Nebraska Law Review

Volume 60 | Issue 1 Article 9

1981

The Constitutionality of State Residency Requirements for Attorneys under the Privileges and Immunities Clause: The Attack Continues: *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979)

Tim Binder
University of Nebraska College of Law

Note

The Constitutionality of State Residency Requirements for Attorneys Under the Privileges and Immunities Clause: The Attack Continues

Gordon v. Committee on Character and Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).

I. Introduction

A unanimous decision by the New York Court of Appeals[1] may signal the beginning of another round in the court fights involving both simple[2] and durational[3] residency requirements for admission to state bars. In the past, attacks on state residency requirements have met with only limited success. These attacks have been based on the grounds that such residency requirements violate the equal protection, due process, and privileges and immunities clauses of the fourteenth amendment, as well as the right of interstate travel.[4] Opponents of residency requirements have also

1. Gordon v. Committee on Character & Fitness, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).
2. A simple residency provision requires the applicant to be a resident on a specific date. *See, e.g.*, BAR & BRI, NATIONAL BAR EXAMINATION DIGEST 24 (1978) (Iowa — date of admission to the bar); *id.* at 32 (Nebraska — date of application for admission to bar).
3. A durational residency provision requires the applicant to be a resident of the State for a specific period of time. *See, e.g., id.* at 31 (Montana — six months prior to application for admission to the bar); note 10 *infra.*
4. *See* Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated and dismissed on other grounds*, 614 F.2d 943 (1980); Wilson v. Wilson, 416 F. Supp. 984 (D. Or. 1976), *aff'd*, 430 U.S. 925 (1977); Tang v. Appellate Div., 373 F. Supp. 800 (S.D.N.Y. 1972), *aff'd on other grounds*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); Kline v. Rankin 352 F. Supp. 292 (N.D. Miss. 1972), *vacated and remanded for convention of three-judge court*, 489 F.2d 387 (5th Cir. 1974); Note, *The Constitutionality of State Residency Requirements for Admission to the Bar*, 71 MICH. L. REV. 838 (1973); Note, *Constitutional Law—Equal Protection and Residence Requirements*, 49 N.C. L. REV.

argued that these provisions violate the commerce clause of the Constitution.[5] In addition, such requirements might be subject to attack under the Sherman Act[6] when the requirements are not mandated by a state court or agency but are promulgated and enforced by a separate state bar.[7] Nevertheless, none of these theories have yet successfully provided applicants with a method to strike down simple or short-term durational residency requirements. A majority of the court decisions of this century have upheld or strongly indicated approval of state residency requirements of six months or less.[8] However, the courts recently have been equally aggressive in striking down residency requirements of one year or more.[9] The effect of these court decisions is that today, although most states maintain some form of residency requirement, no state has a durational residency requirement longer than six months residency prior to taking the bar examination.[10] A new theory, however, has been advanced in *Gordon v.*

753 (1971). For a general review of cases in the areas, see Annot., 53 A.L.R.3d 1163 (1973).

5. *See* Comment, *Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys*, 72 NW. U. L. REV. 737 (1978).
6. 15 U.S.C. §§ 1-7 (1976).
7. *Cf.* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (Sherman Act applies to minimum fee schedules set by state bars); United States v. Oregon State Bar, 385 F. Supp. 507 (D. Or. 1974) (same). *But cf.* Bates v. State Bar, 433 U.S. 350 (1977) (the state "as sovereign, imposed the restraint [on advertising] as an act of government which the Sherman Act did not undertake to prohibit." *Id.* at 357.) The *Bates* court held that although the prohibition of advertising did not violate the Sherman Act it did violate the first amendment rights of petitioners. *See generally* Note, *The Sherman Act and Bar Admission Residence Requirements*, 8 U. MICH. J. L. REF. 615 (1975).
8. *See* Martin v. Walton, 368 U.S. 25 (1961), *aff'g per curiam*, Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960); Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated and dismissed on other grounds*, 614 F.2d 943 (4th Cir. 1980); Suffling v. Bondurant, 339 F. Supp. 257 (D.N.M. 1972); *aff'd sub nom.* Rose v. Bondurant, 409 U.S. 1020 (1972); Tang v. Appellate Div., 373 F.Supp. 800 (S.D.N.Y. 1972), *aff'd on other grounds*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S.906 (1974); Kline v. Rankin, 352 F. Supp. 292 (N.D. Miss. 1972), *vacated and remanded for convention of three-judge court*, 489 F.2d 387 (5th Cir. 1974); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); *In re* Robinson, 82 Neb. 172, 117 N.W. 352 (1908); *In re* Admission to Bar, 61 Neb. 58, 84 N.W. 611 (1900); *In re* Titus, 213 Va. 289, 191 S.E.2d 798 (1972). *But see* Potts v. Honorable Justices of Supreme Ct., 332 F. Supp. 1392 (D. Hawaii 1971).
9. *See* Smith v. Davis, 350 F. Supp. 1225 (S.D. W. Va. 1972); Lipman v. Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971); Keenan v. Board of Law Examiners, 317 F. Supp. 1350 (E.D.N.C. 1970); Webster v. Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970). *But see* Baker v. Varser, 240 N.C. 260, 82 S.E.2d 90 (1954).
10. *See* BAR & BRI, *supra* note 2. Montana is the only state which requires a six month residency prior to taking the bar examination, although a few states require a six month residency period prior to admission. However, Arizona, California, Florida, Georgia, Illinois (if by exam), Louisiana, Massachusetts, Michigan (if by exam), Ohio and Pennsylvania have no residency require-

Committee on Character and Fitness,[11] where the New York Court of Appeals unanimously held that the state residency requirement was in violation of the privileges and immunities clause of article IV to the United States Constitution.[12] Under *Gordon*, applicants for admission to the bars in states which still maintain residency requirements now may have a strong argument for the invalidation of all residency requirements imposed by the respective state bars.

II. Facts of *Gordon*

The appellant, Gordon, was a graduate of the University of Virginia Law School and a member of the bars of Virginia and North Carolina. While serving as in-house counsel to Western Electric Company for more than two years in New York City, Gordon took and passed the New York State Bar Examination.[13] However, before he received the test results, his company transferred him to North Carolina. Thereafter, the appellant filed an application for admission to practice law in New York with the Committee on Character and Fitness of the First Department.[14] However, the Committee deferred action on the appellant's application because the New York Bar required the appellant to be an "actual resident of the State of New York for six months immediately preceding the

---

ments. In Nebraska, the only requirement is that an applicant must be a resident at the time of the application. *Id.* Apparently, we can now add New York to the list of states without any residency requirements.

11. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).
12. This argument was raised in Golden v. State Bd. of Law Examiners, 452 F. Supp. 1082 (D. Md. 1978), *vacated and dismissed on other grounds*, 614 F.2d 943 (4th Cir. 1980), but that court seemed to confuse the article IV clause with the privileges and immunities clause found in the fourteenth amendment. Although the practice of law is not a privilege or immunity of national citizenship under the fourteenth amendment, Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873), it should be a privilege or immunity of citizens in the several states under article IV. For a recent treatment of the privileges and immunities clause of article IV as it relates to bar residency requirements, see Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461 (1979).
13. 48 N.Y.2d at 269, 397 N.E.2d at 1310, 422 N.Y.S.2d at 643. At this time Gordon had fullfilled the six-month residency requirements under 22 N.Y. CT. R.R. 520.2[a][3]. This rule required the applicant to be a resident of the State of New York for six months prior to taking the bar examination. However, *Gordon* failed to meet a second residency requirement contained in N.Y. CIV. PRAC. LAW & R. § 9406, which required a six month residency prior to admission to the bar.
14. N.Y. JUD. LAW § 90(1); N.Y. CIV. PRAC. LAW & R. § 9402; 22 N. Y. CT. R.R. 520.9. In addition to meeting the two durational requirements, see note 13 *supra*, the applicant must, unless waived, pass an examination, possess the requisite character and fitness, and swear to support the federal and state constitutions. 48 N.Y.2d at 270 n.5, 397 N.E.2d at 1311 n.5, 422 N.Y.S.2d at 643 n.5.

submission of his application for admission to practice."[15] Gordon then petitioned the appellate division for admission without certification, but the appellate division denied the petition, upholding the constitutionality of the requirement.[16] Subsequently, Gordon appealed to the Court of Appeals for the State of New York which reversed the lower court's decision.[17]

III. ANALYSIS

A. The Privileges and Immunities Clause

Article IV of the United States Constitution reads in part: "The Citizens[18] of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[19] Interpretation of this clause has not been an easy task for the courts. They have struggled with two distinct and separate questions in applying the privileges and immunities clause to specific cases: (1) Is the asserted right within the scope of protection of the clause; and, (2) if so, what test should be used in applying the clause?[20]

---

15. N.Y. CIV. PRAC. LAW & R. § 9406(2).
16. Gordon v. Committee on Character & Fitness, 67 A.D.2d 215, 414 N.Y.S.2d 692 (1979), *rev'd*, 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).
17. 48 N.Y.2d 266, 397 N.E.2d 1309, 422 N.Y.S.2d 641 (1979).
18. The term "citizen" has been defined by the courts to include the term "resident" so that the courts tend to "find that discrimination on the basis of residency is sufficient to invoke the clause." Knox, *Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution*, 43 MO. L. REV. 1, 10 (1978). *See also* Austin v. New Hampshire, 420 U.S. 656 (1975). However, it should be noted that the term "citizen" excludes corporations which, although being legal persons, are incapable of becoming legal citizens. Hemphill v. Orloff, 277 U.S. 537, 548 (1928) (citing Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839)).
19. U.S. CONST. art. IV, § 2, cl. 1. The privileges and immunities clause had its origin in the Articles of Confederation which stated:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof . . . .

1 U.S.C. at xxxv (1976). Charles Pinckney, who drafted the privileges and immunities clause, stated that it was "formed exactly upon the principles of the 4th article of the present Confederation . . . ." 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (1911).
20. In 1978, the United States Supreme Court decided two cases which addressed these two questions involving the privileges and immunities clause of article IV. In Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978), the Court found that hunting elk was not within the scope of the clause and, consequently, the Court did not reach the issue of what test should apply. *Id.* at

In the past, courts considered only certain "fundamental" or "natural" rights to be protected by this clause.[21] In 1823, Bushrod Washington, Associate Justice of the Supreme Court, set forth this theory in *Corfield v. Coryell*:[22]

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.[23]

However, the courts have greatly broadened the scope of the privileges and immunities clause since the *Corfield* decision so that, today, the clause is considered to embody a general nondiscriminatory principle.[24] In *Toomer v. Witsell*,[25] the Court summarized this principle by saying that the privileges and immunities

---

388. In Hicklin v. Orbeck, 437 U.S. 518 (1978), one's employment was found to be within the purview of the privileges and immunities clause. *Id.* at 529. The Court then articulated a series of tests, the application of which resulted in a finding that the Alaska resident preferential hiring practice was unconstitutional. *See id.* at 534.

21. There has been much scholastic and legal debate over the use of the term "fundamental" to describe rights protected under the privileges and immunities clause. The most recent case to use the term "fundamental" was Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978), where the Court held that the right to hunt elk was not "fundamental" and, therefore, not protected under the privileges and immunities clause. However, Justice Brennan, dissenting, said, "I think the time has come to confirm explicitly that which has been implicit in our modern privileges and immunities decisions, namely that an inquiry into whether a given right is "fundamental" has no place in our analysis of whether a State's discrimination against nonresidents . . . violates the Clause." *Id.* at 402 (Brennan, J., dissenting, joined by White, J. & Marshall, J.). The majority itself explicitly stated that their use of the term "fundamental" was in a "modern" rather than a "natural rights" sense. 436 U.S. at 387.

22. 6 F. Cas. 546 (C.C.E.D. Pa. 1823)(No. 3230).

23. *Id.* at 551.

24. The nondiscriminatory theory of the privileges and immunities clause was first set forth in Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), where the Court stated:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits *discriminating* legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other states the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.

Id. at 180 (emphasis added).

25. 334 U.S. 385 (1948).

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."[26] Thus, fundamental rights are no longer the only rights protected under the privileges and immunities clause. Other rights falling within this clause include those granted by a state to its citizens, such as the right of equal access on equal terms for commercial hunting or fishing of state wildlife,[27] and the right to medical services available in the state,[28] even when it is recognized that the state may properly restrict, control or allow the exercise of such rights.[29]

Although considerably broadened by *Toomer*, the principle of nondiscrimination under the privileges and immunities clause is not absolute. For example, a citizen of one state may be required to become a resident in another state before demanding the right to vote[30] or to run for an elective office in that state.[31] Similarly, privileges granted by the state which do not greatly or directly affect others outside of the state are not within the scope of the clause. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[32] Thus, a state may charge nonresidents much higher fees for the privilege of hunting elk than it charges its own residents because hunting is not vital to our nation as a single entity.[33] On the other hand, a state may not charge nonresidents fees higher than those charged residents for the privilege of commercial shrimp fishing[34] because

26. *Id.* at 395. For a discussion of the relationship between the term "citizen" and the term "resident," see note 18 *supra.*
27. *See* Toomer v. Witsell, 334 U.S. 385 (1948); Mullaney v. Anderson, 342 U.S. 415 (1952).
28. *See* Doe v. Bolton, 410 U.S. 179 (1972).
29. Toomer v. Witsell, 334 U.S. at 393.
30. Carrington v. Rash, 380 U.S. 89 (1965); Lassiter v. Northampton Election Bd., 360 U.S. 45 (1958). "Residence requirements, age, previous criminal record are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters." *Id.* at 51.
31. *See* Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978). In dicta, the *Baldwin* Court said:

    > No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims the right to vote. The same is true as to qualifications for an elective office of the State.

    Id. at 383.
32. *Id.*
33. *Id.* at 388. In *Baldwin*, the Court upheld a Montana practice of charging nonresidents $225 for a licence to hunt elk while charging resident only $9. However, elk hunting was not a commercial activity because of limitations on the number of elks that could be legally taken, and because the cost of hunting elk greatly exceeded the probable return. *Id.*
34. Toomer v. Witsell, 334 U.S. 385 (1948).

the *right to earn a living is one of those privileges which bear upon the vitality of the Nation as a single entity*.[35] Consequently, the right to earn a living is within the scope of the privileges and immunities clause.

The second major question under the privileges and immunities clause is related to the development of appropriate criteria for evaluating whether differential treatment of nonresidents by the states is permitted. Through several court decisions, a three-tiered test has emerged as a backbone of the judicial reasoning processes: (1) Does the state treat residents and nonresidents with substantial equality;[36] if not, (2) do nonresidents "constitute a peculiar source of the evil at which the statute is aimed;"[37] and, if they do, (3) is the method of regulation adopted closely tailored or substantially related to the evil presented.[38]

The privileges and immunities clause does not demand absolute equality. Rather, it looks to the degree of discrimination delineated by the state regulation in order to determine whether there is a potential violation of the clause.[39] Regulations which cause only a very slight or incidental degree of discrimination are not unconstitutional,[40] while regulations which fail to treat residents and

35. *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978) (struck down a state law which granted all Alaskans a flat employment preference for all jobs resulting from oil and gas leases); Toomer v. Witsell, 334 U.S. 385 (1948) (struck down a state law which required a higher licensing fee for nonresidents); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) (struck down a state law which discriminatorily taxed out-of-state produce vendors).

In *Toomer*, the Court said "it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." 334 U.S. at 396.

36. Austin v. New Hampshire, 420 U.S. 656, 665 (1974); Toomer v. Witsell, 334 U.S. 385, 396 (1948).

37. Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978); Toomer v. Witsell, 334 U.S. 385, 398 (1948).

38. Hicklin v. Orbeck, 437 U.S. 518, 527, 528 (1978); Gordon v. Committe on Character & Fitness, 48 N.Y.2d at 274, 397 N.E.2d at 1313, 422 N.Y.S.2d at 645. One commentator, citing Austin v. New Hampshire, 420 U.S. 656 (1974), has stated that the standard is one of reasonableness. Knox, *supra* note 18, at 16-22. In *Austin*, the Court used a two pronged analysis: whether there was a reasonably fair distribution of burdens and whether there was any intentional discrimination. 420 U.S. at 664. However, this two-pronged analysis goes to the question of whether there was any discrimination in the first place; not to whether that discrimination is prohibited under the privileges and immunities clause.

39. *See* Austin v. New Hampshire, 420 U.S. 656, 663-65 (1974), where the Court reviewed the cases concerning the amount of discrimination which is required before a potential violation arises.

40. *See* Shaffer v. Carter, 252 U.S. 37 (1919). In *Shaffer*, a tax case construing the privileges and immunities clause, the Court said, "The difference, however, is only such as arises naturally from the extent of the jurisdiction of the State in

nonresidents with substantial equality are potentially unconstitutional, and must be subjected to the second and third tiers of the test.[41] The second tier of the test probes the reasoning behind the challenged regulation: Was the regulation intended to address a problem presented to the state by nonresidents but not by residents,[42] or was the state simply attempting to secure some advantage for its residents?[43] If the mere fact of nonresidency was the only substantial reason for the discrimination, the state regulation violates the privileges and immunities clause.[44] However, if there are other substantial reasons for the discriminatory treatment of nonresidents, the constitutionality of the discrimination will be determined under the third tier of the test, which examines the relationship of the statute or regulation to the evil which it addresses.[45] If the statute or regulation is closely tailored to meet the evil presented by nonresidents, the discriminatory treatment is constitutional.[46]

B. The Tests Applied

In *Gordon*, the New York Court of Appeals held that the practice of law was within the scope of the protection granted by the

---

the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination." *Id.* at 57. *But see* Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1919); Canadian N. Ry. v. Eggen, 252 U.S. 553 (1919).

41. Although the Supreme Court apparently has never applied all three tiers of this test together in the same case, each stage of the test has been applied in distinct cases. For application of the first tier, see Austin v. New Hampshire, 420 U.S. 656 (1974). In Hicklin v. Orbeck, 437 U.S. 518 (1978) and in Toomer v. Witsell, 334 U.S. 385 (1948), the Court did not directly address the first tier of the test but did apply the final two tiers. Nevertheless, in both of these cases, substantial equality would not have been found: In *Hicklin*, Alaska gave preferential treatment to its residents in relation to employment rights; in *Toomer*, South Carolina charged nonresidents much higher fees for the privilege of commercial fishing than it charged residents.
42. Hicklin v. Orbeck, 437 U.S. 518, 526 (1978).
43. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 81 (1919).
44. Toomer v. Witsell, 334 U.S. 385, 396 (1948). "It 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.*
45. *See* Hicklin v. Orbeck, 437 U.S. 518, 527 (1978). In *Hicklin* the Court stated:
> Moreover, even if the State's showing is accepted as sufficient to indicate that nonresidents were 'a peculiar source of evil,' *Toomer* and *Mullaney* compel the conclusion that Alaska Hire nevertheless fails to pass constitutional muster. For the discrimination the Act works against nonresidents does not bear a *substantial relationship* to the particular 'evil' they are said to present.

Id. (emphasis added). It should be noted that both "substantial relationship" and "closely tailored" are used to denote the same concept. *See id.* at 527, 528.
46. *Id.* at 528.

privileges and immunities clause.[47] Based upon this holding, the court applied the three-tiered test to the New York regulations concerning attorney residency.

First, the court found that the residency requirement worked invidious discrimination against nonresidents in that an out-of-state attorney who already maintained a practice in another state could not become a member of the New York Bar without moving to New York and forfeiting his right to engage in his chosen occupation for six months, whereas an in-state attorney could practice law immediately.[48] The finding of invidious discrimination clearly fails to meet the substantial equality requirement of the first tier of the test because invidious discrimination denotes substantial inequality.

After determining that the residency requirement failed to pass the first tier of the test, the *Gordon* court did not address the second tier of the test beyond simply assuming that nonresidents did "indeed present a problem with which the State may legitimately address."[49] This assumption allowed the court to focus on the third stage of this test, and to thoroughly scrutinize the relationship between the special problems which non-residents allegedly presented and the relief the residency requirement purportedly provided.[50]

The first such problem considered by the *Gordon* court was the bar admission authorities' admittedly legitimate interest in observing and evaluating an out-of-state applicant's character.[51] Because

47. 48 N.Y.2d 266, 272, 397 N.E.2d 1309, 1312, 422 N.Y.S.2d 641, 644-45 (1979). The court stated:

> It is now beyond dispute that the practice of law, despite its historical antecedents as a learned profession somehow above that of the common trades, is but a species of those commercial activities within the ambit of the clause. . . . From the standpoint of both the public and the legal profession itself, the practice of law is analogous to any other occupation in which an independent agent acts on behalf of a principal.

Id.

48. *Id.* at 272-73, 397 N.E.2d at 1312-13, 422 N.Y.S.2d at 645. The court also noted the penalizing effect that this residency requirement would have on attorneys who specialize in a particular area in a multistate practice (usually as one specializes topically, one must also expand geographically to maintain a level of efficiency), and on attorneys who are employed by large corporations (more than 10% of the bar). *Id.*
49. *Id.* at 273, 397 N.E.2d at 1313, 422 N.Y.S.2d at 645.
50. In relation to the third tier of the test, the State did not list any reasons why the admission to the practice of the law in New York should be dependent on residency. Nevertheless, the court considered some of the standard justifications for residency requirements. *Id.* at 273-74, 297 N.E.2d at 1313, 422 N.Y.S.2d at 645-46. For a list of potential justifications, see note 74 *infra*.
51. 48 N.Y.2d at 274, 397 N.E.2d at 1313, 422 N.Y.S.2d at 646.

applicants were personally interviewed, were available to the Committee on Character and Fitness, and, in some cases, were permitted to furnish affidavits as to their character,[52] the court found that this justification "serve[d] only administrative convenience . . ."[53] and, thus, was "not closely tailored to serve a legitimate State interest."[54]

A second special problem presented by nonresident attorneys involved the ability of New York courts to properly supervise and discipline their inappropriate conduct. The *Gordon* court found that there were solutions to this problem that were less restrictive than the blanket banning of nonresidents from admission to the New York Bar.[55] For example, the state could require "nonresident attorneys to appoint an agent for the service of process within the State"[56] so that the state could maintain jurisdiction over its attorneys at all times. Moreover, other forms of discipline such as contempt, suspension or revocation of license, and malpractice actions could be applied as easily to nonresidents as to residents.[57] Consequently, the general failure of the proposed justifications to reach the level of legitimacy required to support residency regulations, and the availability of less restrictive alternatives that would meet the special problems caused by nonresidents, caused the court to conclude that New York's six month residency requirement was unconstitutional under the privileges and immunities clause of article IV.[58]

C. Analysis of the Application

1. Is The Legal Profession Within the Ambit of the Clause?

Before *Gordon*, the legal profession was not considered to be within the ambit of the privileges and immunities clause.[59] Consequently, attorneys or would-be attorneys were effectively prevented from using the clause to challenge residency requirements. It had been settled for some time that the right to pursue one's chosen occupation was protected against state protectionist activi-

52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646.
56. *Id. Cf.* Doherty & Co. v. Goodman, 294 U.S. 623 (1934) (state may provide that service of process upon an agent or clerk constitutes service upon the principal or the employer); Hess v. Pawloski, 274 U.S. 352 (1927) (state may declare that service of process upon the registrar constitutes service upon a nonresident who uses the state's highways). *See also* Note, *supra* note 12, at 1488.
57. 48 N.Y.2d at 274, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646.
58. *Id.* at 274-75, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646.
59. *See* Note, *supra* note 12, at 1468-70.

ties by the privileges and immunities clause of article IV.[60] Nevertheless, because the practice of law had been traditionally viewed as being above, or at least somehow different from, the "ordinary trades," it was not subject to the settled right formulated for "ordinary trades."[61] However, this concept has been severely eroded in recent years. The perceived gap between the professions and the common trades has narrowed considerably because of the increased recognition given by the courts to the commercial aspects of modern law practice,[62] and because of the large increase in the number of occupations which now are either deemed to be professions or are otherwise subject to extensive state regulations.[63] Thus, differences between the practice of law and other trades now appear to be a matter of degree rather than of substance.

The Supreme Court in recent years has recognized this trend toward equalizing the legal status of professions and common trades by severely restricting the states' power to regulate the practice of law. In striking down a state prohibition against advertising by lawyers, the Court in *Bates v. State Bar of Arizona*[64] stated: "Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled."[65] If lawyers are no longer above other trades,[66] the argument naturally seems to follow that the legal profession should have the same protection under the privi-

60. *See* note 35 & accompanying text *supra*.
61. *See* Note, *supra* note 12, at 1468-70.
62. *See* notes 64-66 & acompanying text *infra*.
63. *See* Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 10-13 (1976); Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 WM. & MARY L. REV. 46, 46-50 (1972).
64. 433 U.S. 350 (1977).
65. *Id.* at 371-72. The Court, however, did not say that there could never be any distinctions between professions and other trades. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
66. *But see* Goldfarb v. Virginia State Bar, 421 U.S. 772 (1975). In *Goldfarb* the Supreme Court held that a minimum fee schedule promulgated by a local bar association and enforced by the state bar violated the Sherman Act when it resulted in a rigid price floor for legal services. However, the Court stated:

> It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Id. at 778 n.17. Apparently, the Court meant that although the profession may be a trade for some purposes of the Sherman Act, it may be viewed as somehow different from a trade in other situations because of its public service aspect. Interpreted in this manner, this *Goldfarb* footnote may become a future pressure point in litigation of state residency requirements under the

leges and immunities clause that other trades enjoy.[67]

Extending the coverage of the privileges and immunities clause to the legal profession will not prohibit states from regulating the profession. Today, many of the common trades which have been protected by the clause for years are highly regulated.[68] The main effect of extending protection to the legal profession will be to eliminate residency requirements which lack constitutionally sound justifications.

2. *State Residency Requirements and Substantial Equality*

Residency requirements, including simple residency requirements, have formed a significant barrier to lawyers seeking admission to practice in other states. The concept that a lawyer should have to move his place of residence, even for a day, before being permitted to practice his chosen profession in another state not only contravenes the policy of unity undergirding the privileges and immunities clause,[69] but also may tend to discourage many lawyers from practicing law in neighboring states or in states where their local clients have interests. For many lawyers who may otherwise be willing to take the required tests, to appear for private interviews and to provide material on their character and

---

privileges and immunities clause. Nevertheless, it should be noted that the *Gordon* court did not even address the "public service" problem.

What the Supreme Court in *Goldfarb* meant by its term "public service aspect" and why that separates the practice of law from other service trades is presently unclear. The Supreme Court has also stated:

> Lawyers do indeed occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts. . . . Yet, they 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.

In re Griffiths, 413 U.S. 717, 729 (1973) (discrimination based on citizenship was unconstitutional where it excluded aliens from the practice of law). If there are no governmental reasons for regarding lawyers differently from other trades, *i.e.*, if the argument that lawyers should be treated differently because they are officers of the court is no longer valid, then the public service aspect of the legal profession appears to be little different from the public service aspect of banking or any other business which provides services to the public.

67. The protection granted by the privileges and immunities clause includes the right to be employed in another state without discriminatory restrictions. In Hicklin v. Orbeck, 437 U.S. 518 (1978), the Court stated: "*Ward* thus recognized that a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State." *Id.* at 525 (italics supplied) (referring to Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870)).

68. *See* note 63 & accompanying text *supra.*

69. *See* note 19 *supra.*

fitness, the residency requirement of a state may be the hurdle over which they are unwilling to jump.

The concept of substantially equal is and should be a high standard.[70] This high standard should cause almost all discriminations against nonresidents which involve rights under the protection of the clause to fall within the ambit of the clause. Thus, every state enactment which requires a nonresident to change his place of residence in order to secure a right protected under the privileges and immunities clause should be subject to scrutiny by the courts to determine whether the requirement is supported by strong reasons commensurate with the rights which are being denied.

3. Special Problems Presented by Nonresident Attorneys

The Supreme Court has repeatedly held that a state has legitimate interests in assuring the competency and good character of its bar.[71] Character screening prior to admission to the bar[72] and disciplinary action after admission[73] are two methods often used to achieve these legitimate state goals.[74] Because nonresidents will

70. The only case apparently meeting this standard was the Oklahoma tax case of Shaffer v. Carter, 252 U.S. 37 (1919). In *Shaffer*, the Court held that the discrimination was only to be found in "theoretical distinctions . . . [and not in] . . . the practical effect and operation of the respective taxes as levied . . . ." *Id.* at 56. The Court, in a companion case, held that allowing residents a tax exemption of from $1000 to $2000 or more but denying nonresidents a similar exemption did not meet the substantial equality requirement. Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1919). In Toomer v. Witsell, 334 U.S. 385 (1947), the Court found that a South Carolina licensing statute "plainly and frankly discriminates against non-residents." *Id.* at 396.

71. *In re* Griffiths, 413 U.S. 717, 722-23 (1972); Law Students Research Council v. Wadmond, 401 U.S. 154, 159 (1970); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1956); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318-20 (1866).

72. Gordon v. Committee on Character & Fitness, 48 N.Y.2d at 274, 397 N.E.2d at 1313, 422 N.Y.S.2d at 646.

73. *Id.*, 397 N.E.2d at 1314, 422 N.Y.S.2d at 646.

74. The fact that nonresidents are less likely to know state laws and understand local customs, and the fact that nonresidents may not be subject to the type of character study determined to be necessary by state bars are the most commonly cited justifications for residency requirements. *See, e.g.*, Brown v. Supreme Ct., 359 F. Supp. 549, 556-62 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973); Tang v. Appellate Div., 373 F. Supp. 800, 802 (S.D.N.Y. 1972), *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, 402 (N.D. Miss. 1971); Webster v. Wofford, 321 F. Supp. 1259, 1262 (N.D. Ga. 1970). Another possible justification for residency requirements is that residency gives the lawyer "a deeper sense of community responsibility, and . . . affords him an opportunity to give a strong indication of his sincere intent to become a permanent resident to the community." Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change*, 56 CORNELL L. REV. 831, 837 (1971). Furthermore, it has been asserted that a residency requirement "(1) facilitates attorney-client communication, (2) gives the public confidence in the stabil-

probably be more geographically distant, the state, in its attempt to determine character and competency, may be forced to deal with nonresidents differently than it deals with residents. Moreover, since nonresidents may not be subject to the state's service of process for disciplinary actions, the state may need to require nonresidents to appoint an agent for service of process within the state.[75] These problems illustrate that nonresidents do present a special problem to the state and that in order to accomplish its admittedly legitimate goals, a state will need to tailor special regulations to meet these sources of potential evil.[76] As stated in *Toomer*, there are other reasons for the discrimination beyond the "mere fact that they are citizens of other States."[77]

4. *Closely Tailoring Residency Requirements to the Evil Presented*

In order to determine whether the "closely tailored" requirement is met, each possible justification must be considered. The *Gordon* court considered and properly rejected the rationale of character evaluation.[78] An out-of-state applicant's character may be checked in the same way as an in-state applicant's character — through interviews and affidavits.[79] The residency requirement is over-inclusive in that many out-of-state applicants in areas bordering the state may be as well-known within the state as are some in-state applicants and may be available for the same type of character assessment. Furthermore, it is under-inclusive in that in-state applicants who live some distance from the general situs of the main congregation of the bar may be less available for character study than some out-of-state applicants.

Most of the other possible justifications for state residency requirements[80] would also fail for the reason that they are both over- and under-inclusive.[81] Facilitating attorney-client communica-

---

ity of the local bar, (3) expedites the conduct of trials and local judicial proceedings, (4) aids in the apprehension of lawyers suspected of malpractice, or (5) eases the administration of bar admission procedures such as registration, testing, investigation, and interviewing." *Id.* at 839.

75. *See* note 56 & accompanying text *supra.*
76. *See* note 37 & accompanying text *supra.*
77. Toomer v. Witsell, 334 U.S. at 396.
78. 48 N.Y.2d at 274, 397 N.E.2d at 1313, 422 N.Y.S.2d at 646.
79. *Id.*
80. *See* note 74 *supra.*
81. The Court used this analysis in its decision in Hicklin v. Orbeck, 437 U.S. 518 (1978), where it stated:

> For the discrimination the Act works against nonresidents does not bear a substantial relationship to the particular 'evil' they are said to present. Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment prefer-

tions, increasing the stability of the local bar, showing a sincere intent to become a permanent resident of the community, and understanding the local laws are justifications directed toward the evil allegedly presented by the fact that nonresident attorneys do not live in the *local* community. However, a *state* residency requirement is over-inclusive because it excludes nonresident attorneys who may live in a metropolitan area that encompasses more than one state. It is under-inclusive because it does not address the problems presented by out-state attorneys. For example, the knowledge of local law is not substantially related to residency because some nonresident attorneys may be very familiar with the local law, while other in-state attorneys may be quite inept in local law controversies. Furthermore, a bar examination, a less restrictive alternative to residency requirements, would arguably be more closely tailored to this aspect of the evil presented by nonresident attorneys.

The only justification which clearly is not over-inclusive or under-inclusive is the argument relating to the amenability to the supervision of state courts for discipline. Although the state courts have jurisdiction over all persons residing in the state, they do not automatically have jurisdiction over those residing outside of the state.[82] Consequently, state boundaries do form a line between those presenting the amenability problem and those who do not. However, the amenability justification is particularly unconvincing in light of settled doctrines which provide less restrictive alternatives. First, although nonresident attorneys are not automatically subject to the jurisdiction of the state courts, they may be brought into the jurisdiction of the courts if they maintain minimum contacts.[83] Arguably, any attorney who practiced in the state would have the required minimum contacts. Moreover, the state may require nonresident attorneys to appoint agents within the state for the service of process.[84] This should meet the amenability prob-

---

> ence for all jobs covered by the Act. A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program. . . . Even if a statute granting an employment preference to unemployed residents or to residents enrolled in job-training programs might be permissible, Alaska Hire's across-the-board grant of a job preference to all Alaskan residents clearly is not."

Id. at 527-28.

82. Pennoyer v. Neff, 95 U.S. 714 (1877).
83. *See* International Shoe Co. v. Washington, 326 U.S. 310 (1945). *See also* Rush v. Savachuk, 444 U.S. 320 (1980); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980).
84. *See* note 56 *supra*.

lem presented by out-of-state attorneys with a minimum of inconvenience to the state.

Furthermore, an assertion of inconvenience as a separate justification for a residency requirement might be subject to attack under another constitutional principle. In *Sosna v. Iowa*,[85] a case involving an attack on a residency requirement under the equal protection and due process clauses, the Supreme Court stated that justifications based on administrative convenience were insufficient to justify residency requirements in the face of constitutional attacks.[86] In light of *Sosna*, there appears to be no cogent reason to conclude that any conceivable administrative inconvenience caused by requiring nonresident attorney's to appoint agents within the state would justify a residency requirement.

In summary, it appears that none of the justifications for residency requirements would withstand analysis based on whether the requirements were closely tailored to the evil presented by nonresidents. Unless more convincing justifications are offered in the future, even simple residency requirements should be rejected under the privileges and immunities clause of article IV.

IV. CONCLUSION

The scope of *Gordon* might be viewed narrowly as being restricted to the facts of the case, *i.e.*, that only a six month durational residency requirement was declared unconstitutional.[87] Even under this narrow analysis the court has pushed farther than

85. 419 U.S. 393 (1975).

86. *Id.* at 406. *Sosna* involved a person who sought a divorce in Iowa one month after she had taken up residence in the state. The Court upheld the requirement that a person must reside in the state for one year before seeking a divorce in state court in the face of a challenge under the equal protection and due process clauses. The rational for the residency requirement was largely based on protecting the sovereignty of the state under the full faith and credit clause, U.S. CONST. art. IV, § 1. In referring to several prior cases where residency requirements were struck down as unconstitutional, the Court said: "What those cases had in common was that the durational residency requirements they struck down were justified on the basis of budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals." 419 U.S. at 406. *Gordon* involved an alleged violation of the privileges and immunities clause rather than attacks based on the equal protection clause or the constitutional right to travel present in previous cases attacking residency requirements. *See, 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).

87. In Golden v. State Board of Law Examiners, 614 F.2d 943 (4th Cir. 1980), the court stated: "The New York Court of Appeals, however, recently held that the privileges and immunities clause prevents a state from imposing *durational* residency requirements on applicants for admission to the bar." *Id.* at 945 (emphasis added).

most other courts have been willing to go in striking down the residency requirement.[88] However, the actual conclusion of the *Gordon* court suggests the broader interpretation and analysis given it in this note to the effect that even simple residency requirements are unconstitutional. The court stated:

> By denying otherwise qualified applicants their right to practice their chosen occupation *based solely on their state of residence*, CPLR 9406 (subd. 2) works an unconstitutional discrimination against nonresidents. Any interest the State may have in regulating nonresident attorneys is ill served by the onerous burden imposed by the rule. A number of less drastic, and constitutionally permissible, alternatives are readily available to protect the interest of the State in supervising those who practice in its courts.[89]

The decision of the *Gordon* court striking down New York's residency requirements under the privileges and immunities clause of article IV is clearly supported by analysis. The fact that ten states have no residency requirements[90] is an additional indication that the justifications for any residency requirement are not persuasive. Even if nonresident attorneys do present certain evils, residency requirements are not closely tailored to meet those evils. Appropriately, the decision of the *Gordon* court has already made its way into a federal circuit court's opinion. In *Golden v. State Board of Law Examiners*,[91] a case dismissed because the residency issue had become moot, the Court of Appeals for the Fourth Circuit favorably cited *Gordon*.[92]

Although the Supreme Court has yet to rule on the precise question placed before the *Gordon* court, in recent years it has been receptive to arguments based upon the privileges and immunities clause.[93] Moreover, the Court's holdings in *In re Griffiths*[94] and in *Bates*[95] have provided valuable support for the argument that law should no longer be treated as a quasi-public profession exempt from the privileges and immunities protection,[96] but should be subject to the same constitutional tests under that

88. The only other case which held a six month residency requirement to be unconstitutional was Potts v. Honorable Justices of Supreme Ct., 332 F. Supp. 1392 (D. Hawaii 1971). *See* notes 4-11 & accompanying text *supra*.
89. 48 N.Y.2d at 274-75, 397 N.E.2d 1314, 422 N.Y.S.2d at 646 (emphasis added).
90. *See* note 10 *supra*.
91. 614 F.2d 943 (4th Cir. 1980).
92. *Id.* at 945.
93. *See* Hicklin v. Orbeck, 437 U.S. 518 (1978); Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978); Austin v. New Hampshire, 420 U.S. 656 (1974).
94. 413 U.S. 717 (1972).
95. Bates v. State Bar, 433 U.S. 350 (1977).
96. For this early view, *see* Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286, 292-308 (1902). For the proposition that law should no longer be treated differently than other occupations for residency requirement purposes, see Note, *supra* note 12, at 1470-79.

clause as would be any other occupation. Concededly, the interest of a state in regulating the legal profession is considerably higher than its interest in regulating certain other occupations. However, that is an entirely separate question from whether the practice of law is within the protections of the privileges and immunities clause. Placing the practice of law within the privileges and immunities clause is a giant step toward providing the legal profession with the full constitutional guarantees accorded to other occupations while still enabling the state to maintain closely tailored regulations to protect societal interests.

Tim Binder '81