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N.H. Bar's Residency Requirement Faces a Constitutional Challenge

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CONSTITUTIONAL LAW

By Neal Devins

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ON OCT. 31, the U.S. Supreme Court heard oral arguments in a case that will determine whether states can prohibit non-residents from becoming members of the state bar. The case, *Supreme Court of New Hampshire v. Piper*,[1] involves a challenge under the Constitution's privileges and immunities clause to New Hampshire's residency requirement.

The privileges and immunities clause prevents a state from discriminating against citizens of other states in favor of its own. Although the Supreme Court has yet to define the precise contours of the interests protected by the clause, the court has interpreted it "to prevent a state from imposing unreasonable burdens on citizens of other states in their pursuit of common callings within the state; in the ownership of disposition of privately held property within the state; and in access to the courts of the state."[2]

To justify discrimination under this provision, a state must show either that "non-citizens constitute a peculiar source of the evil at which the statute is aimed," or that the state discrimination had a "close relation" to a "substantial" state interest.[3]

New Hampshire cannot satisfy this standard of proof. The reasons proffered by the state in support of its residency requirement simply do not take into account the realities of modern law practice.

Initially, the state argues that its residency requirement does not implicate the privileges and immunities clause because "state court control over bar membership involves an activity which is directly connected and bound up with the state's exercise of its judicial power rather than an interest fundamental to the promotion of interstate harmony."[4]

For the state, its requirement is not an economic regulation. Thus, according to the state, federalism concerns outweigh the need to apply the privileges and immunities clause. In support of this claim, the state points to the Supreme Court's admonition that "the national government will fare best if the states and their institutions are free to perform their separate functions in their separate ways."[5]

New Hampshire is correct in suggesting that our federalist system demands that states have leeway to structure their legal system. No one disputes the fact that our nation is a conglomerate of 50 individual states; each of which has unique laws, unique court systems and unique standards for lawyer competency.

Yet, although these federalism concerns weigh into privileges and immunities clause analysis, the Supreme Court has held that clause coverage is triggered by "discrimination against out-of-state residents on matters of fundamental concern."[6] One of these fundamental concerns, undoubtedly, is the right to pursue a trade.

Law practice differs from most trades in that lawyers, as "officers of the court," affect the implementation of state and federal law. Yet, as the Supreme Court noted in a case that invalidated Connecticut's requirement of U.S. citizenship for admission to the state bar, lawyers "are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy."[7]

Consequently, although the state should be accorded meaningful deference in its regulation of the state bar, the state still must provide a reasonable explanation for regulations that diminish the ability of non-residents to practice in state courts. Since a residency requirement is the most extreme form of state regulation against out-of-state residents, the state must justify such a requirement with practical reasons — not lofty rhetoric about federalism.

> Interests of the national marketplace and adequate legal representation could support invalidation of the residency requirement.

NEW HAMPSHIRE has articulated several "peculiar evils" posed by non-resident applicants: "[N]on-resident attorneys, once admitted, are less likely to remain familiar with legal rules and procedures and less likely to keep attuned to local conditions which may affect the needs of their local clients. Similarly, non-resident attorneys are less likely to be subject to local peer pressure which, imposes informal, but powerful curbs on unethical or incompetent conduct through the regular practice of law in a relatively small and closely knit legal community. Also, non-resident attorneys are less likely to be available for court appearances, disciplinary proceedings and participation in the voluntary activities of a unified bar."[8] Because of these alleged dangers, New Hampshire claims that its residency requirement placed a justifiable burden on out-of-state applicants.

The state, however, has failed to introduce any evidence to support any of its proffered justifications. Additionally, there are strong intuitive arguments that rebut each of New Hampshire's justifications.

First, there is no reason to think that the New Hampshire bar exam could not adequately test non-resident's familiarity with local rules and procedures. Also, any possible state concerns of non-resident attorneys forgetting state law could be addressed by requiring non-resident attorneys to take periodic competency exams.

Second, competition in the economic marketplace and commonly shared standards of professionalism contradict New Hampshire's presumption that out-of-state attorneys are either unconcerned with their reputations or unavailable for court appearances or other required activities. In addition to this common-sense conclusion, New Hampshire still would have authority either to disbar or to discipline attorneys who breach their responsibilities.

New Hampshire's stated justifica-

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Can N.H. Keep Non-Residents From Joining Bar?

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tions seem especially spurious in light of the details of the Piper case. An attorney, who lived only 400 yards from the New Hampshire state line, intended to join a New Hampshire law firm. Additionally, lawyers in bordering states are, in many instances, equally accessible to New Hampshire residents as they are to home-state residents.

Finally, New Hampshire, by not imposing a continuing residency requirement upon practicing attorneys, appears less than fully committed to the objectives sought to be furthered by the residency requirement.

It thus appears that New Hampshire's residency requirement is subject to former American Bar Association President Chesterfield Smith's criticism that "[m]any of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition."[9]

ASIDE FROM being an unfair restriction on an attorney's right to practice his trade, New Hampshire's residency requirement is unfair to legal consumers who rely on in-house counsel, multistate law firms or "specialist" law firms.

As Justice John Paul Stevens noted in 1979 in *Ceis* v. *Flynt*: "[T]he 'change in the character of law practice from a generalist skill to an increasingly specialized one' " means that modern legal practice " 'transcend[s] jurisdictional boundaries and the legal competence of local generalists.' "[10] Additionally, New Hampshire residents can reap the benefits of economic competition between New Hampshire lawyers and lawyers from bordering states.

This "consumerism" aspect of the Piper case has brought together two unlikely bedfellows, Ralph Nader's Public Citizen and the American Corporate Counsel Association — both of which filed amicus briefs arguing that the state residency requirement improperly interfered with consumer choice.

Public Citizen claims that the end of "assuring that clients will be well served by honest and capable attorneys" is best accomplished "by allowing qualified non-residents to become members of the New Hampshire Bar and thereby increase the pool of attorneys available to represent clients."[11]

The consumerism argument advanced by the American Corporate Counsel speaks to the needs of corporations to have in-house attorneys represent them in court; for these attorneys are intimately familiar with both the internal workings of the corporations they represent and the industries served by those corporations. Such "consumerism" concerns undercut much of state's argument that its residency requirement ensures competent legal representation.

The interests of the national marketplace as well as adequate legal representation support the invalidation of New Hampshire's residency requirement. Constitutional protections against anti-competitive state practices combined with the growth of "national" law firms *has* weakened the state's interest in regulating the legal profession.

At the same time, the state has great authority to regulate its bar. It may demand continued legal education, pro bono work and competency examinations. Additionally, the state may discipline or disbar attorneys who do not comply with reasonable rules designed to preserve the integrity of the state bar. In other words, the invalidation of the residency requirement need not be equated with a defeat for states' rights.

(1) 83-1466.
(2) Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371 383 (1978).
(3) Toomer v. Witsell, 334 U.S. 385, 398, 396 (1948).
(4) Brief for Appellant at 7.
(5) Younger v. Harris, 401 U.S. 37 (1971).
(6) United Building v. Camden, 104 S.Ct. 1020, 1028 (1984).
(7) In re Griffiths, 413 U.S. 7-17, 7-29 (1973).
(8) Brief for Appellant at 29.
(9) Smith, "Time for a National Practice of Law Act," 64 A.B.A.J. 557 (1978).
(10) 439 U.S. 438, 449 n. 8 (Stevens J., dissenting).
(11) Amicus brief of Public Citizen at 2.