley v. Board of Wardens, 53 U.S. (12 How.) 298 (1851), by focusing on the need for a single, uniform regulatery rule in the area. Under the *Cooley* analysis, a state could regulate a subject of commerce if it was sufficiently local in character to require diverse treatment. *Id.* at 319-20. This distinction between *national* and *local* subjects of commerce, however, is no longer determinative of a state's power, but rather serves an important role in the balancing of legitimate local and national interests. *See* note 639 *infra* and accompanying text.

633. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

634. " '[T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States.' " Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976) (quoting Freeman v. Hewit, 329 U.S. 249, 252 (1946)).

635. 397 U.S. 137 (1970).

636. *Id.* at 142.

the health, safety, or welfare of the state's citizens.[637] On the other hand, economic protectionism or the reduction of competition from interstate commerce are impermissible goals under commerce clause analysis.[638] Furthermore, an otherwise legitimate local interest must survive a balancing test that regards as an important factor the need for uniform regulation of the area.[639]

A determination that a state regulation furthers a legitimate local interest, however, will not end a court's inquiry. In addition to analyzing the purpose of the regulation, the court focuses on the existence of any discrimination against interstate commerce.[640]

---

637. "Each State may use its police power to regulate business within its own borders to the extent necessary to protect its citizens as to their health, safety, morals and general welfare . . . ." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 512 (1935). *See also* Hunt v. Washington State Advertising Comm'n, 432 U.S. 333, 350 (1977) (power "particularly strong when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs"); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976) (milk regulation in the form of reciprocity clause did not, in fact, protect the state's health standards); Mintz v. Baldwin, 289 U.S. 346 (1933) (regulation of interstate flow of livesteck valid if purposes were to prevent the spread of disease among dairy cattle and to safeguard public health).

638. *See* Bosten Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977) (state provision reducing tax liability on security transactions if sale occurred in-state invalid because purpose was to create a financial advantage for sales on New York stock exchanges at the expense of regional out-of-state exchanges); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) (state may not refuse to license in-state activity by an out-of-state business solely to promote state's own economic advantages by curtailing interstate competition).

639. The Supreme Court initially recognized, in Cooley v. Board of Wardens, 53 U.S. (12 How.) 143 (1851), the need in some areas for a single, uniform rule to protect the national interest in free-flowing interstate commerce. The *Cooley* Court noted that

> the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation.

Id. at 152. The Court concluded that "[w]hatever subjects . . . are in their nature national, or admit only of one uniform system, a plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by congress." *Id.*

A more flexible balancing of interests, however, has since replaced the conclusory nature of the *Cooley* national-local dichotomy. In 1945 the Court invalidated a state safety measure that regulated the length of interstate trains because the regulation went beyond what was essential for safety and yet had a "seriously adverse effect on transportation efficiency and economy." Southern Pac. Co. v. Arizona, 325 U.S. 761, 781 (1945). The Court appeared to ground its decision upon the need for national uniformity in the area and concluded that it was "plain that the state interest [in safety] is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation service . . . ." *Id.* at 783-84. *See also* Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (requirement of installation of rear fender splash guards, which necessitated time-consuming alterations to interstate trucks when entering the state, constituted an impermissible burden on interstate commerce).

640. *See* South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 (1938) ("[t]he commerce clause . . . prohibits discrimination against interstate commerce,

Differential treatment of in-state and out-of-state goods and services, whether evident on the face of the regulation or from its practical effects, warrants careful judicial scrutiny because of its destructive effect upon the unrestricted flow of commerce in a national market.[641] A state may manifest this discrimination by the intentional adoption of a state regulatory scheme that lacks facial neutrality,[642] or, as is more likely, by the adoption of a facially neutral statute that as a practical matter discriminates in favor of local goods and services.[643] For example, discrimination occurs when a state requires "business operations to be performed in the home State that could have more efficiently been performed else-

---

whatever its form or method").

641. *See generally* Blumstein, *Some Intersections of the Negative Commerce Clause and the New Federalism: The Case of Discriminatory State Income Tax Treatment of Out-of-State Tax-Exempt Bonds*, 31 VAND. L. REV. 473, 501-18 (1978).

642. In Voight v. Wright, 141 U.S. 62 (1891), the Court held that a Virginia state law that required presale inspection of flour brought into the state, but not of in-state flour, was void because it discriminated against interstate commerce. The Court emphasized that "[a]ny local regulation which in terms or by its necessary operation denies this equality in the markets of a State is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and, therefore, void." *Id.* at 67 (quoting Welton v. Missouri, 91 U.S. 275, 281 (1875)). *See also* Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 394-95 (1952) (state "privilege tax" of $50 per truck for out-of-state laundries and $8 per truck for in-state laundries is facially discriminatory and therefore void).

643. For example, in Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), discrimination was the practical effect of a city ordinance that prohibited the sale of milk not pasteurized and bottled at an approved plant within five miles of the center city. Although the ordinance on its face made no distinction between out-of-state and in-state milk producers, its practical effect was the total exclusion of the foreign bottlers from the city's local market. In light of reasonable nondiscriminatory alternatives that recognized no geographic limits, the Court held that the city could not deprive foreign milk producers of their ability to compete with the local business and that consequently this economic barrier was illegitimate discrimination against interstate commerce. *Id.* at 354.

Similarly, in Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977), the Supreme Court found that unconstitutional discriminatory treatment was the result of a North Carolina statute that prohibited the display of state quality grades on closed containers of apples shipped into the state. The Court discussed three forms of discrimination created by the regulation that authorized only "the applicable U.S. grade or standard or the marking 'unclassified,' 'not graded' or 'grade not determined.' " *Id.* at 339. First, the regulatory scheme increased the cost of doing business in North Carolina for Washington state apple producers who, as leaders in the industry, practiced a highly competitive marketing system and maintained a grading system equal or superior to the U.S.D.A. grades in all corresponding categories. Second, the regulatory scheme, by denying the use of superior grades, stripped away the competitive and economic advantages of Washington's expensive and aggressive marketing system. Since North Carolina previously had no superior grading system, there were no advantages to be stripped away, and North Carolina producers benefited from the Washington producers' disadvantage. Third, a downgrading of Washington's superior apples occurred in the sense that the North Carolina statute required their sale under inferior U.S.D.A. grades. *Id.* at 350-52.

where."[644] If the plaintiff proves that the state regulatory scheme discriminates against interstate commerce, then the burden of proof shifts to the state "to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[645]

Even absent discriminatory treatment of out-of-state goods and services, however, a court will invalidate the regulatory scheme if it constitutes an unreasonable burden on interstate commerce. For example, in *Pike v. Bruce Church, Inc.*[646] the Court assumed that although an Arizona "statute regulate[d] even-handedly,"[647] the imposition of "a straitjacket on the appellee company with respect to the allocation of its interstate resources"[648] unreasonably burdened the free flow of interstate goods. The *Pike* Court indicated that the allowable burden will "depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[649] In *Pike* the Court balanced the extent of the burden on interstate commerce against the local benefits and concluded, in light of the absence of a compelling state interest, that the burden was "clearly excessive in relation to the putative local benefits."[650]

---

644. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). In *Pike* an Arizona statute required, with certain exceptions, that all cantaloupes grown in Arizona and offered for sale must "be packed in regular compact arrangement in closed standard containers approved by the supervisor." *Id.* at 138. Although the Court found that one purpose of the regulation was to promote and preserve the reputation of Arizona cantaloupe growers by prohibiting deceptive product packaging, it recognized a "far different impact." *Id.* at 144. Because the statute would prohibit defendant from transporting uncrated cantaloupes from its Arizona farm to its California plant for packing and processing, defendant would be forced to build an expensive packing facility in Arizona. Considering the minimal state interest involved, *see* note 650 *infra*, the Court held that the regulation was "virtually *per se* illegal." *Id.* at 145.

645. Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 353 (1977). The *Hunt* Court held that under this strict standard North Carolina did not justify the discrimination because it failed to sustain the burden on either point. By allowing out-of-state apple growers to market their products under no classification at all, North Carolina failed to offer its consumers any of the benefits that allegedly would result from regulation of deceptive, differing state grades. In addition, the Court noted that the goal of consumer protection would be furthered by requiring the out-of-state apple producer to display the applicable U.S.D.A. grade, a uniform grading system in all states.

646. 397 U.S. 137 (1970).

647. *Id.* at 142.

648. *Id.* at 146.

649. *Id.* at 142.

650. *Id.* The Court recognized a legitimate state goal of protecting and enhancing the reputation of in-state cantaloupe growers, and it assumed the constitutional validity of tho statute as applied to in-state growers. As applied to defendant, the statute had a similar, yet less compelling, purpose of protecting the reputation of in-state growers by requiring Ari-

In summary, the negative implications of the commerce clause serve as a powerful force to strike down local trade barriers that interfere with the free flow of interstate commerce. Of course, a state may validly exercise its police powers to protect legitimate local interests, but whether any particular exercise of power will survive a commerce clause challenge depends upon the existence of unreasonable burdens upon or differential treatment of interstate commerce. A showing of discrimination in favor of local goods and services triggers a strict standard and places the burden upon the state to justify the discriminatory treatment. On the other hand, even-handed state regulation that burdens the interstate flow of goods and services will survive a commerce clause challenge if the local benefits outweigh the extent of the burdens—in theory, a more lenient standard by which to judge state regulation.

---

zona's superior cantaloupes to be identified as originating in Arizona. The reputation of Arizona growers was allegedly in jeopardy not "because the company is putting the good name of Arizona on an inferior or deceptively packaged product, but because it is not putting that name on a product that is superior and well packaged." *Id.* at 144. This danger was minimal at best in light of the practical requirement that defendant construct an unneeded $200,000 packing plant in Arizona.

The Supreme Court had used this balancing approach in Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), to find that local nondiscriminatory safety measures placed an unconstitutional burden on interstato commerce. An Illinois safety statute required all trucks and trailers that operated on state highways to have a special contoured mudguard that would have made regular mudguards, which were legal in forty-five states, unusable in Illinois. Although it noted that certain safety measures might be so innovative and the local benefits so compelling that the burden would be outweighed, the Court concluded that "the present showing—balanced against the clear burden on commerce—is far too inconclusive to make this mudguard meet that test." *Id.* at 530. The state regulatory measure resulted in a clear burden on interstate commerce, because the design of the mudguard differed from the requirements of almost every other state and thus resulted in delay and inconvenience to those interstate travelers who were forced to modify their mudguards as they entered and exited Illinois. This burden, coupled with a finding that the new mudguards created more hazards than safeguards, convinced the Court that any possible local benefits did not justify the particular exercise of state power to regulate highways.

Similarly, in Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366 (1976), the Supreme Court balanced the extent of the local benefits against the scope of the burden on commerce when it examined a Mississippi health regulation that allowed out-of-state milk products to be sold ouly if the other state accepted milk products of Mississippi on a reciprocal basis. Admittedly, the regulation was an attempt "to assure the distribution of healthful milk products to the people of its State," *id.* at 370, but the reciprocity clause, by allowing lower standards if the other state was willing to do the same, failed to "do so in the sense of furthering Mississippi's established milk quality standards." *Id.* at 375. Furthermore, there were less burdensome alternatives such as inspection of out-of-state plants by local inspectors and reliance on out-of-state quality standards that equalled those of Mississippi. *Id.* at 373.

(2) Application to Bar Admission Residency Requirements

It is well established that the states have a legitimate interest in the effective administration of their judicial systems. The practical ease of local solutions to particularized administrative problems largely explains local control over the legal profession as an established feature of Anglo-American jurisprudence.[651] The *Goldfarb* Court recently commented that

> the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts."[652]

Although the Supreme Court presently exercises caution when reviewing state bar admission requirements,[653] a state's compelling interest no longer justifies unlimited state power over local bar admissions. Because the scope of modern legal services has been broadened by the increased interstate mobility of attorneys and their clients, by an obvious trend toward legal specialization, and by the ever increasing dominance of federal and uniform laws and regulations, bar admission requirements should help to further the state's interest in protecting its citizenry by ensuring competent legal practice and ethical conduct by attorneys practicing within the state's borders. This part of the Special Project subjects one particular bar admission requirement—residency—to commerce clause analysis in light of the conclusion that bar admission requirements may affect interstate commerce.[654]

Almost every state maintains some type of residency requirement for admission to the bar. Some states require the potential practitioner to establish residency for a fixed length of time prior to the filing of the application, the taking of the examination, or the granting of admission to the bar.[655] Other states require only

---

651. *See generally* H. COHEN, A HISTORY OF THE ENGLISH BAR (1929); C. WARREN, A HISTORY OF THE AMERICAN BAR (1911).

652. 421 U.S. at 792.

653. *See, e.g.*, Konigsberg v. State Bar, 353 U.S. 252, 273 (1957) ("We recognize the importance of leaving states free to select their own bars . . . ."). Justice Harlan, dissenting in *Konigsberg*, stated that "this case involves an area of federal-state relations—the right of States to establish and administer standards for admission to the bars—into which this Court should be especially reluctant and slow to enter." *Id.* at 276.

654. *See* notes 614-31 *supra* and accompanying text.

655. *See* note 496 *supra*.

simple residence at the time of one of these events.[656] Finally, some states require a showing of intent to maintain continuing residence after admission to the bar.[657]

Whether the state requires simple residence or some period of durational or continuing residence, discrimination against out-of-state applicants may result. A nonresident applicant who possesses the same scholastic qualifications, examination results, legal experience, moral fiber, and reputation as a resident but who is denied admission to the bar receives differential treatment "on the basis of some interstate element."[658] Furthermore, differential treatment of out-of-state bar applicants is evident on the face of bar residency requirements,[659] therefore, the commerce clause analysis need not involve a search for discrimination as a practical effect.[660] Instead, the state must justify the facial discrimination in terms of the local benefits of the residency requirements and the unavailability of nondiscriminatory alternatives.[661]

One state justification for a continuing residency requirement after admission to the bar is the belief that the continuing physical presence of attorneys is essential for the efficient administration of the state's legal system.[662] An exclusively local bar eliminates the

---

656. *See* note 497 *supra* and accompanying text.

657. *See* note 498 *supra* and accompanying text.

658. Bosten Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 332 n.12 (1977).

659. Courts have found discrimination on the face of residency requirements in other contexts. For example, in Toomer v. Witsell, 334 U.S. 385 (1948), the Supreme Court considered a South Carolina statute that regulated commercial shrimp fishing by selling licenses to state residents for $25 per year and to nonresidents for as much as $2,500 per year. The Court invalidated the statute under the privileges and immunities clause, since "[b]y that statute South Carolina plainly and frankly discriminate[d] against non-residents . . . ." *Id.* at 396. *See also* Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (Montana statute discriminating between residents and nonresidents in establishing access to elk hunting did not threaten basic right in way that violated the privileges and immunities clause).

660. Practical discrminatory effects of residency requirements are also evident. For example, as in Pike v. Bruce Church, Inc., 297 U.S. 137 (1970), *see* note 644 *supra*, residency requirements may necessitate the provision of legal services by in-state counsel even though an out-of-state attorney could more efficiently provide these services. If an out-of-state corporation faces litigation in the forum state, then it must hire local counsel if its regular atterney cannot comply with the residency requirements or obtain admission *pro hac vice.* Thus, the corporation incurs the additional legal expense of representation by a local attorney who is less familiar with the foreign corporation's legal and operational problems.

661. *See* note 645 *supra* and accompanying text.

662. *See, e.g.*, Aronson v. Ambrose, 479 F.2d 75 (3d Cir.), *cert. denied*, 414 U.S. 854 (1973); Brown v. Supreme Court, 359 F. Supp. 549, 561 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973) ("[W]e know of no other means to achieve the goal of a responsible bar in a particular state . . . . [W]ithout having local counsel . . . [c]ontrol over the docket would be next to impossible. The foreign attorney would assuredly not be amenable to a court appoint-

problems generated by the inability of long distance counsel to answer a docket call, "attend pretrial conferences, meet trial calendars and appear on short notice as court-appointed counsel for criminal defendants."[663] The local bar advanced this argument in *Aronson v. Ambrose*,[664] an equal protection case involving the Virgin Islands bar admission requirement that an applicant state and prove his intention to reside in and practice law in the Virgin Islands. In holding the requirement valid under the equal protection clause, the Third Circuit noted the compelling state interest in the "speedy and efficient administration of justice"[665] and termed "intolerable" the possible dependence of the Virgin Islands courts upon sub-standard airline service absent the residency requirements.[666] While the Virgin Islands' interest may be substantial and the justification for discriminatory treatment legitimate under conditions of geographic isolation, the argument loses some persuasiveness when applied to the continental United States. Modern modes of transportation easily allow one day travel between New York and Los Angeles, and almost instantaneous contact between a foreign attorney and his in-state client or the local judiciary is possible via telephone service. Furthermore, as one commentator has noted, "residence is itself no guarantee of availability in emergencies."[667] Thus, although the state admittedly possesses a substantial interest in maintaining an efficient judicial system, continuing residency requirements have little direct effect upon such efficiency. Indeed, many states authorize continuing practice by admission without regard to residency, attesting to the fact that such requirements have few local benefits. On the other hand, alternatives less restrictive than continuing residency requirements may contribute to the efficient administration of the local legal system. For example, a state might require the nonresident practitioner to associate himself with a local attorney in order to assure the local judiciary and the client of effective representation when

---

ment as counsel for an indigent person."); *In re* Tang, 39 A.D.2d 357, 360, 333 N.Y.S.2d 964, 966-67 (1972) (nonresident practitioner is neither "susceptible to discipline nor available for service").

663. 479 F.2d at 78.

664. 479 F.2d 75 (3d Cir.), *cert. denied*, 414 U.S. 854 (1973).

665. *Id.* at 77.

666. *Id.* at 78.

667. Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1714-15 (1967). *See also* Brown v. Supreme Court, 359 F. Supp. 549, 561 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973). The *Brown* court felt that residency requirements cannot be justified solely by the state interest in client protection.

the need arises.[668] Likewise, a state bar admission requirement that a nonresident attorney designate a local agent for service of process guarantees adequate receipt and service in the forum state.[669]

Another justification that states offer for requiring the continuing physical presence of attorneys is that it maintains the amenability of attorneys to disciplinary proceedings for any unethical conduct arising from in-state practice.[670] The existence of less restrictive and nondiscriminatory alternatives, however, casts doubt on the continued validity of this justification. The Supreme Court has recognized that "once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts. In addition to discipline for unprofessional conduct, the range of post-admission sanctions extends from judgments for contempt to criminal prosecutions and disbarment."[671] On the other hand, states could revise their court rules or their admission requirements to provide explicitly that the mere practice of law is sufficient to establish long-arm jurisdiction over the nonresident attorney, or that admission to the bar is conditioned upon submission to such jurisdiction.[672] Therefore, because of minimal local benefits and the

668. *See, e.g.*, Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960), *dismissed for want of a substantial federal question sub. nom.* Martin v. Walton, 368 U.S. 25 (1961). Of course, association with a local practitioner may increase the cost of using a nonresident attorney. In addition to compensating the nonresident lawyer, the client must pay for those essential services rendered by the local attorney. The additional costs, however, should not contravene discriminatory commerce clause principles. For example, in Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951), the Supreme Court invalidated a local health and safety regulatory statute and suggested that the city could legitimately ensure high milk standards by relying upon its own inspection of the distant milk processing plants. The Court concluded that "such inspection is readily open to [the city] without hardship for it could charge the actual and reasonable cost of such inspection to the importing producers and processors." *Id.* at 355.

669. *See, e.g., In re* Tang, 39 A.D.2d 357, 360, 333 N.Y.S.2d 964, 960-67 (1972) (concern that nonresident counsel meant nonavailability for service of process). *See also* MINNESOTA RULES FOR ADMISSION TO THE BAR, R. II(B) (1980) (in lieu of residence, applicant may designate Clerk of Supreme Court as agent for service of process for all purposes).

670. *See, e.g., In re* Tang, 39 A.D.2d 357, 360, 333 N.Y.S.2d 964, 960-67 (1972).

671. *In re* Griffiths, 413 U.S. 717, 726-27 (1972) (state's denial of admission to the bar, based on alien citizenship, violated equal protection clause because citizenship/noncitizenship classification was not necessary to serve state's interest in maintaining high professional standards of its bar).

672. Such state revisions may also appear facially discrminatory, but probably do not violate the commerce clause since the measures are intended to achieve equality between resident and nonresident attorneys. Although the state directs the long-arm jurisdiction at nonresident attorneys, it merely balances the judicial control over nonresident attorneys with a similar control over resident attorneys. For a similar judicial analysis of state use taxes, see General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944) (use tax imposed upon resident purchasers in interstate sales valid because of effect of equally distributing

availability of numerous nondiscriminatory alternatives to the actual physical presence of attorneys, it is probable that continuing residency requirements would violate the commerce clause.

Other justifications for discriminatory state residency requirements appear more compelling than the facilitation of efficient administration of the judicial system by the mere physical presence of the attorney.[673] In *Schware v. Board of Bar Examiners*[674] the Supreme Court emphasized strongly that "[a] State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."[675] Residency requirements arguably protect the citizenry from the improper practice of law by facilitating the state's evaluation of an applicant's moral character and legal proficiency.[676] Proponents of residency requirements argue that because residency permits the applicant to acquire a working knowledge of and familiarity with local customs, governmental structure, and judicial procedure, it assures the provision of quality legal services and the orderly and efficient administration of the state judicial system.[677] Furthermore, prior residence in a community affords that community the opportunity to

---

cost of local government).

673. The Supreme Court suggested strongly that mere administrative convenience is insufficient justification for durational residency requirements in a divorce context. *See* Sosna v. Iowa, 419 U.S. 393, 406 (1975) (state one-year durational residency requirement for obtaining divorce valid under equal protection and due process clauses).

674. 353 U.S. 232 (1957) (any qualification to practice law must have a due process rational connection with the applicant's fitness or capacity to practice law).

675. *Id.* at 239.

676. *See, e.g.*, Golden v. Stato Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated*, 614 F.2d 943 (4th Cir. 1980) (applicant's failure of bar examination made residence issue moot); Suffling v. Bondurant, 359 F. Supp. 257 (D.N.H.), *aff'd mem. sub. nom.* Rose v. Bondurant, 409 U.S. 1020 (1972) (six month durational residency requirement valid as reasonable period in which to investigate applicant's moral character); Lipman v. Van Zant, 329 F. Supp. 391, 403 (N.D. Miss. 1971) ("[T]he reasonable counection of residence with one's professional fitness and capacity is that it allows the [state], charged with the duty of investigating the applicant's background, moral character and education, a fair opportunity for personal interviews with the applicant and on-the-ground investigation."). *But cf.* Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) (one year durational residency requirements have no rational relationship to fitness or capacity to practice law).

677. *See* Nahstoll, *Freedom to Practice Law in Another State*, 55 A.B.A.J. 57, 58 (1969); Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change*, 56 CORNELL L. REV. 831, 837-39 (1971); Note, *supra* noto 609, at 1480. *See also* Brown v. Supreme Court, 359 F. Supp. 549, 561-62 (E.D. Va. 1973) ("Familiarity with local legal nuances is assured by the requirements of residence and full-time practice of law.").

observe more accurately the applicant's moral character.[678]

Despite the presence of apparent justifications for discriminatory state residency requirements, equally plausible arguments may be advanced that residence bears little or no correlation to legitimate state objectives, and that in instances in which discrimination does serve to protect the citizenry, nondiscriminatory alternatives cast additional doubt on residency requirements as permissible exercises of state regulatory power over commerce.

For example, simple residency requirements offer the state little opportunity to make an informed observation prior to admission, and durational periods of residence are, at best, inefficient aids in assessing "moral character." In *Keenan v. Board of Law Examiners*[679] a federal district court found that North Carolina's twelve month prior residency requirement furthered no compelling state interest and that it denied the bar applicant equal protection under the laws.[680] Unable to conclude that mere prior durational residence was "in any way relevant to a determination that 'desirable moral' qualities" are present in a bar admission applicant, the court quoted Dean Horack, a leading critic of residency requirements: "A mere year of residence does not go far to establish a man's character and only careful investigation at 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."[681] Dean Horack argued that observation of an applicant at a time of "attendant idleness or separation from practice"[682] results in distortions that may work against the better quality of the local bar. For example, if an unethical attorney from state *A* relocates his practice in state *B*, then he must comply with state *B*'s durational residency requirement prior to admission to the new bar. Without the opportunity to practice, the attorney, on good behavior, never demonstrates professional misconduct. If state *B* neglects to investigate the applicant's background, which has no connection with residency in state *B*, then the applicant probably will pass the community's "good moral character" examination, and state *B* will

678. *See* Suffling v. Bondurant, 359 F. Supp. 257 (D.N.H.), *aff'd mem. sub. nom.* Rose v. Bondurant, 409 U.S. 1020 (1972); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970) (twelve month durational residency requirement invalid because it serves no legitimate state interest).

679. 317 F. Supp. 1350 (E.D.N.C. 1970).

680. *Id.* at 1362.

681. *Id.* at 1359 (quoting Horack, *"Trade Barriers" to Bar Admissions*, 28 J. AM. JUD. SOC'Y 102, 103 (1944)).

682. Horack, *supra* note 681, at 103.

fail to achieve its otherwise valid objective. The effect of modern urban society upon a community's ability to observe one of its new members further weakens the justification for durational residency requirements. Effective observation becomes impractical, if not impossible, because, as the *Keenan* court stated, "[e]xcept in very small communities our society has pretty well succeeded in substituting numbers for names—as most anyone knows who has tried to cash a check in his own bank without having his imprinted, magnetic check book."[683] In any event, a less restrictive, nondiscriminatory means to promote the licensing of honest, trustworthy lawyers is investigation of the applicant's prior out-of-state background.[684] The *Keenan* court suggests that the National Conference of Bar Examiners provides an "efficient, thorough, and widely used nationwide investigatory service."[685] Thus, the state may obtain information regarding the applicant's character not only from the applicant himself, but also from third parties who would be otherwise unavailable to local admission committees for comment. Furthermore, this additional information flows from methods that do not discriminate on the basis of interstate borders and that represent a less restrictive alternative—an alternative that would probably contribute to invalidation of residency requirements under a commerce clause challenge.

Some courts have held that residency requirements have a rational connection with an "applicant's fitness or capacity to practice law."[686] For example, in *Brown v. Supreme Court*[687] a district court agreed that Virginia's residency requirements prevented the defrauding of its citizenry by assuring the applicant's "[f]amiliarity with local legal nuances."[688] Exposure to the peculiar aspects of a state's law and its government structure clearly serves as a means by which an attorney can acquire familiarity with local idiosyncrasies. Critics, however, argue convincingly that mere residence has no relevance to this valuable exposure.[689] Only the actual practice or study of law provides a practical and meaningful opportunity to

683. 317 F. Supp. at 1360. *See also* Note, *supra* note 677, at 838-39.

684. *See* note 681 *supra* and accompanying text.

685. 317 F. Supp. at 1360. *See also* Horack, *supra* note 681, at 103 (comments on the completeness of a nationwide investigatory service); Note, *supra* note 609, at 1481-82.

686. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

687. 359 F. Supp. 549 (E.D. Va. 1973).

688. *Id.* at 561.

689. *See, e.g.*, Keenan v. Board of Law Examiners, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) ("too often, even lifelong residents of a community have no knowledge of even the basic rudiments of the governmental units closest at hand").

learn the refined aspects of the legal system, and residence alone, particularly prior to admission, assures the state of neither.[690] Mere residence bears no correlation to the quality of a law school or of an applicant's pre-admission legal education. Prior durational and simple residency requirements, by failing to afford the applicant an opportunity to practice,[691] serve minimally, at best, the state's interest in licensing only those attorneys knowledgeable about local laws and procedure.

Even a requirement of continuing residence after admission, which at least assures the state of the attorney's residence while practicing the law with which he is to become familiar, should not withstand a commerce clause challenge in light of less restrictive alternatives. Such alternatives include a requirement that the nonresident attorney associate with local counsel before providing legal services.[692] The local counsel whose experience touches a variety of problems could provide the nonresident attorney with special knowledge of local practice. A state could also require that a nonresident's admission to the local bar be conditioned upon the taking of a special course on local practice and procedure. Either alternative, although discriminatory to some extent, is far less restrictive in that knowledgeable, qualified nonresident specialists would then have the opportunity to join and practice before the local bar. Furthermore, another nondiscriminatory alternative is the traditional written bar examination that tests all applicants, residents and nonresidents alike, on their substantive knowledge of local law.[693]

(d) Conclusion

According to proponents of bar admission residency require-

---

690. *See* Note, *supra* note 677, at 837-38; Note, *supra* note 609, at 482-83. *But see* Note, *The Constitutionality of State Residency Requirements for Admission to the Bar*, 71 MICH. L. REV. 838, 848-49 (1973) (conclusion that under an equal protection test, both simple and durational requirements have rational relationship with attorney's knowledge of local customs and procedures).

691. Simple residency requirements that do not require the potential practitioner to remain a resident after admission provide, in effect, for only one day of exposure to the local laws and customs. An applicant's prior residence is likewise ineffective if the applicant's exposure through practice may not begin until *after* admission to the bar.

692. *See, e.g.*, Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960), *dismissed for want of substantial federal question sub nom.* Martin v. Walton, 368 U.S. 25 (1961) (rule requiring resident lawyer who practiced regularly in another state to associato local counsel before making appearances in-state held valid).

693. *See* Note, *supra* note 677, at 838 (residency requirements only supplement a written bar examination).

ments, such requirements protect state interests by facilitating the efficient administration of a state's legal system, by guaranteeing the amenability of attorneys to disciplinary proceedings, by assuring the local bar of a period during which to investigate the applicant's moral background, and by providing for an attorney's familiarity with local practice and procedure. Residency requirements, however, do very little to serve a state's legitimate interest in protecting the health, safety, and welfare of its citizens. Indeed, discriminatory admission based upon the applicant's state residence impermissibly serves state interests by acting as an effective form of illegitimate economic protectionism.[694] Although the articulated purposes for residency requirements are legitimate in that they relate to the goal of stimulating higher professional standards, residency requirements are both over-inclusive and under-inclusive,[695] and their practical effect is not insurance against professional incompetence, but the exclusion of out-of-state competition with the local lawyer.[696] Given the practical prohibition of competition, the minimal protection of legitimate state interests, and less restrictive alternatives to bar admission residency requirements, it is probable that a commerce clause challenge to a state's authority to regulate bar admissions through residency requirements would be successful.

---

694. *See, e.g.*, Horack, *supra* note 681. One commentator has urged boldly that attorneys "must not be ashamed of speaking out in favor of the concept of the economic protection of the local bar." Young, *A National Bar? No!*, 54 FLA. B.J. 109, 112 (1980).

695. Residency requirements that bear no relation to professional standards do not by themselves prevent the admission of unethical or unqualified applicants. The propensity of an attorney to engage in immoral, unethical, or unprofessional conduct is as great for resident applicants as it is for nonresident applicants. Likewise, a resident attorney may engage in full-time office practice and thus maintain no competence in court procedure or rules. Whether the applicant is a state resident or a nonresident, investigation of his background or examination of his skills more successfully avoids the danger of licensing incompetent attorneys. On the other hand, residency requirements prevent many competent attorneys from providing legal services in-state. This exclusion will become more prevalent as the practice of law, characterized by increased attorney mobility and legal specialization, evolves toward a true interstate business.

696. The prohibition of out-of-state competition is an illegitimate state purpose under commerce clause analysis. *See* note 638 *supra* and accompanying text. In Buck v. Kuykendall, 267 U.S. 307 (1925), the Supreme Court held that the practical "effect upon commerce" of a state licensing statute was the obstruction of competition because it determined who could use the state highways. The Court examined the licensing statute and concluded that it "determine[d] not the manner of use, but the persons by whom the highways may be used. It prohibit[ed] such use to some persons while permitting it to others for the same purpose and in the same manner." *Id.* at 315-16. Bar admission residency requirements, which bear no strong correlation to professional standards, also tend to determine not the

3. The Privileges and Immunities Clause of Article IV

(a) Introduction

The privileges and immunities clause of article IV provides that "The Citizens of each State shall be entitled to all Privileges and Immunites of Citizens in the several States."[697] The framers designed the clause to facilitate the creation of a national economic unit by preventing states from discriminating against nonresidents.[698] The Supreme Court recently revived interest in the long dormant clause by rendering two decisions that provide an avenue of attack on all types of state residency requirements, including bar admission rules.[699] Resurrecting a doctrine that limits article IV protection to "fundamental rights,"[700] the Court in *Baldwin v. Fish & Game Commission*[701] held that elk hunting is not a fundamental right and that a state therefore may charge nonresidents seven times more than residents for elk hunting licenses. In the

---

manner or the quality of in-state legal services, but solely those who may engage in such legal practice. This effect is illegitimate and thus violates the commerce clause.

697. U.S. CONST. art. IV, § 2, cl. 1. The article IV clause should not he confused with the privileges or immunities clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1, which provides that "[n]o State shall make or enforce any law which shall ahridge the privileges or immunities of citizens of the United States . . . ." The former provision deals with discrimination as to rights recognized by state law, while the latter was limited in The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873), to a small number of rights that derive from national citizenship.

698. The privileges and immunities clause was based upon the fourth article of the Articles of Confederation, which provided

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

ARTICLES OF CONFEDERATION art. IV (emphasis added).

Charles Pinckney, who drafted the fourth article of the Constitution, commented that "the 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States . . . is formed exactly upon the principles of the 4th article of the present Confederation." 3 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (1911).

699. Hicklin v. Orbeck, 437 U.S. 518 (1978); Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978). In *Baldwin* Justice Blackmun noted that the clause "is not one the contours of which have been precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789." *Id.* at 379.

700. In constitutional law, the meaning of the phrase "fundamental rights" varies with the provision involved. For example, voting is not a fundamental right under the privileges and immunities clause, 436 U.S. at 383 (dictum), but is a fundamental right under the equal protection clause, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 626-27 (1969).

701. 436 U.S. 371 (1978).

same term, the Court in *Hicklin v. Orbeck*[702] held that an Alaska statute that gave residents absolute preference for employment in the state's oil and gas industry deprived nonresidents of a fundamental right to practice their occupations.

The boundaries of the privileges and immunities clause are poorly defined, "perhaps because of the imposition of the Fourteenth Amendment upon our consciousness,"[703] but the Supreme Court has established a three-step analytical framework. A state violates the privileges and immunities clause when it imposes unequal treatment on residents and nonresidents,[704] when that unequal treatment affects a "fundamental right,"[705] and when the discrimination lacks a substantial relationship to the peculiar evil at issue.[706] Because the Supreme Court has concluded that the terms "citizens" and "residents" are interchangeable for purposes of article IV analysis, the privileges and immunities clause applies to state residency requirements, including those for admission to the bar.[707] In fact, state and federal courts recently have considered several challenges[708] to such bar requirements under the privileges and immunities clause.

This section of the Special Project first argues that the practice of law is a protected "fundamental right" and therefore is entitled to a *Toomer-Hicklin* standard of review under article IV. Next, the section reviews and analyzes recent applications of the privileges and immunities clause and considers the impact of these cases on future challenges to state statutory schemes. Finally, the

---

702. 437 U.S. 518 (1978).

703. 436 U.S. at 380.

704. Generally, the clause was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948) (footnote omitted). The Court in *Toomer* declared that the clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States." *Id.* at 396.

705. Only "fundamental rights" are protected under the clause. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 387 (1978).

706. The third part of the Supreme Court's analytical framework, first discussed in *Toomer* and later reconfirmed in *Hicklin*, consists of two tests. A state statute that discriminates against nonresidents will fail unless the state shows that nonresidents are a peculiar source of the evil at which the statute is aimed, and the degree of discrimination is closely related to the problem caused by such nonresident activity.

707. Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978) (quoting Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975)).

708. Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286 (W.D. Wis. 1980); Sheley v. Alaska Bar Ass'n, 620 P.2d 640 (Alaska 1980); Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

section draws conclusions as to the trend in this area and the preferability of an article IV avenue of attack.

(b) The Privilege and Immunities Clause

(1) Fundamental Rights

Because a fundamental rights[709] limitation exists for article IV protections, the privileges and immunities clause encompasses only those "basic and essential activities, interference with which would frustrate the purposes of the formation of the Union."[710] The Supreme Court has held that the clause protects the right to fish,[711] to market produce,[712] to be employed in the oil and gas industry,[713] to engage in "common callings,"[714] and to pursue "ordinary livelihoods."[715] While the Court has not specifically determined whether the practice of law is such a fundamental right, the language of its recent decisions[716] strongly suggests that conclusion.[717] In *Baldwin v. Fish & Game Commission*[718] plaintiffs raised a privileges and immunities challenge to Montana's elk-hunting licensing scheme, which, among other things, imposed substantially higher fees on nonresidents than on residents.[719] The Supreme Court affirmed a

---

709. *See* note 705 *supra*. In *Baldwin* the Court reconfirmed the "fundamental rights doctrine" first enunciated in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1825). 436 U.S. at 387.

710. 436 U.S. at 387.

711. Toomer v. Witsell, 334 U.S. 385 (1948).

712. Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).

713. Hicklin v. Orbeck, 437 U.S. 518 (1978).

714. 334 U.S. at 403.

715. *Id.* at 408 (Frankfurter, J., concurring).

716. Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978); Bates v. State Bar, 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

717. Some commentators and scholars argue that certain "political rigbts" do not fall within the ambit of the article IV clause because such rights impinge directly on a state's sovereiguty. *See, e.g.*, Note, *The Equal Privileges and Immunities Clause of the Federal Constitution*, 28 COLUM. L. REV. 347 (1928). The majority in *Baldwin* noted that various equal protection cases applying a strict scrutiny analysis but upholding residency requirements for voting and for holding public office support the argument for a "political rights" exception. 436 U.S. at 383. *See, e.g.*, Marston v. Lewis, 410 U.S. 679 (1973) (per curiam) (upholding fifty day durational residency requirement for voting); Chimento v. Stark, 353 F. Supp. 1211 (D.N.H.), *aff'd mem.*, 414 U.S. 802 (1973) (upholding durational residency requirement for holding public offices). One commentator argues persuasively that the practice of law is not sufficiently related to the residual sovereign powers of the states to fall within the "political rights" exception. *See* Note, *supra* note 609 (arguing, *inter alia*, that the attorney's role as an "officer of the court" does not create a sufficient nexus with state sovereignty to bring the practice of law within the exception).

718. 436 U.S. 371 (1978).

719. *Id.* at 373-74.

divided three judge district court decision[720] and held that since the clause extends only to fundamental rights of citizenship, equal access to Montana elk by nonresident hunters is not protected by the clause.[721] Writing for the majority, Justice Blackmun quoted the list of fundamental rights enumerated by Justice Washington in *Corfield v. Coryell*,[722] the first federal case construing the clause. Justice Washington's illustrative list of rights included

> [t]he 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.[723]

The court's reliance upon language that explicitly refers to "professional pursuits" suggests that the practice of law is a fundamental right triggering scrutiny under the privileges and immunities clause.[724]

The relationship between the privileges and immunities clause and the commerce clause[725] provides further support for the argument that the practice of law falls within the scope of article IV protections.[726] In *Baldwin* Justice Blackmun noted the common origin of the two clauses in the fourth article of confederation,[727] and Chief Justice Burger, in his concurring opinion, asserted that "all the privileges of trade and commerce" protected by the Articles of Confederation language are also protected by the privileges and immunities clause.[728] Recent Supreme Court decisions involving

---

720. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976).

721. 436 U.S. at 388. For a critical discussion of *Baldwin* and the "fundamental rights doctrine," see 55 WASH. L. REV. 461 (1980).

722. 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (upholding a New Jersey statute that prohibited nonresidents from taking oysters from the state's tidal flats on the theory that a state property interest in oyster beds gave New Jersey the power to limit the privilege of taking oysters to its own citizens).

723. *Id.* (emphasis added).

724. *See* Note, *supra* note 609, at 1469.

725. U.S. CONST. art. I, § 8, cl. 3.

726. *See* Note, *supra* note 609, at 1471-75.

727. 436 U.S. at 379. The manifest distinction between the two clauses is that the privileges and immunities clause grants affirmative rights to individuals, whereas the commerce clause limits the power of the states to restrict the free flow of goods and services across state lines. *See* Philadelphia v. New Jersey, 437 U.S. 617, 621-22 (1978). For a discussion of bar admission residency requirements in the context of the commerce clause, see Part II, Section C, subsection 3.

728. 436 U.S. at 394 (Burger, C.J., concurring). In *Hicklin* Justice Brennan noted the "mutually reinforcing relationship" between article IV and the commerce clause. 437 U.S. at 531.

state regulation of the legal profession characterize the practice of law as a form of trade or commerce. In *Bates v. State Bar of Arizona*[729] the Court invalidated a ban on advertising by two attorneys who operated a "clinic" offering routine legal services.[730] The Court referred to the proposition that lawyers are "somehow 'above' trade" as an "anachronism."[731] Similarly, in *Goldfarb v. Virginia State Bar*[732] the Supreme Court banned certain minimum fee schedules as a "restraint of trade" in violation of the Sherman Act.[733] The Court recognized that "in the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce."[734] These pronouncements thus support the view that the practice of law may be classified as a fundamental right for purposes of article IV analysis.[735]

(2) The Standard of Review

In *Toomer v. Witsell*[736] the Supreme Court first discussed the applicable standard of review in cases brought under the privileges and immunities clause. While acknowledging that the clause does not provide absolute protection against discrimination,[737] the Court nonetheless held that South Carolina's statute unconstitutionally discriminated against nonresident shrimp fishermen[738] because the state failed to show either that "non-citizens constitute a peculiar source of the evil at which the statute is aimed,"[739] or that the discrimination bore a "close relation" to a "substantial" state interest.[740] *Mullaney v. Anderson*[741] confirmed the *Toomer* analysis and used it to invalidate an Alaskan licensing scheme that im-

729. 433 U.S. 350 (1977).

730. For a discussion of the facts of *Bates*, see note 729 and accompanying text.

731. 433 U.S. at 371-72.

732. 421 U.S. 773 (1975).

733. For a discussion of the facts of *Goldfarb*, see notes 603-06 and accompanying text.

734. 421 U.S. at 788.

735. The Supreme Court, however, recognizes that the practice of law is not always a purely commercial activity. *See, e.g., In re* Primus, 436 U.S. 412 (1978).

736. 334 U.S. 385 (1948).

737. The Court recognized "the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.* at 396.

738. Georgia commercial fishermen challenged highly discriminatory nonresident license fees imposed by South Carolina for shrimp fishing in its marginal sea. *Id.* at 387.

739. *Id.* at 398.

740. *Id.* at 396.

741. 342 U.S. 415 (1952).

posed a substantially higher fee on nonresident than on resident commercial fisherman. The Court further refined the standard of review in *Hicklin v. Orbeck*,[742] which invalidated an Alaskan statute giving residents absolute preference for employment in the state's oil and gas industry.[743] The Court relied upon prior cases "holding violative of the [privileges and immunities] [c]lause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the state."[744] The Court found neither an indication that nonresidents were a "peculiar source of the evil"[745] that the statute purported to remedy nor a demonstration that a "substantial relationship" existed between the means chosen by the statute and the end sought to be achieved.[746] As further support for its decision, the Court noted the existence of less restrictive alternatives that could achieve the stated goal of lowering the high rate of unemployment in the state.[747]

The *Toomer* standard of review, as amplified by the Court in *Hicklin*, consists of two tests. First, the state must show that nonresidents are a "peculiar source of the evil" at which the statute is aimed. Second, the discrimination against nonresidents must bear a substantial relationship to the particular "evil" that these non-

742. 437 U.S. 518 (1978).

743. The key provision of "Alaska Hire," as the Act came to be known, was the requirement that "all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the state is a party" contain a provision "requiring the employment of qualified Alaska residents" in preference to nonresidents. ALASKA STAT. § 38.40.030(a) (1977).

744. 437 U.S. at 524. The Court cited Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871) (invalidating a Maryland statute that required nonresident merchants to obtain licenses in order to practice their trade without requiring the same of similarly situated Maryland merchants, charged nonresidents a higher license fee than those Maryland residents who were required to secure licenses, and prohibited both resident and nonresident merchants from using nonresident salesmen, other than their regular employees, to sell their goods in the city of Baltimore); Toomer v. Witsell, 334 U.S. 385 (1948) (invalidating a South Carolina statute that required nonresident shrimp fishermen to pay a fee one hundred times greater than that paid by residents); and Mullaney v. Anderson, 342 U.S. 415 (1952) (invalidating an Alaskan licensing scheme that discriminated against nonresident commercial fishermen).

745. 437 U.S. at 526-27.

746. *Id.* at 527-28. Contrary to previous practice in article IV cases, *see, e.g.*, Mullaney v. Anderson, 342 U.S. 415, 418-19 (1952), the Court appeared to place the burden of proof on the state to show that nonresidents are "a peculiar source of the evil." 437 U.S. at 526. Even if a state carries this burden, a discriminatory statute still may be unconstitutional because of the existence of less restrictive alternatives. *Id.* at 528.

747. Justice Brennan suggested that a statute granting an employment preference to unemployed residents or to residents enrolled in job training programs might be permissible. 437 U.S. at 528.

residents purportedly present. With respect to the latter test, the *Hicklin* Court's reference to less restrictive alternatives suggests an additional analytical step in future article IV cases.

(c) Bar Admission Cases

In *Gordon v. Committee on Character & Fitness*[748] the highest court of New York considered a constitutional challenge to a durational[749] residency rule providing that a person may not be admitted to the bar unless he furnishes proof "that he has been an actual resident of . . . New York for six months immediately preceding the submission of his application for admission to practice."[750] Gordon had qualified for, taken and passed the New York State Bar Examination,[751] but before he received notification of the results his employer transferred him to North Carolina.[752] In view of his North Carolina residence and the New York rule, the bar committee deferred action on his application.[753] Gordon then filed suit, alleging that the rule denied nonresidents equal protection, due process of law, and the same privileges and immunities accorded residents.[754] The *Gordon* court held that the rule violated the privileges and immunities clause and therefore found it unnecessary to pass on the first two claims.[755] The court found manifest discrimination between residents and nonresidents because "given two equally qualified candidates who have passed the bar examination . . . and possess the requisite character and fitness, the rule would deny one admission based solely upon residence."[756] Relying upon *Hicklin, Bates,* and *Goldfarb,* the court adopted a two-step approach and reasoned that the clause protected an attorney's right to pursue his chosen profession.[757] The court first applied *Toomer*'s substantiality test[758] and found no justification for the

748. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

749. "Durational" rules require residency for a fixed period prior to application, examination, or admission. *See* note 496 *supra* and accompanying text.

750. N.Y. CIV. PRAC. LAW § 9406(2) (McKinney Supp. 1980-1981).

751. 48 N.Y.2d at 269, 397 N.E.2d at 1310, 422 N.Y.S.2d at 643.

752. *Id.* at 269-70, 397 N.E.2d at 1310-11, 422 N.Y.S.2d at 643.

753. *Id.* at 270, 397 N.E.2d at 1311, 422 N.Y.S.2d at 643.

754. With respect to the first two claims, the court noted the prior rejection of similar challenges to six month durational residency requirements. *Id.* at 270 n.6, 397 N.E.2d at 1311 n.6, 422 N.Y.S.2d at 643 n.6.

755. *Id.* at 270, 397 N.E.2d at 1311, 422 N.Y.S.2d at 643.

756. *Id.* at 273, 397 N.E.2d at 1313, 422 N.Y.S.2d at 645.

757. *Id.* at 272, 397 N.E.2d at 1312, 422 N.Y.S.2d at 644-45.

758. The court stated that under *Toomer,* "the governmental interest claimed to justify the discrimination must be carefully examined to detemine whether that interest is

state's discrimination against nonresident practitioners.[759] Then, as in *Hicklin,* the court stressed the availability of less restrictive alternatives to protect the interest of the state in supervising those who practice in its courts.[760] The *Gordon* court's rationale provides a model for plaintiffs seeking to challenge durational residency requirements for initial admission to the bar.

Canfield v. Wisconsin Board of Attorneys Professional Competence[761] involved the constitutionality of Wisconsin's simple[762] residency requirements, which required bar applicants to reside in the state at the time of their application[763] and at the time of their admission to the bar.[764] Canfield stated in his bar application that he did not reside in Wisconsin and that he did not intend to become a resident of that state.[765] The Board denied Canfield's application because of his failure to comply with the residency requirement.[766] Following the Wisconsin Supreme Court's denial of his petition for a waiver of the residency requirement, Canfield sought declaratory and injunctive relief in the district court[767] and alleged, *inter alia,* that the residency requirements violated article IV.[768] The court rejected this constitutional challenge, stating that the Supreme Court's summary affirmance in *Wilson v. Wilson* dictated the result.[769] In *Wilson* plaintiff challenged the constitutionality of various Oregon state statutes, supreme court rules, and bar regula-

---

substantial . . . ." *Id.* at 273, 397 N.E.2d at 1313, 422 N.Y.S.2d at 645.

759. The court, however, recognized the legitimate interest of the state in controlling the attorneys who appear in its courts. *Id.* at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646.

760. The less restrictive alternatives suggested by the court included permitting nonresidents to furnish affidavits attesting to the applicant's character and fitness to practice law, enacting legislation requiring nonresident attorneys to appoint an agent for service of process within the state, and utilizing the remedies of contempt, disciplinary proceedings, and malpractice actions to protect against abuses by resident attorneys. *Id.* at 274, 397 N.E.2d at 1313-14, 422 N.Y.S.2d at 646.

761. 490 F. Supp. 1286 (W.D. Wis. 1980).

762. "Simple" residency rules require residency merely at the time of application, examination, or admission. *See* note 497 *supra.*

763. Wisconsin Bar Rule 1.03(3).

764. WIS. STAT. ANN. § 757.28(2) (West 1980) (repealed by Wisconsin Supreme Court order dated Dec. 11, 1979, effective Jan. 1, 1980).

765. 490 F. Supp. at 1288.

766. *Id.*

767. *Id.*

768. *Id.* at 1289. Plaintiff also alleged that the residency requirements violated the equal protection, due process, and privileges or immunities clauses of the fourteenth amendment. *Id.*

769. *Id.* at 1290 (citing Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976), *aff'd mem.,* 430 U.S. 925 (1977)).

tions,[770] including a requirement that applicants manifest an intention to reside in the state at the time of admission.[771] Plaintiff contended that the residency requirements violated his rights under the equal protection and due process clauses.[772] The three judge district court rejected plaintiff's claim without mentioning article IV, although the provision had been cited in a pretrial order.[773] In his appeal to the Supreme Court, Wilson's jurisdictional statement included, *inter alia,* arguments based on the article IV clause.[774] Consequently, the *Canfield* court concluded that the Supreme Court's summary affirmance in *Wilson* controlled the outcome of *Canfield* because the Wisconsin requirement was "suhstantially equivalent to the Oregon requirement upheld in *Wilson:* residency at the time of admission."[775] In reaching its decision, the court criticized *Gordon v. Committee on Character & Fitness,* arguing that the *Gordon* court mistakenly addressed the article IV issue in light of the summary affirmance in *Wilson.*[776] The *Canfield* court, however, noted that the *Gordon* court's apparent disregard of *Wilson* might have stemmed from a perceived distinction between the six month durational residency requirement in New York and the simple residency requirements upheld in *Wilson.*[777]

In *Sheley v. Alaska Bar Association*[778] the Alaska Supreme Court cited *Gordon* as precedent for invalidating the requirement that bar applicants establish domicile in the state at least thirty days before taking the examination.[779] When she applied to take the Alaska bar examination, Sheley already held law licenses in Washington and Texas and plaimed to complete a judicial clerk-

---

770. 416 F. Supp. 984, 985 (D. Or. 1976), *aff'd mem.,* 430 U.S. 925 (1977).

771. *Id.* at 986.

772. *Id.* at 985.

773. The *Canfield* court noted the presence of the article IV issue in the *Wilson* pretrial order. 490 F. Supp. at 1290.

774. *Id.* at 1291.

775. *Id.*

776. *Id.* at 1290.

777. *Id.*

778. 620 P.2d 640 (Alaska 1980).

779. Alaska Bar Rule 2 provided in pertinent part,

Section 1. Every applicant for examination shall

. . . .

(e) Establish domicile in the State of Alaska for at least 30 days prior to the first day upon which the bar examination is to be given. Domicile may be shown for purposes of taking the bar examination by physical presence in Alaska for the 30-day period prior to the first day of the examination.

620 P.2d at 641 n.1. Obviously, the rule discriminated against nonresidents of Alaska.

ship in Texas before moving to Alaska.[780] Based upon her representation that she could not move to Alaska until the end of her clerkship, the Board of Governors denied her application.[781] Invoking the state equal protection clause and the federal privileges and immunities clause,[782] Sheley appealed to the Alaska Supreme Court. The court held that the thirty day residency requirement violated the privileges and immunities clause because the state denied nonresidents the opportunity to take the bar examination on an equal basis with residents.[783] Recognizing that the practice of law is a fundamental right triggering scrutiny under article IV,[784] the court applied the *Toomer-Hicklin* standard of review and asked whether there was a "substantial reason" for the residency requirement.[785] The Board contended that the rule afforded a reasonable opportunity to investigate an applicant's academic fitness and moral character—concededly a legitimate state interest.[786] The court, however, disagreed that there was a "substantial relationship" between the means chosen and the legitimate objectives sought to be achieved by the bar.[787] Since less restrictive means were available to achieve those goals,[788] the court concluded that the discrimination violated the privileges and immunities clause.[789]

---

780. *Id.* at 641.

781. *Id.*

782. *Id.* After filing her appeal, Sheley asked the court for permission to take the examination pending the outcome of her appeal. The court granted the motion and Sheley took and passed the examination. *Id.* at 641.

783. *Id.* at 643.

784. The court agreed with the New York Court of Appeals in *Gordon* and the commentators, *see, e.g.*, Notc, *supra* note 609, that the practice of law is a fundamental right triggering scrutiny under the privileges and immunities clause. *Id.* at 642-43.

785. *Id.* at 645.

786. *Id.*

787. *Id.*

788. The court statcd that information concerning fitness and character could be found outside of Alaska and cited the language of Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970) (holding a twelve-month residency requirement for har examinees unconstitutional on right to travel and equal protection grounds), for the proposition that a short period of residence does not aid in establishing an attorney's character. 620 P.2d at 645. The court also noted the availability of the National Conference of Bar Examiners' nationwide investigatory service and suggested that the Alaska Bar Association or a master outside of Alaska could interview the applicant following the examination, since there was a three to four month delay in reporting test results. *Id.* at 645-46.

789. 620 P.2d at 646.

(d) Analysis

(1) Durational Residency

Both *Gordon* and *Sheley* indicate that state bar admission statutes that discriminate on the basis of durational residency cannot withstand a challenge under the privileges and immunities clause. The *Gordon* court based its holding upon the absence of a substantial reason for the discrimination and the availability of less restrictive alternatives, while the *Sheley* court emphasized only the latter factor. Nevertheless, both courts correctly applied the *Toomer-Hicklin* standard in striking down discriminatory statutes.[790] The incorporation of the "less restrictive alternatives" component in privileges and immunities clause analysis by the Supreme Court in *Hicklin*[791] increases the likelihood that state bar requirements based upon durational residency will not survive judicial scrutiny. In general, there are several means available other than durational residency requirements to protect a state's legitimate interest in controlling the attorneys who practice in its courts.[792]

(2) Simple Residency

Canfield casts some doubt on the viability of an article IV challenge to simple residency requirements. The Supreme Court's summary affirmance in *Wilson* was a disposition on the merits that binds the lower courts.[793] A summary affirmance, however, affirms the judgment only, and is not necessarily based upon the rationale of the opinion below.[794] The district court in *Wilson* did not specifically rely upon article IV in its opinion, and it cannot be presumed, as the *Canfield* court did, that the *Wilson* court referred to article IV when it used the phrase "right to travel."[795] If the Supreme Court relied upon the lower court opinion then it in effect agreed that the statute could withstand an equal protection or due

---

790. *See* note 746 *supra.*

791. *See* note 747 *supra.*

792. For a discussion of less restrictive alternatives, see notes 805-12 *infra* and accompanying text.

793. Canfield v. Wisconsin Bd. of Attorneys Professional Competence, 490 F. Supp. 1286, 1289 (W.D. Wis. 1980) (citing Hicks v. Miranda, 422 U.S. 332, 334-35 (1975)).

794. Mandel v. Bradley, 432 U.S. 173 (1977). The term is ordinarily used in the equal protection context.

795. For a discussion of the "right to travel," see notes 500-72 *supra* and accompanying text.

process challenge.[796] Additionally, it is important to note that the *Wilson* affirmance preceded the revival of the privileges and immunities clause in *Baldwin* and *Hicklin*. *Hicklin*'s emphasis on the importance of least restrictive alternatives arguably suggests that the Court's technical rejection of an article IV argument with respect to simple residency requirements is no longer valid. Simple residency requires not only physical presence, but also a subjective intent to remain indefinitely.[797] Satisfying a simple residency requirement places a heavy burden on an applicant because the state demands demonstration of intent by some objective evidence, such as ownership of a home. While the state has a legitimate interest in ensuring the ethical character of a bar candidate, simple residency may not afford the state an opportunity to evaluate the applicant.[798] Consequently, a simple residency requirement is even less rational than a durational rule and should be even more vulnerable to attack under article IV.

(3) Legitimate State Interests

Although *Gordon* and *Sheley* invalidated the particular discriminatory state statute under consideration, the court in each case recognized the states' legitimate interest in controlling the attorneys who practice in its courts. The Supreme Court also has recognized the state's long established authority to regulate the practice of law. In *Goldfarb v. Virginia State Bar*[799] the Court noted

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions . . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts."[800]

Various courts and commentators have identified several interests that a state may have in residency requirements. First, the state has an interest in "minimizing its administrative and investigative

---

796. The *Wilson* court specifically addressed equal protection and due process arguments. Wilson v. Wilson, 416 F. Supp. 984, 987 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977).

797. *See* Note, *supra* note 609, at 1481.

798. *Id.*

799. 421 U.S. 773 (1975).

800. *Id.* at 792.

workload."[801] Second, the state may properly exclude morally unfit lawyers.[802] Third, the state may ensure that those who practice within its borders are familiar with its substantive law, court procedures, and local customs.[803] Finally, the state may justify a requirement of physical presence on the grounds that it facilitates malpractice investigation, bar discipline, response to motion calls, appointment of counsel for indigent defendants, service of process, and communication with in-state clients.[804]

(4) Less Restrictive Alternatives

While a state has a legitimate interest in regulating the admission of attorneys to its bar, recent cases demonstrate that residency requirements are particularly susceptible to constitutional challenge, especially under the privileges and immunities clause. To avoid such challenges and to comply with constitutional mandates, states must rely upon less restrictive alternatives to accomplish their objectives. As suggested by the courts, these alternatives include the following: first, utilizing the National Conference of Bar Examiners' nationwide investigatory service for information concerning fitness and character;[805] second, requiring nonresident attorneys to appoint an agent for service of process within the state;[806] third, conducting personal interviews within the state or before a master outside the state;[807] fourth, permitting applicants to submit affidavits attesting to their character and fitness to practice law;[808] and last, applying remedies currently available to safeguard against abuses by resident attorneys, including contempt, disciplinary proceedings, and malpractice actions.[809] Commenta-

801. Wilson v. Wilson, 416 F. Supp. 984, 988 (D. Or. 1976), *aff'd mem.*, 430 U.S. 925 (1977).

802. *See* Sheley v. Alaska Bar Ass'n, 620 P.2d 640, 645 (Alaska 1980); Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 274, 397 N.E.2d 1309, 1314, 422 N.Y.S.2d 641, 646 (1979); Brakel & Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 709 (1975); Simson, *Discrmination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 390-91 (1979); Note, 71 MICH. L. REV., *surpa* note 690, at 838.

803. *See* Simson, *supra* note 802, at 390-91.

804. *See* Aronson v. Ambrose, 479 F.2d 75, 77-78 (3d Cir.), *cert. denied*, 414 U.S. 854 (1973); Brown v. Supreme Ct., 359 F. Supp. 549, 561 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973); Note, *supra* note 609, at 1480.

805. *See* Sheley v. Alaska Bar Ass'n, 620 P.2d 640, 645 (Alaska 1980).

806. *See* Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 274, 397 N.E.2d 1309, 1314, 422 N.Y.S.2d 641, 646 (1979).

807. *See* 620 P.2d at 646; 48 N.Y.2d at 274, 397 N.E.2d at 1313, 422 N.Y.S.2d at 646.

808. *See* 48 N.Y.2d at 274, 397 N.E.2d at 1313, 422 N.Y.S.2d at 646.

809. *Id.* at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646.

tors have suggested additional alternatives. States could improve methods of testing bar applicants' familiarity with the state's law,[810] require lawyers to pass periodic examinations on issues of state law as a condition of continued practice,[811] and enact long-arm statutes and statutes providing for service by mail.[812]

(5) Comparisons with Other Methods of Challenge

Recent cases demonstrate that article IV provides the most viable method to challenge bar admission statutes and rules that discriminate between nonresidents and residents. Bar residency requirements repeatedly have survived equal protection challenges,[813] primarily because courts usually apply the rational basis test in such cases. Governmental classifications almost always withstand equal protection challenge when courts apply this standard of review.[814] In contrast, assuming that the practice of law is a fundamental right for purposes of article IV, bar residency requirements trigger a level of scrutiny under the privileges and immunities clause that requires a state to show a substantial relationship between nonresidents and the peculiar "evil" at which the statute is aimed. Few bar residency requirements can survive such review, especially because less restrictive alternatives almost always exist.

The article IV approach also is preferable to equal protection because it is inherently limited to residency requirements involving fundamental rights such as the practice of law. Courts are hesitant to employ an analysis that may be broadly applied to *all* types of residency requirements. Under the equal protection clause, if all residency rules, regardless of subject matter, were subjected to a strict level of judicial review, then they would surely fall.[815] In con-

---

810. *See* Simson, *supra* note 802, at 390-92.

811. *Id.*

812. *Id.*

813. For a discussion of equal protection challenges to bar residency requirements, see Part II, Section C, subsection 1.

814. The degree of review afforded under the equal protection clause varies depending upon the affected individual interest and the basis of the challenged classification. If a suspect class or fundamental interest is involved, the state must demonstrate a compelling interest achieved through the least restrictive means available. If, however, mere economics are involved, the state must only show a rational relationship to a legitimate governmental interest. *See* notes 502-05 *supra* and accompanying text.

815. Although the Supreme Court has found a fundamental right to travel in some equal protection cases, *see, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972), it has refused to apply strict scrutiny in all equal protection cases involving residency requirements. Such a course would invalidate a broad range of state legislation, a result specifically rejected by the Supreme Court. *See* notes 535-43 *supra* and accompanying text.

trast, invalidating state bar residency requirements under article IV does not provide a basis for proscribing residency requirements involving different subject matter.[816]

Although state bar residency requirements arguably violate the commerce clause,[817] article IV remains the more viable approach for litigation. The privileges and immunities clause affirmatively grants rights to individuals, while the commerce clause limits state power in transactions crossing state lines. Because of this distinction the burden on the applicant under the commerce clause is greater. Furthermore, the commerce clause case law in this area is not well developed, and unlike an article IV case the applicant would be litigating a case of first impression.

(e) Conclusion

Recent decisions proscribing discriminatory state bar admission requirements under the privileges and immunities clause suggest a developing trend toward invalidation of various residency requirements. This judicial trend reflects the greater mobility of lawyers, their clients, and the society in general. Movements toward legislative uniformity and specialized legal practice accelerate the development of an interstate law practice, and the increasingly multistate character of legal problems and lawyers' practices focuses attention on restrictive bar admission requirements. Consequently, state legislatures and judiciaries must respond with nonrestrictive means to accomplish the states' legitimate objective of ensuring the ethical character of bar candidates. If, however, the states are slow to respond to pressures for reform, plaintiffs may rely on article IV to attack discriminatory statutes. The reasoning of the *Gordon* and *Sheley* courts represents a logical extension of the Supreme Court's privileges and immunities analysis and provides a sound basis for challenging durational residency requirements. Whether the same analysis applies to simple residency requirements remains an open question because of the apparent conflict between the Supreme Court's summary affirmance in *Wilson* and its incorporation of a "less restrictive alternative" test in *Hicklin.*

---

816. *See* Note, *supra* note 609, at 1465.

817. For a discussion of commerce clause challenges to bar residency requirements, see Part II, Section C, subsection 2.

III. ADMISSION *Pro Hac Vice*

A. Introduction

Parties to civil or criminal litigation frequently prefer representation by a specialized, out-of-state attorney rather than by a local generalist.[818] Numerous factors,[819] including the increased mobility of lawyers and the multistate character of today's legal problems, have contributed to the sharp increase in the ranks of corporate in-house counsel, civil rights attorneys, and federal law specialists.[820] Because the interstate practice of law in this country is an expanding phenomenon, a re-evaluation of the restrictive out-of-state practice rules is essential for the multistate practitioner.

The nonresident attorney granted permission to try a single lawsuit in a foreign jurisdiction is said to have been admitted *pro hac vice*.[821] The requirements for admission *pro hac vice* are provided for statutorily in all but one jurisdiction.[822] The various state

---

818. *See* Brakel & Loh, *supra* note 802. A local party may gain an advantage by engaging counsel admitted to practice in a foreign jurisdiction whose law will be controlling in the local action. Another consideration is the need to secure competent nonresident counsel when the litigant is unpopular locally, as was often true in the civil rights cases of the 1960s. *See* Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, 4 HARV. C.R.-C.L. L. REV. 65, 65 (1968). *See also* Sobol v. Perez, 289 F. Supp. 392 (E.D. La. 1968).

819. For a discussion of the factors responsible for this trend, see H. TWEED, THE CHANGING PRACTICE OF LAW (1955); Note, *The Practice of Law by Out-of-State Attorneys*, 20 VAND. L. REV. 1276 (1967).

820. *See* Brakel & Loh, *supra* note 802, at 729-34.

821. *Pro hac vice* literally means "for this turn" or "for this one particular occasion." BLACK'S LAW DICTIONARY 1363 (5th ed. 1979). This legal fiction allows an attorney not permanently admitted to the bar of the trial jurisdiction to become a member thereof while he participates in litigation. Admission *pro hac vice*, however, does not bestow the rights and privileges of full membership. For example, the procedure does not enable an attorney to have an office practice, write a will, draft documents, or advise clients in a nonlitigious setting. *See* Sherman, *supra* note 818, at 73.

822. R. GOVERN. ANMISS. TO THE ALA. STATE BAR R. VIII (1979); ALASKA CIV. R. 81(A)(2) (1973); ARIZ. R.S. CT. 28(C)I (1979); R. GOVERN. ADMISS. TO BAR XIV (Ark. 1975); CAL. R. OF CT. 983 (West 1980); COLO. REV. STAT. § 12-15-113 (1973); R. SUPERIOR CT. AND REG. OF THE STATE BAR EXAM. COMM. REG. ADMISS. TO THE BAR § 24 (Coun. 1980); DEL. SUP. CT. R. 53(b) (1978); D.C. CT. APP. R. 46 II[b][4] (1978); FLA. R. JUD. ADMIN. 2.060(b) (1980); GA. CODE ANN. § 24-4502 (1976); HAWAII SUP. CT. R. 15 & 16 (1976); ILL. ANN. STAT. ch. 13, § 12 (Smith-Hurd 1963); IND. BAR ADMISS. R. 3 & 6 (1980); IOWA CODE ANN. § 610.13 (West 1975); KAN. STAT. ANN. § 7.104 (Weeks 1975); KY. SUP. CT. R. 3030(2) (1978); LA. REV. STAT. ANN. § 37:214 (West 1974); ME. REV. STAT. ANN. tit. 4, § 802 (1979); R. GOVERN. ADMISS. TO BAR 19 (Md. 1977) and S. CT. R. 20; MASS. ANN. LAWS ch. 221, § 46A (Michie/Law. Co-op 1974); MICH. COMP. LAWS § 600-946 (1968); MINN. STAT. ANN. § 481.02 (West 1971); MISS. CODE ANN. § 481.02 (1972); MO. ANN. STAT. § 484.100 (Vernon 1965); MONT. REV. CODES ANN. § 37-61-208 (1979); NEB. REV. STAT. § 7-103 (1977); NEV. REV. STAT. § 7-103 (1943); and SUP. CT. R. 42 (Nev. 1979); N.H. REV. STAT. ANN. § 311:3 (1966); SUP. CT. R. 1.21-2

statutes are distinguishable on the basis of several prerequisites for admission *pro hac vice.*

One typical requirement[823] for admission *pro hac vice* is association by the nonresident attorney with a local attorney.[824] States have advanced a number of policy considerations to justify the existence of this and other restrictions on foreign practice. A traditional rationale is that a state has a duty to ensure competency among practicing attorneys.[825] A second policy justification is that the limitation in appearances of out-of-state attorneys facilitates the administration of justice because local attorneys are more readily available for service of process and disciplinary proceedings.[826] Finally, it is argued that the real consideration behind admission *pro hac vice* is the protection of the economic interests of the local bar.[827]

Despite the confusion created by the considerable interstate diversity among statutes and policy justifications, the procedure for admission *pro hac vice* is relatively simple. The usual procedure requires introduction of the nonresident counsel, either by a local lawyer or by letter, to the judge of the court as a member in good standing of the bar of another state; the nonresident counsel must also request that he be granted admission for all matters re-

---

(N.J. 1979); N.M. STAT. ANN. § 36-2-27 (1978); N.Y. JUD. LAW § 478 (McKinney 1968); N.C. GEN. STAT. § 84-4.1 (1975); N.D. CENT. CODE § 27-11-27 (1974); OHIO REV. CODE ANN. § 4705.01 (Banks-Baldwin 1979); OKLA. STAT. ANN. tit. 5, § 5 (West 1979); OR. REV. STAT. § 240 (1979); PA. B.A.R. SUB. CH. C.R. 301 (1979) and PA. R. OF CT. BAR ADMISS. R. 301 (West 1979); R.I. SUP. CT. R. 40 (Bobbs-Merrill 1976); R. OF CT. ADMISS. P. 13 (S.C. Law. Co-op 1979); S.D. CODIFIED LAWS ANN. § 2 (1979); SUP. CT. R. 37 (8.06) (Tenn. 1980); TEX. REV. STAT. ANN. art. 308 (Vernon 1973); UTAH CODE ANN. § 10 (1953); VT. R. CIV. P. 79.1(e) (1974); SUP. CT. R. 14:4 (Va. 1979); WASH. REV. CODE §§ 2.48.170, .190 (1979); W. VA. CODE § 2 (1976); WIS. STAT. ANN. § 256 (West 1979); and APP. STATE BAR R. 19 (West 1979); BAR ASS'N. ORGAN. & GOV'T R. 19 (Wyo. Michie 1957). Case law grants the right to appear *pro hac vice* in Idaho state courts. *See* Mason v. Pelkes, 57 Idaho 10, 59 P.2d 1087 (1936).

823. For a discussion of several requirements, see Brakel & Lob, *supra* note 802, at 703.

824. *See, e.g.,* LA. REV. STAT. ANN. § 37:214 (West 1974) (nonresident attorney "temporarily present" in the state forbidden to practice "unless he acts in association with some attorney duly licensed to practice law by the supreme court of this state.").

825. *See* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). Admission limited to one occasion, however, bears little relation to protecting the public from an incompetent or unethical foreign lawyer.

826. *See* Brown v. Wood, 257 Ark. 252, 516 S.W.2d 98 (1974), *cert. denied,* 421 U.S. 963 (1975); Note, *supra* note 819, at 1284-85.

827. *See* Sanders v. Russell, 401 F.2d 241, 246 (5th Cir. 1968); McKenzie v. Burris, 255 Ark. 330, 344, 500 S.W.2d 357, 366 (1973) (economic protection of the local bar is a legitimate state interest). Restraining the number of attorneys admitted to practice permits the state to maintain a viable bar committed to the local community and to reduce financial pressures that may lead to misconduct.

lating to the case at bar.[828] Hence, judges usually grant admission *pro hac vice* as a routine courtesy.

This section of the Special Project focuses on two constitutional issues in the *pro hac vice* area. First, the section analyzes due process requirements in light of the Supreme Court's decision in *Leis v. Flynt*.[829] Next, the section focuses on equal protection considerations. The section concludes that, while due process avenues of challenge are closed to attorneys seeking admission *pro hac vice*, equal protection remains a viable method for challenging denial of admission *pro hac vice*.

B. *Procedural Due Process*

1. *Leis v. Flynt*

In the recent case of *Leis v. Flynt*[830] the Supreme Court surprisingly restricted the interstate practice of law by holding that the due process clause does not protect an attorney's interest in obtaining admission *pro hac vice*. In *Leis* Larry Flynt and Hustler Magazine, Inc. were charged with violations of the Ohio obscenity statute. Flynt retained two nonresident attorneys who specialized in the defense of obscenity cases.[831] The judge of the court of common pleas informed the local attorneys in the case that he would not allow either of the out-of-state attorneys to represent the defendants. The judge held no hearing on the issue and gave no justification for his decision to deny admission of the attorneys.[832] The state supreme court later dismissed a mandamus action without explanation, but on plaintiff's motion the judge who had denied the admission was removed from the case.[833]

Flynt and his attorneys then instituted an action pursuant to

---

828. Sherman, *supra* note 818, at 73-75.

829. 439 U.S. 438 (1979).

830. *Id.*

831. The attorneys were Herald Fahringer and Paul Cambria. In 1975 Fahringer received the Outstanding Practitioner of the Year award from the New York State Bar Association. Cambria received his legal education in Ohio at the University of Toledo Law School and graduated first in his class. Both attorneys had previously appeared *pro hac vice* in Ohio courts.

832. A newspaper reportedly quoted the judge of the court of common pleas as referring to Fahringer as a "fellow traveler" of pornographers. 439 U.S. at 446 n.3 (Stevens, J., dissenting).

833. The action was apparently dismissed on a procedural point, rather than on the merits of the case. *Id.* at 453 n.18 (Stevens, J., dissenting). The court found no evidence of hias or prejudice, but ruled that a trial before a different judge would avoid even the appearance of impropriety. *Id.* at 440.

42 U.S.C. section 1983[834] in federal district court to enjoin prosecution of the case until they were granted a hearing on the denial of the attorneys' admission. The complaint alleged a violation of the equal protection clause as well as a corresponding violation of the attorneys' procedural due process rights.[835] The district court granted the injunction, and the Sixth Circuit affirmed.[836] These courts held that the attorneys' procedural due process rights were violated because of the lack of a hearing, adequate advance notice, and a specification of the alleged misconduct. Neither the district court nor the Sixth Circuit, however, specified the source of the attorney's protected property interest.

On certiorari the Supreme Court summarily reversed.[837] The Court held that attorneys not admitted to the practice of law in Ohio did not possess the requisite interest to trigger due process protections, and that therefore they were not entitled to a hearing upon denial of their application to appear *pro hac vice*. According to the Court, the only way such an interest could arise would be through a grant of right under state or federal law or through an entitlement under any state "statute or legal rule or . . . mutually explicit understanding."[838] After noting the failure of the courts below to cite authority that would support a finding of such an interest,[839] the Court concluded that there "simply was no deprivation here of some right previously held under state law."[840] The Court reasoned that, regardless of any reliance by the attorneys

---

834. 42 U.S.C. § 1983 (1976) provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

835. Because the district court ruled in favor of the procedural due process argument, it never reached the question of an equal protection violation. Thus, the validity of an equal protection challenge is still unresolved since the question was not before the Sixth Circuit or the Supreme Court. Flynt v. Leis, 434 F. Supp. 481 (S.D. Ohio 1977), *aff'd*, 574 F.2d 874 (6th Cir. 1978), *rev'd and remanded*, 439 U.S. 438 (1979). *See* notes 909-20 *infra* and accompanying text.

836. Flynt v. Leis, 574 F.2d 874 (6th Cir. 1978), *rev'd and remanded*, 439 U.S. 438 (1979).

837. 439 U.S. 438 (1979). Because of the summary disposition of *Leis*, the case was decided before the parties were given an opportunity to address the merits. Justice White voted to grant certiorari and set the case for oral argument. *Id.* at 445. The dissent argued that since this was a matter of "great importance to the administration of justice," it was an egregious error to summarily reverse. *Id.* at 457-58 (Stevens, J., dissenting).

838. *Id.* at 442 (citing Perry v. Sindermann, 408 U.S. 593, 601-02 (1972)).

839. 439 U.S. at 441.

840. *Id.* at 443.

upon Ohio customs, admission *pro hac vice* was a privilege rather than a right because the state had never relinquished the power of its judges to deny admission without explanation.[841]

The dissent[842] criticized the majority for relying upon outdated labels such as the right-privilege distinction.[843] The dissent identified two possible sources of a protected interest and maintained that either one was sufficient to require a court to provide due process protection before denying admission *pro hac vice*. First, the dissent contended that attorneys have a liberty interest not only in pursuing their calling but also in carrying out their "responsibility for the fair administration of justice in our adversary system,"[844] and that admission *pro hac vice* falls within that interest. Second, the dissent argued that the "implicit promise" inherent in Ohio custom and policy with respect to those admissions was sufficient to create a property interest in admission *pro hac vice*.[845] The dissent concluded by noting that this was "the classic situation in which the interests of justice would be served by allowing the defendant to be represented by counsel of his choice."[846]

2. Analysis

The Court in *Leis* resolved that an attorney who is denied admission *pro hac vice* is not entitled to a hearing, either to protest

---

841. *Id.* at 442-43.

842. Justice Stevens dissented in an opinion joined by Justices Brennan and Marshall. *Id.* at 445. Justice White did not join an opinion in the case, voting instead to grant certiorari and set the case for oral argument. *Id.*

843. Under the right-privilege distinction, interests viewed as rights cannot be taken away without the required procedural safeguards, while those viewed as privileges can be withheld arbitrarily. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 617 (1960) (state's refusal to pay old-age benefits is a "mere denial of a noncontractual governmental benefit"); American Communications Ass'n v. Douds, 339 U.S. 382, 389-90 (1950) (Supreme Court not "free to treat § 9(h) [of the Taft-Hartley Act] as if it merely [withdrew] a privilege gratuitously granted by the government."). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 486-87 (1978).

In a series of cases, the Supreme Court has rejected this distinction. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (social security disability benefits); Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972) (public employment); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

For further discussion of the right-privilege distinction—and the suggestion that the Court has once again adopted it sub silentio in recent decisions—see Note, *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 95-102 (1976).

844. 439 U.S. at 453 (Stevens, J., dissenting).

845. *Id.* at 456.

846. *Id.* at 452.

or to request reasons for the denial. According to recent case law,[847] procedural due process safeguards would have attached only if the Court found that the attorney had a protected fourteenth amendment interest in appearing in an out-of-state case. This section comments on the nature of these interests and on the Court's determination that they did not exist in *Leis*.

Traditionally, the fourteenth amendment has protected persons from state action that arbitrarily impairs protected interests in life, liberty, and property.[848] In recent years, courts have broadened the scope of protected interests to include state-created interests called "entitlements."[849] This expansion of protected interests is the result of the government's increasing role as the source of necessary and important goods and the concomitant growth of citizen dependency on this governmental largesse. Consequently, the entitlement doctrine has become an important new source of liberty and property interests. Under this current analysis, if a party claims an interest in admission *pro hac vice*, then the Court should focus upon state law, policies, and practice to ascertain whether an entitlement has been created.[850]

The Supreme Court has held that attorneys possess a constitutionally derived liberty interest in their initial admission to the bar.[851] In his dissent in *Leis*, Justice Stevens argued that attorneys also have a protected liberty interest in admission *pro hac vice* derived from a substantive due process right to practice law.[852] The majority in *Leis*, however, rejected this argument and ruled that a foreign attorney has no liberty interest in appearing *pro hac vice*. One commentator has attempted to explain the majority's holding through the use of a three-step syllogism.[853] First, it is recognized

---

847. *See* notes 862-66 *infra* and accompanying text.

848. U.S. CONST. amend XIV, § 1, provides in part,

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

See Mathews v. Eldridge, 424 U.S. 319 (1976). *See also* Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267 (1975).

849. The Supreme Court first discussed the theory of entitlements in Goldberg v. Kelly, 397 U.S. 254 (1970). Professor Reich of Yale initially articulated this theory in an article entitled *The New Property*, 73 YALE L.J. 733 (1964). *See* note 843 *supra* and accompanying text.

850. *See* Perry v. Sindermann, 408 U.S. 593, 602 (1972); *accord*, Bishop v. Wood, 426 U.S. 341 (1976); Goss v. Lopez, 419 U.S. 565 (1975). *See also* 439 U.S. at 442-43.

851. Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957).

852. *See* 439 U.S. at 452 n.17 (Stevens, J., dissenting).

853. *See* 79 COLUM. L. REV. 572, 577 (1979).

that a state may exclude from the practice of law any applicant who has not complied with reasonable state requirements.[854] Thus, permanent admission to the bar of the state in which the applicant chooses to practice is a reasonable requirement.[855] Therefore, if a state may require all those who practice within its borders to become permanent members of its bar, then the state may also grant admission *pro hac vice* in any manner it wishes, however arbitrary, without violating any due process right. The problem with this argument is that the conclusion is based upon the right-privilege distinction consistently rejected by the Court.[856] Although a state has the power to terminate a benefit altogether, it does not necessarily follow that a state can administer that benefit in any fashion it chooses. A state may require permanent admission only because it is a reasonable requirement; if the state chooses not to require permanent admission then any substitute scheme must also be reasonable.

Assuming the inadequacy of the above syllogism, there are two possible explanations for the Court's decision in *Leis*. First, the Supreme Court failed to find a protected liberty interest in *Leis* because Ohio's refusal to admit the nonresident attorneys for a single occasion did not constitute a deprivation of a sufficient degree to be protected by the fourteenth amendment.[857] In *Board of Regents v. Roth*[858] the Court indicated that some foreclosures of opportunities might rise to the level of deprivations of liberty.[859] Instead of further specifying the precise requirements of such a deprivation, the Court cited *Schware v. Board of Bar Examiners*, a case in which the Court held that an applicant has a significant due process interest in admission to the bar.[860] A denial of permanent admission to the bar in one's home state amounts to a foreclosure of opportunities sufficient to constitute a deprivation of lib-

854. *See, e.g.*, Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

855. *See, e.g.*, Brown v. Supreme Court, 414 U.S. 1034 (1973), *aff'g mem.* 359 F. Supp. 549 (E.D. Va.); Hawkins v. Moss, 503 F.2d 1171, 1175-76 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975).

856. *See* note 843 *supra* and accompanying text. The syllogism is also invalid because it ignores the existence of any equal protection challenge. *See* notes 909-20 *infra* and accompanying text. A convincing argument can be advanced, however, suggesting that the Court has re-adopted the "wooden" right-privilege distinction. If so, then the logic of the syllogism is arguably sound.

857. *See* notes 71-77 *supra* and accompanying text.

858. 408 U.S. 564 (1972).

859. *Id.* at 574 n.13.

860. 353 U.S. 232 (1957).

erty.[861] On the other hand, a refusal to admit an attorney *pro hac vice* hardly constitutes a serious foreclosure of opportunities since the attorney can still pursue the practice of law in his home state.

Second, the narrow definition given to protected liberty interests in *Leis* may also be attributed to the current Court's philosophy on the scope of protected interests. In the past, the Court has recognized liberty interests that arise independently of state or customary law.[862] In recent decisions, however, the Court has taken a conservative stance when analyzing liberty interests. For example, in *Paul v. Davis*[863] the Court suggested that liberty interests not found in the Bill of Rights must be "initially recognized and protected by state law" in order to receive constitutional protection.[864] In *Paul* the police placed a picture of Davis on an active shoplifters list when he had been arrested but not convicted of that crime. Later, the charges were dismissed and Davis sued, claiming a deprivation under the fourteenth amendment due to the damage to his reputation. But because Kentucky did not "extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioner's action," Davis was not entitled to constitutional relief.[865] The Court could have taken a more liberal approach in *Paul* and found reputation to be an interest stemming directly from the Constitution, but it chose not to do so. Similarly, the *Leis* Court did not look outside state law in determining whether admission *pro hac vice* is a protected interest. Such a conservative approach virtually ensures that interests such as admission *pro hac vice* will be defined outside the scope of protected interests.[866]

---

861. For the most part, if an applicant is denied admission in his home state for lack of good moral character, then he will also be denied admission in other states. *See* notes 71-77 *supra* and accompanying text.

862. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

863. 424 U.S. 603 (1976). *See also* Bishop v. Wood, 426 U.S. 341 (1976).

864. 424 U.S. at 710. The Court stated in a footnote,

> There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been "incorporated" into the fourteenth amendment.

Id. at 710-11 n.5.

865. *Id.* at 711-12.

866. *See* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 322-28 (1976); Note, *supra* note 843, at 91.

Whether or not this approach will continue to receive the support of a majority of the Court in all cases is an open question. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 672-73 (1977) (holding that a liberty interest is involved when schoolchildren receive corporal punishment despite the fact that such an interest is not created by state law). *See also* Blum-

The majority in *Leis* also rejected the claim that Ohio had in fact created a property entitlement in admission *pro hac vice*.[867] The Court stated that "the Constitution does not create property interests. Rather it extends various procedural safeguards to certain interests 'that stem from an independent source such as state law.' "[868] Deciding that there was no property interest in admission *pro hac vice* in Ohio, the Court based its determination upon a rule of the Ohio Supreme Court allowing "participation by a nonresident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such cause."[869] A claim of entitlement is defeated when such a statute creates absolute discretion in the trial judge to allow or deny admission.[870] A review of available evidence by the dissent,[871] however, revealed that Ohio had not granted unfettered discretion to the trial judge but had arguably created a property entitlement in the nonresident attorney.[872] In *State v. Ross*[873] the Ohio Court of Appeals heard an appeal from a trial judge's order denying an out-of-state attorney's *pro hac vice* application. The appellate court made an extensive inquiry into the trial court's reasons for the denial.[874] Although the appellate court found the denial to be justified, it can be inferred from the opinion that an arbitrary ruling by the trial

---

stein, *Constitutional Perspectives on Governmental Decisions Affecting Human Life and Health*, 40 LAW & CONTEMP. PROBS. 231, 243-46 (1977).

867. 439 U.S. at 442-43, 444 n.5.

868. Id. at 441.

869. *Id.* at 439 n.2 (quoting SUP. CT. R. GOV'T B. OHIO I. § 8(C)).

870. *See* Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636-37 (1971). When the rule establishes only a limited discretion, a court can still find the mutuality of expectation required for finding an entitlement.

871. Judicial inquiry necessarily focuses upon state laws, policies, and practices, because the claimant seeking to establish an entitlement must prove the existence of "rules and understandings, promulgated and fostered by state officials." Perry v. Sindermann, 408 U.S. 593, 602 (1972).

872. *See* 439 U.S. at 453-54, 454 n.24 (Stevens, J., dissenting). Canon 3 of Ohio's ethical code expresses an official state policy favoring admission *pro hac vice*. It recognizes the indispensability to many modern attorneys of the ability to pursue their clients' interests across state lines:

> [T]he legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

Id. at 454 n.21 (quoting OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 3-9).

873. 36 Ohio App. 2d 185, 304 N.E.2d 396 (1973), *cert. denied*, 415 U.S. 904 (1974).

874. *Id.* at 190-201, 304 N.E.2d at 401-06.

judge would have been reversible error.[875] Thus, the above rule of the Ohio Supreme Court conferring discretion upon the trial court did not necessarily defeat the attorney's claim of property entitlement.

Although the claimants in *Leis* arguably had a valid property entitlement, the Court's summary disposition of the case may be attributable to the majority's conservative view of entitlements. Ohio law did not clearly establish the entitlement, and so the Court opted for the view that no protected interest existed.[876] This approach did not prevent Ohio from making a contrary finding if it so chose. Such a conservative position rests upon basic principles of federalism[877] whereby states have autonomous power, subject only to constitutional limitations, to govern their internal affairs.[878] The concept of federalism is consistent with the entitlement doctrine itself. Thus, the Court will not require the state to provide procedural safeguards unless it is clear that the state has recognized the interest sought to be protected.

3. The Impact of *Leis v. Flynt*

Because the court relied upon Ohio state law to define the property interest allegedly protected by the due process clause in *Leis*, a restrictive interpretation may arguably be given to the Court's holding. Under such an interpretation, a similar challenge in another state in which the policy governing admission *pro hac vice* is more clearly established may result in the attachment of due process safeguards. An examination of the law governing admission *pro hac vice* in other states, however, reveals that this area of the law is generally no more well defined than in Ohio. Thus, *Leis* may effectively foreclose due process challenges to denials of admission *pro hac vice*.

Bundy v. Rudd[879] indicates that an attorney has no constitutionally protected right to appear *pro hac vice* in Florida.[880] Applying Florida law, the Fifth Circuit held that the nonresident attorney's prior appearances in Florida courts were not sufficient to

875. 439 U.S. at 455 (Stevens, J., dissenting).

876. The Ohio Supreme Court had dismissed a mandamus action brought by Flynt's attorneys. *Id.* at 440. Further, the court found the record "devoid of any indication that an out-of-state lawyer may claim such an entitlement in Ohio." *Id.* at 442.

877. *See* 79 COLUM. L. REV., *supra* note 853, at 580.

878. *See generally* National League of Cities v. Usery, 426 U.S. 833 (1976).

879. 581 F.2d 1126 (5th Cir. 1978).

880. *Id.* at 1130-31.

create a liberty entitlement.[881] There are, however, implications from the opinion that a denial without some justification would have been reversible error.[882]

New York case law suggests that the trial court has some discretion in allowing *pro hac vice* appearances.[883] In *In re Rappaport*[884] the Second Circuit held that permission to appear *pro hac vice* for the initial trial did not guarantee the automatic right to appear for the retrial of the case. Another New York case, *Spanos v. Skouras Theatres Corp.*,[885] fell short of creating a right to appear *pro hac vice* because it only determined that the practice is permissive. Like New York, the California courts appear to lack a well-established policy on the right of foreign attorneys to appear *pro hac vice*.[886] In *Munoz v. United States District Court*,[887] however, the court ruled that an appearance *pro hac vice* must be permitted in California unless adequate justification for denial is established.

None of the above mentioned states has any statute or court

---

881. *Id.* at 1131.

882. *Id.* at 1132. *Bundy v. Rudd* was decided after the Sixth Circuit's decision in *Leis* but before the Supreme Court's decision. The Fifth Circuit distinguished *Bundy* from *Leis* by noting that there was a report of misconduct by the attorney in *Bundy* in another state. The court's view of the Sixth Circuit's decision in *Leis* therefore implies that an unjustified denial may constitute reversible error.

883. *See* People v. Epten, 248 F. Supp. 276 (S.D.N.Y. 1965). Whether that discretion is limited or unfettered is unclear. In *Epton*, the district court ruled that the state trial court had not abused its discretion by excluding defendant's nonresident attorney, despite the failure to give any reason for the exclusion. *Id.* at 277.

884. 558 F.2d 87 (2d Cir. 1977).

885. 364 F.2d 161 (2d Cir.), *cert. denied*, 385 U.S. 987 (1966). In *Spanos* a California attorney was awarded legal fees even though he was not formally admitted to appear *pro hac vice* in New York. Justice Stevens relied upon *Spanos* in his dissent in *Leis*. 439 U.S. at 449-50 (Stevens, J., dissenting). The majority in *Leis*, however, observed that *Spanos* was limited, if not rejected entirely, by Norfolk & W. Ry. v. Beatty, 423 U.S. 1009 (1975). 439 U.S. at 442 n.4.

886. The California decisions seem to turn on the presence or absence of unique circumstances. In *Ex Parte* McCue, 211 Cal. 57, 293 P. 47 (1930), an out-of-state attorney sought admission for the sole purpose of transferring his case to another court. Ruling that the attorney should have been admitted, the court stressed that the qualifications and the moral character of the attorney were insignificant when dealing with such a slight appearance. More recently in Magee v. Superior Court, 8 Cal. 3d 949, 506 P.2d 1023, 106 Cal. Rptr. 647 (1973), the California Supreme Court again relied upon the presence of unique circumstances in holding that appearance by foreign counsel should have been allowed. The Superior Court of California had denied admission *pro hac vice* because of its desire to avoid any error on the trial court record in a criminal case that had already consumed a large amount of court time and vast expenditures for security.

887. 446 F.2d 434 (9th Cir. 1971). Both the original case and the rehearing contained vociferous dissents maintaining that the state *pro hac vice* rule made appearances only permissive.

rule that specifically grants a nonresident attorney the right to appear *pro hac vice*. Furthermore, because few, if any, other state rules clearly create an entitlement to admission *pro hac vice*[888] —most statutes make the practice permissible but then fail to enumerate the grounds upon which the admission may be withheld—it is unlikely that any procedural due process challenge to state *pro hac vice* rules will succeed. In addition, even if a specific statute or court rule granted admission *pro hac vice*, there is no indication that the Court will alter its current practice of narrowly construing these rules. Thus, although it is still possible in some states for a court to find that an attorney has a property entitlement to appear *pro hac vice*, the chances of such a finding are remote.

Since *Leis* state courts addressing the question of whether a nonresident attorney has a protected interest in appearing *pro hac vice* have all adopted the Supreme Court's position. In *Whitaker v. State*[889] the Georgia Supreme Court cited *Leis* and opined that an out-of-state lawyer has no cognizable fourteenth amendment property interest that requires automatic recognition of a right to appear *pro hac vice*. The court, however, also declared that the trial court did not abuse its discretion by excluding the attorney.[890] This dictum implies that an abuse of discretion might have been grounds for reversal. Although the New Jersey case of *Burlington County Internal Medicine Associates, P.A. v. American Medicorp, Inc.*[891] is factually distinguishable from *Leis*,[892] the Superior Court nevertheless discussed the *Leis* holding and concluded that an attorney has no constitutional right to admission *pro hac vice*. These two recent decisions indicate a general adoption of the *Leis* holding among the state courts and perhaps will generate a uniform state practice in a once poorly-defined field of law.

Leis is of less consequence in the federal courts because local court rules govern admission *pro hac vice*.[893] Although these rules

888. *But see* A. KATZ, ADMISSION OF NONRESIDENT ATTORNEYS PRO HAC VICE 1 n.1 (1968).

889. 246 Ga. 163, 269 S.E.2d 436 (1980).

890. *Id.* at 167-68, 269 S.E.2d at 440-41. The exclusion occurred because the trial judge denied a continuance of several hours in order to allow time for the out-of-state attorney to arrive. The judge decided to proceed with the hearing on schedule in order to accommodate a state's witness, who would have been inconvenienced by a delay of several hours.

891. 168 N.J. Super. 382, 403 A.2d 43 (1979).

892. *Burlington County* concerned the client's right to choose an out-of-state counsel, while *Leis* related to the attorney's interest in admission in a foreign state.

893. *See* 28 U.S.C. § 2071 (1976). Rule 83 of the Federal Rules of Civil Procedure was promulgated under the rulemaking power granted by 28 U.S.C. § 2071. Rule 83 provides,

> Each district court by action of a majority of the judges thereof may from time to

vary substantially,[894] the federal courts routinely permit *pro hac vice* appearances and apply procedural safeguards.[895] The recent case of *Johnson v. Trueblood*[896] exemplifies the relatively minor impact of *Leis* in the federal courts. In *Johnson* the district court revoked sua sponte the *pro hac vice* status of a nonresident attorney.[897] Citing *Leis v. Flynt*, the trial judge reasoned that, since the nonresident attorney had no property interest in admission *pro hac vice*, the procedure was merely a privilege granted by the courtesy and grace of the court.[898] Accordingly, the trial judge ruled that the attorney had no due process right to a hearing.[899] On appeal the Third Circuit vacated.[900] Unlike the court below, the appellate court did not find it necessary to first identify authority in the district that recognized the attorney's property interest in admission *pro hac vice*. Instead, the court emphasized the desirability of due process safeguards in this area of interstate law practice.[901] It also held that a procedural requirement serves a number of salutary purposes.[902] While a full scale hearing is not necessary in every case, the court concluded that an attorney is entitled to a meaningful opportunity to respond to identified charges before his *pro hac vice* status is terminated.[903]

As *Johnson* illustrates, the attorney seeking admission *pro hac*

---

time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district court may regulate their practice in any manner not inconsistent with these rules.

See also Theard v. United States, 354 U.S. 278 (1957).

894. *See* Brakel & Loh, *supra* note 802, at 718.

895. *See, e.g., In re* Evans, 524 F.2d 1004 (5th Cir. 1975); United States v. Bergamo, 154 F.2d 31 (3d Cir. 1946).

896. 629 F.2d 302 (3d Cir. 1980).

897. Johnson v. Trueblood, 476 F. Supp. 90, 91 (E.D. Pa. 1979).

898. *Id.* at 92 n.5. The trial judge did not inquire whether the attorney might have had a liberty interest in his admission *pro hac vice*. *Cf.* 439 U.S. at 448-52 (Stevens, J., dissenting) (finding a liberty interest in admission *pro hac vice*). The district court relied upon the right-privilege distinction. 476 F. Supp. at 92. *See* note 843 *supra* and accompanying text.

899. The trial judge also concluded that a hearing was not merited because all of the matters before the court concerned conduct committed in the actual presence of the court. 476 F. Supp. at 92 n.5. Plaintiffs, however, contended that fairness dictated the holding of revocation proceedings before a different judge rather than the potentially biased trial judge. 629 F.2d at 304.

900. 629 F.2d at 302.

901. *Id.* at 303.

902. *Id.* The court found that procedural due process protection ensures that the attorney's reputation and livelihood are not unnecessarily damaged; it protects the client's interests; and it promotes more of an appearance of regularity in the court's process. *Id.*

903. *Id.* at 304.

vice will encounter little resistance in the federal courts.[904] The implication of *Leis,* however, is that an attorney who is denied admission *pro hac vice* in state court will not have a valid due process argument.[905] Consequently, the nonresident attorney must rely on other constitutional claims to vindicate his own or his client's rights. Possible challenges include a violation of the privileges and immunities clause,[906] a denial of the client's right to counsel under the sixth amendment,[907] and, perhaps the most persuasive of all, a challenge on equal protection grounds.[908]

C. *Equal Protection*

The fourteenth amendment mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the law."[909] An equal protection problem thus arises when states utilize classifications that treat similarly situated persons unequally. Under current analysis, if the classification disadvantages persons within a suspect class[910] or affects a fundamental interest,[911] the classification falls unless the state can demonstrate a compelling interest served through the least restrictive means available.[912] If the classification affects an economic interest, however, then the classification must only bear a rational relationship to a legitimate state interest.[913]

---

904. *See generally* Annot., 33 A.L.R. Fed. 799 (1977).

905. *See* notes 879-92 *supra* and accompanying text.

906. Under the privileges or immunities clause of the fourteenth amendment, the states may not restrict any measure necessary for the assertion of a federal claim or defense. In Spanos v. Skouros Theatres Corp., 364 F.2d 161 (2d Cir.), *cert. denied,* 385 U.S. 987 (1966), Judge Friendly held that under the privileges and immunities clause no state can prohibit a citizen with a federal claim or defense from engaging an out-of-state attorney.

907. *See* 79 COLUM. L. REV, *supra* note 853, at 581.

908. *See* notes 909-20 *infra* and accompanying text.

909. U.S. CONST. amend. XIV, § 1.

910. *See, e.g.,* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Lovy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Korematsu v. United States, 323 U.S. 214 (1944) (race).

911. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1963) (voting); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

912. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

913. *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). Courts utilize a third level of review if a significant individual interest other than economics is involved. In that case, the classification must bear a substantial relationship to a legitimate state interest. *See, e.g.,* Reed v. Reed, 404 U.S. 71 (1971). *See also* Gunther, Foreward: *In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

In *Leis v. Flynt*[914] petitioners argued before the district court that the state judge's denial of *pro hac vice* to Flynt's attorneys violated both the equal protection and due process clauses. The district court, however, relied solely on due process grounds in rendering its decision; thus, the equal protection challenge was not before either the Sixth Circuit or the Supreme Court.[915] Unlike the due process clause, which requires an individual to demonstrate that the state's action has infringed upon a "protected" interest,[916] the equal protection clause applies whenever similarly situated individuals are treated unequally by the state. Thus, equal protection principles apply when a court routinely grants admission *pro hac vice* to applicants but has denied such admission to a particular individual.

In any equal protection challenge, a court's determination of the appropriate standard of review to be utilized is critical to the outcome of the case. Considering the nature of the interest involved in admission *pro hac vice,* it is apparent that the rational basis test is the appropriate standard of review. Clearly, the attorney has an economic interest in such appearance. Although an argument can be made that career and reputation interests are also involved, the Supreme Court's treatment of admission *pro hac vice* in the due process context teaches that it is not likely that the current Court will sanction any standard of review but the most minimal.[917]

Despite the application of minimal scrutiny, however, it appears that the court's action in denying admission to Flynt's attorneys would not stand under equal protection scrutiny. In denying admission to the attorneys, the Ohio court stated only that "Mr. Fahringer and Mr. Cambria are not attorneys of record in this case and will not be permittod to try this case."[918] Justice Stevens, in his dissent, stated that conceivably the reason for the denial hinged on the nature of the suit—an obscenity trial.[919] In any event, such an arbitrary classification would not appear to pass constitutional muster even under a minimal scrutiny standard of equal protection review.[920] Thus, although the Court's decision in

914. 439 U.S. 438 (1979).
915. 574 F.2d 874 (6th Cir. 1979).
916. *See* notes 60-61 *supra* and accompanying text.
917. *See* notes 830-46 *supra* and accompanying text.
918. 439 U.S. at 446 n.3 (Stevens, J., dissenting).
919. 439 U.S. at 447 n.3 (Stevens, J., dissenting).
920. *See* note 913 *supra.*

Leis casts considerable doubt on the viability of any due process challenge to denial of admission *pro hac vice*, the same cannot be said of equal protection challenges. The equal protection clause should provide a viable method of challenging arbitrary denials.

BEN C. ADAMS
EDWARD H. BENTON
DAVID A. BEYER
CHARLES H. COFFIN
HARRISON L. MARSHALL, JR.
CARTER R. TODD

JANE GETKER ALLEN
Special Projects Editor