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A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of- State Lawyers

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A Bar Against Competition: The Unconstitutionality of Admission Rules for Out-of-State Lawyers

ANDREW M. PERLMAN*

TABLE OF CONTENTS

I.	INTRODUCTION	136
II.	A PRIMER ON PERMANENT BAR ADMISSION RULES	140
	A. THE ADMISSION PROCESS FOR NEW LAWYERS	141
	B. BAR ADMISSION RULES FOR ADMITTED ATTORNEYS	142
	C. RECENT DEVELOPMENTS	143
III.	EXPLAINING THE STINGINESS: THE ROLE OF ECONOMIC PROTECTIONISM	144
	A. A BRIEF HISTORY OF ATTORNEY ADMISSIONS	145
	B. ECONOMIC SELF-INTEREST AND BAR ADMISSIONS.	146
IV.	THE CONSTITUTIONALITY OF RE-IMPOSING MULTISTATE EXAMS ON EXISTING ATTORNEYS.	150
	A. THE MULTISTATE BAR EXAMINATION REQUIREMENT	151
	1. THE ARTICLE IV PRIVILEGES AND IMMUNITIES CLAUSE	152
	a. Extending Article IV to the MBE Re-Take Rule	153
	b. Potential Objections to the Article IV Analysis	154

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i.	The Out-of-State Lawyer/Out-of-State Citizen Disconnect	154
ii.	The Diligent Lawyer Objection	157
iii.	The Fading Skills Rationale	158
2.	THE FOURTEENTH AMENDMENT PRIVILEGES OR IMMUNITIES CLAUSE	159
a.	The Recent Revival and Its Implications	159
b.	The Meaning of “Out-of-State Lawyer” Revisited	162
3.	THE DORMANT COMMERCE CLAUSE	164
a.	Making Sense of Dormant Commerce Clause Doctrine	164
b.	Applications to the MBE.	165
B.	THE MULTISTATE ESSAY EXAMINATION AND THE MULTISTATE PERFORMANCE TEST	168
V.	CONSTITUTIONAL PROBLEMS WITH STATE WRITTEN EXAMINATIONS	169
A.	STATE TESTING OF NATIONAL CONCEPTS.	170
B.	STATE TESTING OF LOCAL LAW	171
VI.	A PROPOSAL FOR A CONSTITUTIONAL MODEL RULE	175
VII.	CONCLUSION	178

I. INTRODUCTION

Imagine a lawyer who was admitted to the bar four years ago and now wants permanent admission in a second state. Nearly every American jurisdiction would require the lawyer to re-take at least some portion of the bar exam as a condition for the second admission.¹ In most of these states, the lawyer would

1. See NAT’L CONFERENCE OF BAR EXAM’RS & AM. BAR ASS’N SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2004 25–29 [hereinafter COMPREHENSIVE GUIDE], available at <http://ncbex.org/pubs/pdf/2004CompGuide.pdf> (last visited Nov. 6, 2004). This guide contains charts identifying the admission requirements for every American jurisdiction. For additional information, see <http://www.crossingthebar.com> (last visited Nov. 6, 2004), which offers current descriptions of state rules governing multijurisdictional practice.

even have to re-take the Multistate Bar Examination (“MBE”),² a nationally administered 200-question multiple choice test that covers only commonly accepted legal principles.³ Because an attorney usually has to receive a satisfactory MBE score to gain an initial bar admission,⁴ the lawyer’s re-taking of the MBE does not give the second state any additional information about the lawyer’s competence. Rather, as many commentators have observed, this type of requirement has much more to do with the second state’s protection of its lawyers from out-of-state competitors.⁵

What scholars and courts have overlooked is that requirements like the MBE re-take procedure not only make poor public policy, but they also violate three constitutional provisions—the Article IV Privileges and Immunities Clause, the Fourteenth Amendment Privileges or Immunities Clause, and the dormant Commerce Clause.⁶ Indeed, these constitutional provisions were intended to

2. See *id.* at 17, 19 (explaining that only a small number of states allow lawyers to transfer Multistate Bar Examination (“MBE”) scores to other jurisdictions four years after admission to the bar).

3. See Nat’l Conference of Bar Exam’rs, *Multistate Tests: The Multistate Bar Examination*, at <http://ncbex.org/tests.htm> [hereinafter *The MBE*] (last visited Nov. 6, 2004). The National Conference of Bar Examiners expressly states that MBE “questions . . . are designed to be answered by applying fundamental legal principles rather than local case or statutory law.” *Id.*

4. See COMPREHENSIVE GUIDE, *supra* note 1, at 22–24.

5. A number of commentators have identified the self-interested nature of permanent admission rules. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 115–18 (1989); Gerard J. Clark, *The Two Faces of Multi-Jurisdictional Practice*, 29 N. KY. L. REV. 251, 254 (2002); Jerome C. Hafter, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 MISS. L. J. 1, 6–7 (1983); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 725 (1977); Gary A. Munneke, *Multijurisdictional Practice of Law: Recent Developments in the National Debate*, 27 J. LEGAL PROF. 91, 108 (2003); Chesterfield Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557 (1978); Michael J. Thomas, *The American Lawyer’s Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PROF. 235, 249–50, 254–57 (2000) (making a similar observation); Charles W. Wolfram, *Sneaking Around in the Legal Profession: Interjurisdictional Unauthorized Practice by Transactional Lawyers*, 36 S. TEX. L. REV. 665, 679 (1995). There is not much written, however, regarding the protectionism inherent in specific requirements, such as the MBE re-take procedure. *But see* Comment, *Commerce Clause Challenge to State Restrictions on Practice by Out-of-State Attorneys*, 72 NW. U. L. REV. 737, 759–60 (1978) (“There is no reason to subject a practicing attorney who has passed a substantially similar bar examination to the same examination required of recent law school graduates. At the very least, states should accept the scores obtained by the out-of-state attorney on the Multistate Bar Examination (MBE) . . .”).

6. When commentators have addressed this possibility, they typically have offered little detail or analysis. See, e.g., GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 46.5 (3d ed. 2001 & Supp. 2004) (concluding without elaboration that “states will of course be permitted to require established lawyers to sit for the local bar examination on the same basis as first-time takers; lawyers licensed in one state do not have a federal right to be admitted in another”); CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 869–70, 870 n.16 (1986) (relying solely on Supreme Court dictum for the conclusion that “[a] state’s refusal to extend admission on motion is probably constitutional”); Clark, *supra* note 5, at 263–64 (referencing the possibility of using privileges and immunities analysis to “invalidate local barriers to out-of-state competition” but not elaborating on the point). *But see* Wilson Pasley, *The Revival of “Privileges or Immunities” and the Controversy over State Bar Admission Requirements: The Makings of a Future Constitutional Dilemma?*, 11 WM. & MARY BILL RTS. J. 1239 (2003) (addressing the Privileges or Immunities Clause dimensions to some types of bar admission procedures and concluding that the Clause does not pose a threat to existing regulations).

foster a national economy free from economic protectionism.⁷ Thus, they have particular relevance in the context of attorney admission rules that place unnecessary obstacles in front of attorneys who seek to practice regularly in other jurisdictions.

A lack of constitutional scrutiny is particularly evident in the American Bar Association's ("ABA") Model Rule for Admission by Motion. In 2000, the ABA appointed a Commission to draft model rules for lawyers engaged in multijurisdictional practice.⁸ The Commission crafted the Admission by Motion Rule as part of that effort and in an attempt to improve the permanent admission process for out-of-state attorneys.⁹ Unfortunately, the rule, which the ABA adopted in 2002,¹⁰ did not address the admission of junior out-of-state lawyers,¹¹ and it failed to address potential constitutional objections. This Article addresses those omissions and concludes that the new Model Rule and similar state provisions currently under review place unconstitutional limitations on the interstate competition for legal services.

Part II of this Article offers a primer on the rules governing the admission of out-of-state attorneys. The discussion reveals that jurisdictions often require these lawyers—and especially junior out-of-state lawyers—to overcome a number of hurdles before gaining admission. Notably, states usually mandate that attorneys who have practiced for fewer than five years re-take the bar examination in whole or in part.¹² In some jurisdictions, this examination requirement applies to all attorneys no matter how experienced they are.¹³ In either case, the procedures typically include re-taking the MBE and other examinations that, given a lawyer's previous passage of the very same exams,

7. See, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279–80 (1985) (explaining that, “like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union”); DAN T. COENEN, *CONSTITUTIONAL LAW: THE COMMERCE CLAUSE 8–9* (2004) (noting that concerns about interstate economic rivalries played an important role during the 1787 Constitutional Convention).

8. See, e.g., A.B.A. Center for Professional Responsibility, *Client Representation in the 21st Century*, 2002 A.B.A. REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE (Aug. 12, 2002), available at http://www.abanet.org/cpr/mjp/final_mjp_rpt_121702.pdf [hereinafter *MULTIJURISDICTIONAL PRACTICE REPORT*]. For recent developments among state bars in this area, see <http://www.crossingthebar.com> (last visited Nov. 6, 2004).

9. See *MULTIJURISDICTIONAL PRACTICE REPORT*, *supra* note 8, at 47–49. It is arguable that permanent admission rules do not fall within a strict definition of multijurisdictional practice. Indeed, the ABA's Commission defined multijurisdictional practice as “the legal work of a lawyer in a jurisdiction in which the lawyer is not admitted to practice law.” *Id.* at 5. Despite this definition, the ABA's multijurisdictional practice report did address and develop a Model Rule for permanent admissions. Moreover, it seems reasonable to include permanent admissions within the definition because such admissions affect an attorney's ability to engage in law practice in multiple jurisdictions.

10. See *id.* at ii.

11. See, e.g., Jayne W. Barnard & Mark Greenspan, *Incremental Bar Admission: Lessons from the Medical Profession*, 53 J. LEGAL EDUC. 340, 353 (2003) (making a similar observation).

12. See *COMPREHENSIVE GUIDE*, *supra* note 1, at 25–27.

13. See *id.*

have nothing to do with ensuring competence.

Part III explores the reasons for this stingy approach to attorney admissions. It concludes that strict rules arose within the last seventy years and that the most plausible explanation for their strictness is economic protectionism. In particular, state bar organizations have used admission rules as a method of protecting the local bar against competition from attorneys licensed elsewhere.

Parts IV and V argue that this protectionism is not only socially undesirable, as other commentators have argued, but it is unconstitutional as well. Although the Supreme Court has struck down bar admission rules that explicitly discriminate on the basis of citizenship,¹⁴ this Article contends that current rules are unconstitutional even in the absence of an explicit residency requirement.¹⁵ Part IV examines this argument in the context of multistate testing, such as the MBE, and Part V analyzes state written exams.

Part VI explores the doctrinal implications of these constitutional problems. It concludes that all states—many of which are currently studying their rules in this area—should liberalize their rules beyond what the ABA has done with its recent amendments. Part VI thus offers a revised version of the ABA's Model Rule that would both ensure constitutional compliance and make it easier for less experienced attorneys to gain permanent admission in other states.

Unfortunately, bar associations often ignore the need for change until confronted with constitutional challenges.¹⁶ As a result, there is little reason to expect state bars to jettison protectionist admission rules until courts actually strike down those provisions as unconstitutional.¹⁷ This Article, therefore, offers a roadmap for such litigation in the hope that it will spur change in an area that has been too slow to evolve.

The Article also implicitly critiques lawyer regulations more generally. It suggests that there is a disconnect between lawyer regulations, such as bar admission rules, that focus on local concerns and the national and international

14. See, e.g., *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

15. Only one lower court appears to have expressly examined the issue, see *Owens v. Supreme Judicial Court*, 1992 WL 12998 (D. Mass. Jan. 22, 1992) (holding that it is not unconstitutional to force out-of-state lawyers to re-take the MBE), but the analysis was limited and did not explore many of the arguments that could have been made. See *infra* Part IV.A. Although *Friedman* does address the constitutionality of a rule that required out-of-state citizens (but not in-state citizens) to take the full bar examination, the case turned on the explicit discrimination between in-state and out-of-state citizens. 487 U.S. at 61–64. This Article addresses a question that *Friedman* and subsequent cases have left largely unanswered: Can a state require all out-of-state lawyers (regardless of state citizenship) to take the bar?

16. See *Barnard & Greenspan*, *supra* note 11, at 357 n.73 (making a similar point and identifying several examples).

17. Even though at least one member of the multijurisdictional practice Commission thought that a more liberal revision of the rules was a “wonderful idea,” the Commission rejected the proposal at least in part because it could not be “sold” to the ABA's House of Delegates. See *Attorneys—Unauthorized Practice: Interim Recommendations Need Changes, Speakers Urge at MJP Commission Hearing*, 70 U.S. LAW WEEK 2499 (2002).

economy that attorneys increasingly serve. Indeed, it is rather odd to see lawyers actively involved in helping clients solve national or global legal problems while having to comply with admissions requirements that have such a local flavor. The Article thus implies that there is a growing need for a more national form of attorney regulation.

II. A PRIMER ON PERMANENT BAR ADMISSION RULES

Multijurisdictional practice rules govern the extent to which lawyers may practice law in multiple jurisdictions. These rules generally cover: (1) temporary law practice in another jurisdiction's courtrooms (*pro hac vice*),¹⁸ (2) temporary law practice in another state outside of the courtroom context,¹⁹ and (3) the permanent admission of out-of-state lawyers.

Permanent admissions have an advantage over the two other methods of multijurisdictional practice because they free a lawyer from the expense and hassle of *pro hac vice* admissions and the fear of running afoul of a jurisdiction's unauthorized practice laws.²⁰ Despite these advantages, the burdens of gaining permanent admissions are so significant that they are the least common way in which attorneys engage in multijurisdictional practice.²¹ To understand how

18. When an attorney seeks to litigate a matter in a court where the attorney is not licensed, a common way for the lawyer to handle the case is to obtain admission *pro hac vice* ("for this occasion"). Of course, *pro hac vice* admissions only authorize attorneys to perform legal work in connection with the relevant litigation, so they are limited in scope. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 9.

19. *Pro hac vice* admissions offer little help to attorneys when they engage in cross-border practice outside of a courtroom. *See id.* at 10. For example, a lawyer who assists a corporation in its acquisition of another company may perform a great deal of legal work in another jurisdiction. This attorney cannot typically seek admission in the jurisdiction for the limited purpose of working on the transaction. Instead of seeking a formal temporary admission, non-litigators or litigators who are not yet before a court have had to deal with much murkier rules governing the unauthorized practice of law. *See id.* at 12 (observing that "outside the context of litigation, the reach of the jurisdictional restrictions is vastly uncertain as well as, potentially, far too restrictive").

20. With respect to *pro hac vice*, the procedures often require out-of-state lawyers to find and pay for the services of an in-state attorney to perform a variety of tasks. *See, e.g., id.*; Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 739 (1995). In the non-courtroom context, multijurisdictional practice rules raise significant risks because of their ambiguities. This point is best illustrated by the recent and famous (or perhaps, more accurately, infamous) decision in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), where the California Supreme Court invalidated most of a million dollar fee owed to New York lawyers. *Id.* at 13. The court invalidated the fee because the lawyers were not admitted to the California bar and had earned their money while negotiating a pre-litigation settlement in California. *Id.* The ruling surprised many observers because the *Birbrower* attorneys never appeared in a California courtroom and had merely sought a settlement for their client through the use of arbitration. *See* MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 4 (noting the concern caused by the case). More importantly, the ruling demonstrated just how unclear multijurisdictional practice rules can be in the context of law practice outside of a courtroom. Although the Commission on Multijurisdictional Practice has offered a model rule that would make this area of law somewhat clearer, *id.* at 16–20, the rule is still quite vague. *Id.* at 21 (admitting that the "new standard leaves room for individual opinion and judicial interpretation").

21. Outside of the District of Columbia, which has an unusually easy admission on motion procedure, only about 3000 lawyers received admission on motion nationwide in 2003. *See 2003 Statistics*, B. EXAMINER, May

burdensome the procedures are, it is helpful to review the admissions procedures for recent law graduates.²²

A. THE ADMISSION PROCESS FOR NEW LAWYERS

Among other requirements,²³ almost every jurisdiction requires non-lawyers to achieve satisfactory scores on both the bar examination and a separately administered Multistate Professional Responsibility Exam (“MPRE”).²⁴ With respect to the bar exam, all but three jurisdictions require first-time bar applicants to take the Multistate Bar Examination (“MBE”),²⁵ the nationally administered, 200-question multiple choice test.²⁶ The MBE, written by the National Conference of Bar Examiners (“NCBE”), covers fundamental legal concepts and doctrines and does not test any nuances of local law.²⁷

Most state bar examinations also include essay questions.²⁸ Seventeen jurisdictions use the NCBE-written Multistate Essay Examination (“MEE”),²⁹ which, like the MBE, tests widely accepted legal concepts.³⁰ Unlike the MBE, individual state bar examiners grade the MEE, and in some cases, the examiners instruct the test-takers to mention state law in their answers.³¹ In jurisdictions that do not use the MEE or that use the MEE and want to test other subjects, local bar examiners will draft their own essay (and sometimes multiple choice) questions that focus both on state-specific as well as national legal concepts.³² A few states, however, test no local law at all.³³

2004, at 6, 17–18, available at <http://www.ncbex.org/stats/pdf/2003stats.pdf> [hereinafter NCBE STATISTICS]. A total of 1,186 lawyers sought permanent admission through a special attorney exam in California, Georgia, Maine, Maryland, Mississippi, Northern Mariana Islands, Rhode Island, and Utah, with only 766 passing. *Id.* at 13. Given the obstacles, it is hard to imagine that the number of lawyers seeking admission through re-taking the entire bar examination is significantly greater than these numbers. In total, it is likely that fewer than 10,000 lawyers gain permanent admission in another jurisdiction in any given year. This contrasts with the frequent filings of *pro hac vice* motions, which undoubtedly number in the tens of thousands annually.

22. A few notable exceptions to the standard process exist, such as Wisconsin’s diploma privilege, which automatically grants bar membership to all Wisconsin law school graduates. Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 *FORDHAM L. REV.* 1299, 1317 n.121 (2003). Nonetheless, most states impose roughly the same set of requirements.

23. In many jurisdictions, requirements include graduation from an accredited law school, an undergraduate degree, maintenance of a law office in the jurisdiction, passage of character and fitness exams, and completion of skills training. See COMPREHENSIVE GUIDE, *supra* note 1, at 3–16.

24. *Id.* at 21–24.

25. *Id.* at 17.

26. *The MBE*, *supra* note 3.

27. *Id.*

28. COMPREHENSIVE GUIDE, *supra* note 1, at 23–24.

29. *Id.* at 21.

30. Nat’l Conference of Bar Exam’rs, *Multistate Tests: The Multistate Essay Examination*, available at <http://ncbex.org/tests.htm> (last visited Nov. 6, 2004) [hereinafter *The Multistate Essay Examination*].

31. *Id.*

32. COMPREHENSIVE GUIDE, *supra* note 1, at 23–24.

33. *Society of American Law Teachers Statement on the Bar Exam*, 52 *J. LEGAL EDUC.* 446, 448 (2002).

The majority of jurisdictions now also administer a performance exam,³⁴ and thirty of these jurisdictions use the NCBE's Multistate Performance Test ("MPT").³⁵ The MPT "consists of three 90-minute skills questions covering legal analysis, fact analysis, problem solving, resolution of ethical dilemmas, organization and management of a lawyering task, and communication."³⁶ In determining whether an applicant passes the bar examination, jurisdictions combine the MBE score with essay scores (and performance test scores, if any) according to a state-derived formula.³⁷ If the combined score exceeds the necessary score, the applicant passes.

In addition to passing the bar exam, all but four American jurisdictions currently require first-time bar applicants to pass the separately administered MPRE,³⁸ which consists of fifty multiple choice questions concerning lawyer and judicial ethics.³⁹ Although the NCBE writes the exam, each state has set its own passing score that students must achieve in order to become members of the bar.⁴⁰ In short, most jurisdictions require a multiple choice exam (almost always the MBE) and an essay exam (often the MEE) and are now often requiring a performance test (usually the MPT) as well as separate passage of the MPRE.⁴¹

B. BAR ADMISSION RULES FOR ADMITTED ATTORNEYS

Although the testing methods for first-time bar applicants do not vary a great deal among states, jurisdictions differ dramatically in terms of their requirements for existing attorneys who seek permanent bar admissions.⁴² In the most difficult jurisdictions, an out-of-state attorney has to re-take the bar examination, complete a new character and fitness report, and pay a fee that can exceed \$1,000.⁴³

Despite the increasingly national character of the bar exam process, some jurisdictions impose these requirements no matter how experienced the out-of-state attorney is.⁴⁴ Still other jurisdictions impose these requirements only on

34. COMPREHENSIVE GUIDE, *supra* note 1, at 21.

35. *Id.* Some jurisdictions, such as California, administer their own performance exams. Rusty Vetter, *Commission Recommends Modification of Bar Exam by Adding MPT*, 15-SEP. UTAH B. J. 10, 10 (2002).

36. Nat'l Conference of Bar Exam'rs, *Multistate Tests: The Multistate Performance Test*, available at <http://ncbex.org/tests.htm> (last visited Nov. 6, 2004) [hereinafter *The Multistate Performance Test*].

37. COMPREHENSIVE GUIDE, *supra* note 1, at 22–24.

38. *Id.* at 21.

39. Nat'l Conference of Bar Exam'rs, *Multistate Tests: The Multistate Professional Responsibility Examination*, available at <http://ncbex.org/tests.htm> (last visited Nov. 6, 2004).

40. COMPREHENSIVE GUIDE, *supra* note 1, at 22.

41. *Id.* at 22–24.

42. For a summary of some of the requirements and how they differ, see *id.* at 25–27.

43. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 48 (observing the barriers that admitted attorneys face when trying to become members of another bar); COMPREHENSIVE GUIDE, *supra* note 1, at 35 (identifying the fees necessary for bar admission).

44. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 48.

recently admitted attorneys, usually attorneys admitted for fewer than four or five years.⁴⁵ In those jurisdictions, experienced lawyers may be able to gain admission through a more abbreviated process, such as by taking a more limited “attorneys’ exam” or by completing a lengthy application and paying a significant fee.⁴⁶

In those states that require attorneys to re-take the bar examination, the scope of the examination varies. Some states allow an attorney to transfer a previous MBE score and thus only require the attorney to re-take the other parts of the bar exam.⁴⁷ Many jurisdictions, however, do not permit applicants to transfer MBE scores.⁴⁸ Most states permit attorneys to transfer MPRE scores,⁴⁹ but no state currently permits an attorney to transfer essay or performance test scores. Other jurisdictions require out-of-state attorneys to maintain an office within the jurisdiction,⁵⁰ and still others have policies that vary depending on how the attorney’s home jurisdiction treats out-of-state attorneys.⁵¹ In short, an attorney has to sort through a myriad of rules in an attempt to determine what exactly she must do to become a member of the bar in another state.⁵² Rarely is the process painless.

C. RECENT DEVELOPMENTS

Because of the increasingly national nature of law practice, the rising criticism of multijurisdictional practice rules, and the ambiguity of the law, the ABA created a Commission in 2000 to examine the problems associated with cross-border practice.⁵³ In June 2002, the Commission released a set of proposed amendments to the *Model Rules of Professional Conduct* governing multijurisdictional practice, which the ABA’s House of Delegates subsequently adopted in August of that year.⁵⁴

45. COMPREHENSIVE GUIDE, *supra* note 1, at 25.

46. *Id.* at 25–29. The process is commonly referred to as “admission by motion” or “admission *on* motion.”

47. *Id.* at 17.

48. *Id.* For more detail regarding this requirement, see *infra* Part IV.A.

49. *Id.* at 21.

50. See, e.g., *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3d Cir. 1997) (upholding New Jersey’s requirement that all attorneys maintain an office within the state).

51. COMPREHENSIVE GUIDE, *supra* note 1, at 28–29 (identifying the numerous jurisdictions that maintain this reciprocal approach to attorney admissions).

52. For just a sampling of the panoply of rules in this area, see COMPREHENSIVE GUIDE, *supra* note 1, at 25–29 and <http://www.crossingthebar.com> (last visited Nov. 6, 2004).

53. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 1.

54. *Id.* at 2. With respect to *pro hac vice*, the Commission endorsed a rule that would create a more uniform and, to some extent, more permissive standard for admission around the country. *Id.* at 46, 48. On the question of non-courtroom cross-border practice, the new Model Rule contains a number of changes that reflect a more coherent and progressive approach. The particulars of the proposal are beyond the scope of this Article, but it is worth noting that the Model Rule sets out a general prohibition against non-litigation multijurisdictional practice and then carves out a number of important and non-exclusive exceptions. *Id.* at 18–31.

The proposed amendments include a Model Rule for Admission by Motion. The Rule would grant permanent admission to an out-of-state attorney when that lawyer has been admitted to another American jurisdiction, has been practicing law for at least five of the last seven years, has achieved a satisfactory score on the MPRE (according to the new jurisdiction's rules), and has met a few other requirements that applicants can usually satisfy.⁵⁵

Although the Model Rule on Admission by Motion would be a significant improvement over many existing rules, there are three problems. First, states may decide not to adopt the Model Rule. The jury is still out on how many jurisdictions will, in fact, choose to liberalize their rules.⁵⁶ Second, the Model Rule only applies to more experienced attorneys, namely those practicing for at least five years.⁵⁷ The Model Rule is silent with respect to admissions for less experienced lawyers. This omission is significant because less experienced attorneys are often younger and less rooted, making them particularly likely to need permanent admission in a new jurisdiction. Finally, the Model Rule does not resolve several constitutional problems, including the right of attorneys to avoid having to re-take exams that do not provide admitting jurisdictions with any additional information about competence.

As Part VI suggests, the ABA could adopt a Model Rule that would allow less experienced attorneys to transfer their MBE and essay scores to another jurisdiction. If the scores met local standards, the jurisdiction could admit the attorneys without requiring them to re-take the bar examination. Unfortunately, many jurisdictions do not permit score transfers of this type and instead mandate that recently admitted attorneys re-take the exam, an unnecessary and ultimately unconstitutional requirement.⁵⁸

III. EXPLAINING THE STINGINESS: THE ROLE OF ECONOMIC PROTECTIONISM

Despite the strict rules that currently exist, this Part reveals that most American jurisdictions used to allow lawyers to practice freely in other states. Moreover,

55. *Id.* at 47–48.

56. In response to the Commission's proposed amendment, states have begun to assess and, in some cases, modify their own rules. The most recent developments are available at <http://www.crossingthebar.com>. Seventeen months after the ABA adopted the new *Model Rules* relating to multijurisdictional practice, six states had enacted new rules, and proposals for revision were pending in thirteen other jurisdictions. Mark Hansen, *MJP Picks Up Steam*, A.B.A. J., Jan. 2004, at 43, 43. Unfortunately, the ABA's Model Rule for Admission on Motion does not solve the problem addressed by this Article, so wide adoption of it still leaves considerable protectionism in place.

57. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 47.

58. Another imminent development not discussed here relates to international law and, in particular, the effect of the General Agreement of Trade in Services on the regulation of lawyers in this country. *See, e.g.*, Paul Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 NEW ENG. INT'L & COMP. L. ANN. 361 (2003); Laurel Terry, *GATS' Applicability to Transnational Lawyering and Its Potential Impact on U.S. State Regulation of Lawyers*, 34 VAND. J. TRANSNAT'L L. 989 (2001).

one finds that the relatively recent movement toward stricter admissions rules is (as many scholars have noted) the result of economic protectionism.

A. A BRIEF HISTORY OF ATTORNEY ADMISSIONS

Strict regulations are relatively recent in origin. Throughout much of the history of the American legal profession, few restrictions on interstate law practice existed. Professor Richard Abel found that “[u]ntil the 1930s, lawyers admitted in one state encountered few impediments in practicing in another, and many migrated in response to economic opportunities or personal preferences.”⁵⁹ Indeed, “[i]n 1930–31, only five out of forty-nine jurisdictions required out-of-state attorneys to pass their bar examinations. The other forty-four admitted lawyers on motion as long as they had practiced for a specified period in a state that granted reciprocity; virtually every applicant was admitted.”⁶⁰

The limited restrictions on interstate law practice in the past are somewhat surprising given the concerns that states could have raised.⁶¹ Until the early twentieth century, attorneys frequently received law licenses without much, if any, post-high school education or formal legal training,⁶² leaving states without many objective measures of an out-of-state attorney’s competence. In addition, the substantive law not only differed among states more dramatically than is the case today, but researching those differences was more difficult given the limited and more time-consuming methods of legal research that existed.⁶³

Many of these past concerns have now subsided. The bar is more prepared academically and receives more testing before entering the legal profession.⁶⁴ Largely gone are the days when someone could become a lawyer without going

59. ABEL, *supra* note 5, at 124. It is probably no coincidence that there was a significant rise in foreign-born entrants into the legal profession during this time period. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN AMERICA* 120–26 (1976). By many accounts, the profession feared this influx of foreigners, so the rise of multijurisdictional rules not only reflected economic protectionism but protectionism of a much more pernicious sort. *See id.*

60. ABEL, *supra* note 5, at 116.

61. *See, e.g.*, Clark, *supra* note 5, at 251–52.

62. In 1870, only a quarter of all lawyers had gone to law school, and as late as 1910, one-third of attorneys had not received formal legal education. AUERBACH, *supra* note 59, at 94. Auerbach also found that “[i]n 1922 fifteen states had no general education requirements for admission to the bar, while twenty-three states required nothing more than graduation from high school. Four years later, not a single state had subscribed to the ABA recommendations for two years of college and a law degree.” *Id.* at 118; *see also* ABEL, *supra* note 5, at 41–42 (citing similar statistics); DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 150 (2000).

63. *See, e.g.*, Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: The Art of Making Change*, 44 *ARIZ. L. REV.* 685, 686, 694 (2002) (noting the increasing uniformity and accessibility of state law).

64. *Compare* COMPREHENSIVE GUIDE, *supra* note 1, at 3–39 (supplying various statistics about the rigorous educational and examination requirements for becoming an attorney today), *with* ABEL, *supra* note 5, at 43 (noting that written bar examinations were not widely introduced until the late 19th century), and AUERBACH, *supra* note 59, at 94, 118 (describing the much more limited educational requirements that existed in the past).

to law school or without taking a bar examination.⁶⁵ State law is also much more homogenous because of the adoption of uniform codes, Restatements, and the like.⁶⁶ In addition, bar examinations test similar subject matter from state to state, enabling jurisdictions to assess more easily the abilities of existing lawyers.⁶⁷ Finally, the advent of computerized legal research has made it simpler to investigate remaining state law variations.⁶⁸ In short, lawyering in other jurisdictions has become easier, not more challenging, and jurisdictions can have more confidence in the abilities of out-of-state attorneys.⁶⁹

Despite these developments, states have made it *more* difficult for attorneys to become permanently admitted to their bars. A majority of jurisdictions now require newly-licensed lawyers to re-take the bar examination before they can get admitted in another state.⁷⁰ More experienced attorneys also face increased obstacles. Twenty-three jurisdictions require even these lawyers to re-take at least some portion of the bar examination as a condition for admission.⁷¹

B. ECONOMIC SELF-INTEREST AND BAR ADMISSIONS

Given that states should have fewer concerns about attorney quality, why have jurisdictions made it more difficult to obtain permanent admissions? One possibility is that multijurisdictional practice has become more of a concern because of the increasing complexity of legal issues. But to the extent that a

65. One notable exception is Wisconsin, which is the only state that still maintains the diploma privilege (i.e., graduates of Wisconsin law schools receive automatic admission to the Wisconsin bar). Hayden, *supra* note 22, at 1317 n.121. A few other jurisdictions, namely California, New York, Vermont, Virginia, and Washington, permit aspiring attorneys to sit for the bar examination without a formal legal education as long as they have engaged in sufficient “law office study.” NCBE STATISTICS, *supra* note 21, at 8–9. In 2003, only twenty-four people nationwide were admitted to a state bar according to this procedure. *Id.* at 9.

66. *See, e.g.*, Gillers, *supra* note 63, at 686.

67. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 48 (concluding that “most bar examinations have become increasingly less distinctive and less focused on the idiosyncrasies of individual states’ law”).

68. *See, e.g.*, Gillers, *supra* note 63, at 695 (observing that “the law [broadly defined] of every American and some foreign jurisdictions [is] readily accessible via desktop computers”).

69. These realities were obvious even thirty years ago. In 1974, Richard Wiley, then Commissioner of the Federal Communications Commission, said that

the national orientation of business activity in this country with the concomitancy of Federal regulation relative to that activity, the growing mobility of our population, the seemingly irreversible trend toward more and more Federal involvement and, indeed, more and more State law uniformity, the alleged unavailability of local counsel in certain types of cases and a plethora of industrial advances—including the veritable technological revolution occurring in my own field of communications—all have combined to emphasize to any objective observer that the practice of law in America is becoming increasingly interstate in character.

Richard E. Wiley, *Admission on Motion: Do Government Practitioners Practice?*, 43 Nos. 3–4 B. EXAMINER 58, 59 (1974).

70. COMPREHENSIVE GUIDE, *supra* note 1, at 25.

71. *Id.* In addition to these jurisdictions, there are still others that only allow attorneys to gain admission on motion (i.e., bypass the bar examination) if those attorneys’ home jurisdictions offer similar admissions for out-of-state attorneys. *Id.* at 28–29.

lawyer has been deemed competent to deal with those complexities in one jurisdiction, it is difficult to understand why the lawyer would not also be competent to deal with similar complexities in another jurisdiction.

Another possibility is that lawyers are much more mobile today than they were in the past, thus requiring stricter controls of interstate law practice. However, in those few jurisdictions that have friendly admissions requirements and attract many out-of-state lawyers,⁷² there is no evidence of an increase in incompetent lawyering.⁷³ This is not surprising. As Professor Deborah Rhode recently noted, “No effort has been made to correlate performance on admission exams with performance in practice. The most that bar officials can establish is a correlation between examination scores and law school grades.”⁷⁴

The senselessness of rigid rules on interstate law practice is made particularly clear by looking at the European Union. Lawyers there can practice with many fewer restrictions in other member nations despite the existence of deeper linguistic, legal, and cultural differences among European nations.⁷⁵

So what are these rules really about? Scholars have consistently concluded that the most likely answer is economic protectionism. One prominent legal ethicist, Professor Charles Wolfram, has captured the essence of what many commentators have found:

the states [today] are by and large quite restrictive about admitting out-of-state lawyers The reasons given for the restrictions are probably largely pious eyewash. The real motivation, one strongly suspects, has to do with cutting down on the economic threat posed for in-state lawyers . . . by competition with out-of-state lawyers.⁷⁶

72. The most generous, by far, is the District of Columbia, where in recent years 4055% of all admissions by motion take place. NCBE STATISTICS, *supra* note 21, at 17–18.

73. See RHODE, *supra* note 62, at 151 (asserting that, in states with lower score requirements for bar passage, there is “[n]o evidence that these states experience exceptional problems with lawyer performance”).

74. *Id.*; see also George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 126 (2003) (noting that “[a] long literature demonstrates that the bar exam is a seriously flawed means of protecting the public from incompetent lawyers”); *Society of American Law Teachers Statement on the Bar Exam*, *supra* note 33, at 446 (arguing that the bar examination “inaccurately measures professional competence to practice law”).

75. Council Directive 98/5/EC, 1998 O.J. (L 77) 36; see also Roger J. Goebel, *The Liberalization of Interstate Legal Practice in the European Union: Lessons for the United States?*, 34 INT’L LAW. 307, 309 (2000) (noting that “liberal [European Union] rules sharply contrast with the United States’ far more restrictive state rules governing admission to the bar”); D. Bruce Shine, *The European Union’s Lack of Internal Borders in the Practice of Law: A Model for the United States?*, 29 SYRACUSE J. INT’L L. & COM. 207, 208 (2002) (observing that “the EU has allowed lawyers within its Member States greater portability and movement in the practice of law than is enjoyed by lawyers within the United States”); Terry, *supra* note 58, at 1084 (noting that “in the European Union, lawyers from one country are free to practice law in another European Union Member State, even though the languages, legal system, and rules may be fundamentally different from each other”); Jonathan Goldsmith, *Easier Access to Professional Titles: A European Perspective*, B. EXAMINER, May 1998, at 11 (similar).

76. Wolfram, *supra* note 5, at 679.

There is considerable evidence to support Professor Wolfram's claim. Starting in the 1930s, state bars increasingly "sought to protect their markets from out-of-state lawyers. Some increased the number of years a lawyer had to practice before being admitted on motion; others insisted that all entrants take a bar examination (which became progressively more difficult)"77 It is not surprising that market protection occurred during this period. The Great Depression placed obvious financial pressures on the legal profession, making economic protectionism attractive and more common.⁷⁸ At the same time, prominent bar associations, which were relatively recent in origin,⁷⁹ had achieved sufficient influence to protect their interests.⁸⁰

The original content of modern admission rules offers additional evidence of protectionist intent. The rules typically required applicants to be state residents before becoming members of the bar,⁸¹ or they made it more challenging for non-residents to gain bar admissions.⁸² The United States Supreme Court struck down these provisions in the 1980s because they reflected economic protectionism.⁸³ But given that re-take rules made an appearance at around the same time as these more explicitly discriminatory rules, it is easy to conclude that states imposed re-take rules for similarly protectionist reasons.

One can even find some evidence of protectionism within many states' current exceptions to their admission rules. States frequently admit lawyers on motion when the lawyers do not compete with the in-state bar for private clients, such as local law professors, legal services attorneys (who serve indigent clients),

77. ABEL, *supra* note 5, at 124. Not coincidentally, the ABA's first Unauthorized Practice of Law Committee formed in 1930. Clark, *supra* note 5, at 251.

78. See ABEL, *supra* note 5, at 47 (noting that, after 1929, there was an increase in complaints about professional "overcrowding" and in restrictions on entry into practice); JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 284–85 (1950) (reporting widespread discussion during the Depression of capping the number of attorneys that could be admitted to the bar); Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 STAN. L. REV. 1, 6–8 (1981) (noting attempts to create entry barriers during the Depression). This history suggests a protectionist motive for the creation of the National Conference of Bar Examiners itself, which occurred in the midst of the Depression in 1931. See <http://www.ncbex.org> (identifying 1931 as the year the organization was formed).

79. See, e.g., ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* 249 (1953).

80. Although one prominent legal historian has found that the organized bar suffered some loss of power during the Depression, AUERBACH, *supra* note 59, at 6, there is little question that bar associations had achieved considerably more influence by this time than they had enjoyed only decades earlier.

81. Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1461 (1979) (observing that prior to 1980, "[m]ost states [had] long required residency of applicants for admission to the bar").

82. See, e.g., Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) (referencing a Virginia rule that fits this description).

83. Barnard v. Thorstenn, 489 U.S. 546 (1989) (striking down a residency requirement); *Friedman*, 487 U.S. at 61 (finding unconstitutional a rule that permitted residents, but not non-residents, to gain admission on motion); Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985) (holding residency requirement to be unconstitutional).

in-house counsel (who serve a single client), and law students working in clinics (who primarily serve indigent clients).⁸⁴ If jurisdictions had significant concerns about lawyer competence, these exceptions would make little sense. Law professors, legal service attorneys, and in-house counsel from other jurisdictions are no more likely to be familiar with local law than other out-of-state attorneys who seek admission in the state.

Of course, one could come up with a benign explanation for some of these exceptions. For example, because of the dire need for legal services attorneys, a state might say that it is willing to give greater deference to out-of-state attorneys or third-year law students who want to represent indigent clients. Moreover, in the professor and in-house contexts, a state might argue that these attorneys either have a particularly high level of skill or are likely to be (at least in the corporate context) well-supervised.

Although these explanations are plausible, they are not particularly persuasive. For instance, the legal services reasoning implies that indigent clients should have access to lawyers who are otherwise deemed to be incompetent to handle paying-client matters. That would be a surprising conclusion to hear articulated. More importantly, one could develop a no less plausible reason to admit almost any attorney. For example, one could argue that easier admission by motion rules would reduce the cost of legal services for everyone in the state and would therefore make lawyers more widely available. This argument is no less persuasive than the indigent client argument, yet states limit their exceptions to a much narrower group of attorneys who just so happen not to compete with the local bar. The reason is simple: the existing exceptions do not threaten in-state lawyers' economic well-being.

Protectionism is also apparent in the twenty-one jurisdictions that limit admission on motion to lawyers "from jurisdictions also offering admission on motion."⁸⁵ This reciprocal approach to admissions is not contingent on another jurisdiction's admissions requirements, but rather focuses exclusively on whether the other state offers an admission on motion procedure. As a result, a novice lawyer from a "reciprocal" state could receive admission, whereas a much more experienced lawyer from a non-reciprocal state would have to re-take the entire bar examination. There is little, if any, justification for this discrimination that relates to attorney quality. The primary explanation for imposing the full bar examination on the second lawyer while admitting the first on motion is to promote the economic interests of the in-state bar.⁸⁶ These reciprocity provisions

84. WOLFRAM, *supra* note 6, at 870–71; *see also* COMPREHENSIVE GUIDE, *supra* note 1, at 25–27.

85. COMPREHENSIVE GUIDE, *supra* note 1, at 28. A few states have an even stricter control on admission on motion. For example, Oregon grants admission on motion only to lawyers from Idaho and Washington. *Id.* at 26. Similarly, Idaho grants admission on motion only to lawyers from Oregon, Utah, and Washington. *Id.*

86. *See, e.g.,* RHODE, *supra* note 62, at 154 (arguing that "reciprocity rules are difficult to justify from any consumer protection perspective"); *Residency Requirements*, in NAT'L CONFERENCE OF BAR EXAM'RS, THE BAR

thus offer additional evidence that protectionism remains alive and well in admission rules for out-of-state lawyers.

Several states, such as Florida, have even admitted to their protectionist objectives. These states have identified the possibility that a large number of lawyers may retire in the jurisdiction, thus creating increased competition for the local bar.⁸⁷ Although the incentives of these states are more obviously discriminatory against interstate migrants, the history of multijurisdictional practice generally confirms that “[r]ules setting geographical limits on areas in which lawyers may practice are . . . used to protect lawyers . . . against competition from their legally trained brethren.”⁸⁸ Even the United States Supreme Court appears to agree with this conclusion. It favorably quoted a former ABA president’s assertion 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.”⁸⁹

Although many scholars have noted the anticompetitive goals of existing rules, most traditional commentary ends there. Outside of a few prominent cases in the 1980s, there has been very little recent attention to the constitutional implications of current provisions. The remainder of this Article reveals that these rules also raise serious constitutional concerns.

IV. THE CONSTITUTIONALITY OF RE-IMPOSING MULTISTATE EXAMS ON EXISTING ATTORNEYS

This section identifies the three multistate exams that jurisdictions frequently

EXAMINERS’ HANDBOOK 20:103–04 (1991) (suggesting that reciprocity requirements may be unconstitutional); Comment, *supra* note 5, at 756–57 (concluding that reciprocity provisions are “a blatant example of the protection of local attorneys without regard to individual competence of the out-of-state attorney”); Samuel J. Brakel & Wallace D. Loh, *Regulating the Multistate Practice of Law*, 50 WASH. L. REV. 699, 704 (1974–75) (contending that reciprocity requirements “are explicable solely in terms of economic protectionism”). *But see, e.g.*, *Goldsmith v. Pringle*, 399 F. Supp. 620, 623–24 (D. Colo. 1975) (upholding a reciprocity provision against a constitutional challenge on the grounds that it encourages other states to recognize the law licenses of the home state’s citizens); *Minton v. Character & Fitness Comm. of the Ky. Bd. of Bar Exam’rs*, 979 S.W.2d 921 (Ky. 1998) (similar).

87. ABEL, *supra* note 5, at 117 (“Florida explicitly sought to discourage retiring out-of-state lawyers from launching a new practice in the Sunshine State.”); WOLFRAM, *supra* note 6, at 869; Wolfram, *supra* note 5, at 681 (noting that there is a concern in many Sunbelt states that “revolves around the perceived threat of the invading Snowbelt lawyers who retire to balmy climates and increase competition for local law business with the unfair economic cushion of Social Security and other retirement capital”).

88. Morgan, *supra* note 5, at 725; *see also* Clark, *supra* note 5, at 254 (reviewing the recent multijurisdictional practice case law and concluding that “protection of the innocent and unsuspecting . . . public seems very distant to the courts’ deliberations”); Anthony E. Davis, *Multijurisdictional Practice by Transactional Lawyers— Why the Sky Really is Falling*, PROF. LAW., Winter 2000, at 1, 24 (contending that Colorado’s rules in this area were “clearly, and deliberately, part of an exclusionary scheme to limit the number of out-of-state lawyers gaining ‘easy’ admission in Colorado”); Wolfram, *supra* note 5, at 679 (arguing that the “real motivation [for many multijurisdictional practice regulations] . . . has to do with cutting down on the economic threat posed for in-state lawyers . . . by competition with out-of-state lawyers”).

89. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.18 (1985).

require out-of-state lawyers to take and concludes that the re-imposition of these exams is unconstitutional under three related constitutional provisions.

A. THE MULTISTATE BAR EXAMINATION REQUIREMENT

Currently, fifty-three out of fifty-six American jurisdictions require first-time bar applicants to take the MBE.⁹⁰ Despite the near universality of the test and the scaled nature of the scores, thirty of the fifty-three jurisdictions do not allow existing attorneys to transfer MBE scores when seeking permanent admission in another state.⁹¹ In eighteen of these jurisdictions, bar examiners do not allow the transfer of MBE scores under any circumstances.⁹² In the other twelve jurisdictions, bar examiners allow an applicant to transfer an MBE score only when the applicant takes two bar examinations concurrently.⁹³ In addition to these thirty jurisdictions, another twenty jurisdictions allow transfers but require the transfers to occur within a set time period, almost always within three years of taking the MBE and in many cases much sooner.⁹⁴ These restrictions on transferring MBE scores ultimately serve no legitimate government objective and are therefore invalid under the Article IV Privileges and Immunities Clause, the Fourteenth Amendment Privileges or Immunities Clause, and the dormant Commerce Clause.⁹⁵

90. COMPREHENSIVE GUIDE, *supra* note 1, at 17. The data includes a total of fifty-six jurisdictions because it covers a number of American territories (e.g., Puerto Rico and Guam). Thus, this Article's references to "states" should be understood to include both states and United States territories and the District of Columbia. The three jurisdictions that do not require the MBE are Louisiana, Washington, and Puerto Rico.

91. *Id.* at 17, 19. Within the category of thirty jurisdictions that do not allow transfers of previous MBE scores, eighteen have admission on motion procedures for attorneys that have practiced for some period of time, usually four or five years. *Id.* at 25–27. Some of these jurisdictions, however, only permit admission on motion for attorneys from states that also offer admission on motion (i.e., states that offer reciprocal admissions). *Id.* at 28–29. The important point to note here is that, in jurisdictions with admissions on motion, the issue of MBE transfers is only relevant for attorneys who either have practiced for a short period of time and are not eligible for admission on motion or (when the admitting jurisdiction has a reciprocal admission policy) do not come from states that allow for admission on motion. Although admission on motion diminishes to some degree the number of people affected by transfer restrictions, it does not undermine the constitutional argument in those cases where transfers are prohibited.

92. *Id.* at 17.

93. *Id.* at 19. For example, if a law graduate sits for the New Jersey and the New York bar examinations simultaneously, New Jersey (one of the twelve jurisdictions allowing only concurrent transfers) permits the examinee to transfer the MBE score, even if she physically took the test in New York. New Jersey and the other jurisdictions in this category do not allow the transfer of MBE scores that were earned during some earlier non-New Jersey bar examination.

94. *Id.* Some states have minimal requirements for the MBE regardless of how the test-taker does on other portions of the exam, so the MBE score from the other jurisdiction would have to meet that threshold. *Id.* at 22–23.

95. This Article addresses the Fourteenth Amendment clause as "Privileges or Immunities" and the Article IV version as "Privileges and Immunities" so as to reflect the actual constitutional text.

1. THE ARTICLE IV PRIVILEGES AND IMMUNITIES CLAUSE

The Article IV Privileges and Immunities Clause was designed to prevent states from discriminating against out-of-state citizens.⁹⁶ As a result, the Supreme Court has said that it will strike down rules that discriminate against nonresidents unless the state can show that “(i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State’s objective.”⁹⁷

In a trio of cases in the 1980s, the Supreme Court applied this test to attorney admission rules and held that states cannot use residency status as a basis for restricting out-of-state citizens’ admission to the bar.⁹⁸ The Court first struck down an in-state residency rule for lawyers in *Supreme Court of New Hampshire v. Piper*.⁹⁹ New Hampshire had required all bar examinees to be in-state citizens and therefore denied bar admission to a Vermont resident who had already passed the New Hampshire examination.¹⁰⁰ The Court explained that the Article IV Privileges and Immunities Clause prevented states from discriminating against out-of-state citizens in this way, and after drawing on the rich Article IV case law from other contexts,¹⁰¹ held that the New Hampshire rule was unconstitutional.¹⁰²

Similarly, three years later in *Barnard v. Thorstenn*,¹⁰³ the Supreme Court considered a federal court rule in the Virgin Islands that required residency in the jurisdiction for one year before a lawyer could become eligible for bar admission.¹⁰⁴ Relying partially on *Piper*, the Court found that the rule discriminated against out-of-jurisdiction citizens and was therefore unconstitutional.¹⁰⁵

The third case, *Supreme Court of Virginia v. Friedman*,¹⁰⁶ involved a Virginia rule that allowed Virginia citizens to obtain admission by motion while requiring non-resident out-of-state attorneys to take the Virginia bar examination.¹⁰⁷ Under this rule, an attorney who was admitted in Maryland but who lived in Virginia

96. See, e.g., ERWIN CHEMERINKSY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 449 (2d ed. 2002) (“It is well-settled that the privileges and immunities clause is meant to limit the ability of states to discriminate against citizens from other states . . .”).

97. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985).

98. *Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Piper*, 470 U.S. at 274.

99. *Piper*, 470 U.S. at 274.

100. *Id.* at 276.

101. *Id.* at 279–81.

102. *Id.* at 287–88.

103. 489 U.S. 546 (1989).

104. *Id.* at 549.

105. *Id.* at 557–58. The Court also overturned a Louisiana federal district court rule that required federal court bar members to be Louisiana citizens. *Frazier v. Heebe*, 482 U.S. 641 (1987). The Court did not reach the constitutional question, however, and overturned the rule using its supervisory authority. *Id.* at 645.

106. 487 U.S. 59 (1988).

107. *Id.* at 61.

was allowed to gain admission on motion in Virginia, but an attorney licensed in Maryland who also lived in Maryland had to take the bar examination. The Court held that this rule, like the rules in *Piper* and *Thorstenn*, discriminated against non-citizens and therefore met the same fate of unconstitutionality.¹⁰⁸ Even though out-of-state attorneys could still gain access to the Virginia bar by taking the examination, the Court found that Virginia unconstitutionally discriminated against those attorneys by imposing a hurdle that it did not impose on its own citizens.¹⁰⁹

Despite these precedents, few courts have examined whether the Article IV Privileges and Immunities Clause prevents states from imposing the full bar examination on all out-of-state lawyers in the absence of an explicit residency requirement.¹¹⁰ In fact, despite a few federal court decisions to the contrary,¹¹¹ the omission of a residency requirement does not save current rules from unconstitutionality under the Privileges and Immunities Clause.

a. Extending Article IV to the MBE Re-Take Rule

As the above cases make clear, the practice of law constitutes a constitutionally protected “privilege.”¹¹² The first question, therefore, is whether the MBE re-take rule discriminates against nonresident lawyers.¹¹³ It does. By refusing to accept

108. *Id.* at 69–70.

109. *Id.* at 66–67. *But see* Scariano v. Justices of the Supreme Court of Indiana, 38 F.3d 920, 927–28 (7th Cir. 1994) (rejecting a dormant Commerce Clause challenge to a rule that required an in-state office as a condition for gaining admission by motion because people without in-state offices could still gain admission by taking the full bar examination). Even though the Supreme Court in *Friedman* appeared to suggest that the availability of an admission by bar examination does not cure an otherwise unconstitutional rule, the *Scariano* court distinguished *Friedman* on the grounds that it involved the Privileges and Immunities Clause. *Id.* at 927 n.7. The *Scariano* court did not make clear, however, why the availability of the bar examination should cure a potential dormant Commerce Clause problem but not cure a Privileges and Immunities problem.

110. For one exception, see *Owens v. Supreme Judicial Court*, 1992 WL 12998 (D. Mass. Jan. 22, 1992). The analysis in that case, however, was limited and did not examine many potential arguments. *See infra* Part IV.A. Another case, *O’Neal v. Thompson*, 559 F.2d 485 (9th Cir. 1977), rejected a constitutional challenge to a Nevada rule that required out-of-state lawyers to re-take the entire bar exam. The plaintiff in that case also did not raise many potential arguments, including claims under the Privileges and Immunities Clauses and the dormant Commerce Clause. Finally, although several courts have examined challenges to the MBE, *see Fundamental Procedural Due Process*, in NAT’L CONFERENCE OF BAR EXAM’RS, *supra* note 86, at 20:205–07, those cases have tended to focus on other aspects of the MBE and not on whether states must accept transfer scores.

111. *See, e.g.*, *Russell v. Hug*, 275 F.3d 812, 821 (9th Cir. 2002); *Paciulan v. George*, 229 F.3d 1226, 1229 (9th Cir. 2000); *Parnell v. Supreme Court of Appeals of West Virginia*, 110 F.3d 1077, 1081 (4th Cir. 1997); *Kirkpatrick v. Shaw*, 70 F.3d 100, 102–03 (11th Cir. 1995); *Owens v. Supreme Judicial Court*, 1992 WL 12998 (D. Mass. Jan. 22, 1992).

112. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 280–81 (1985). Although there was a lone dissent on this point, *id.* at 289 (Rehnquist, J., dissenting), that view did not attract additional support on the Court in several subsequent cases.

113. Given this understanding of the Clause, it applies to only a subset of attorneys who might seek admission in a new jurisdiction: those attorneys who live in one state but want to gain permanent admission in another (often adjacent) state where they do not plan to reside. The Clause does not appear to apply to lawyers

the prior MBE scores of out-of-state lawyers and by forcing those lawyers to re-take the MBE, a jurisdiction favors in-state lawyers who only had to achieve *one* satisfactory MBE score.

Given this inequality, the next question is whether there is a reason for the disparate treatment and whether the MBE re-take rule is substantially related to the state's legitimate objectives.¹¹⁴ The Supreme Court has recognized that ensuring the competence of lawyers is a compelling state interest,¹¹⁵ and a state would likely argue that its re-take rule is designed to further that interest.

But it is hard to imagine how the re-take rule is related, let alone substantially related, to ensuring competence. Lawyers admitted elsewhere already have achieved satisfactory scores on an earlier administration of the MBE, so a state can simply rely on those previous scores to gauge the lawyer's MBE test-taking skills.¹¹⁶ Moreover, unlike other parts of the bar exam, which may turn on nuances of state law, the MBE tests only nationally recognized legal concepts.¹¹⁷ Accordingly, the MBE re-take procedure has no identifiable relationship to the state's interest in ensuring lawyer competence and fails to satisfy Article IV scrutiny.¹¹⁸

b. Potential Objections to the Article IV Analysis

Despite the simplicity of the Article IV argument, there are a number of possible—though ultimately unpersuasive—objections.

i. The Out-of-State Lawyer/Out-of-State Citizen Disconnect

Unlike the provisions at issue in the Court's earlier attorney admission cases,

who move to a new jurisdiction and seek admission there; those lawyers would have to bring their challenges under the dormant Commerce Clause or the Fourteenth Amendment Privileges or Immunities Clause.

114. *Piper*, 470 U.S. at 284 (requiring that a law discriminating on the basis of citizenship must not only serve a substantial state interest, but it must also be substantially related to that interest).

115. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

116. Indeed, during any given administration of the exam, the MBE consists of the same 200 multiple choice questions no matter where the aspiring bar admittee takes the exam. Although the questions vary from one administration of the exam to the next, the scores are scaled to compensate for differences in test difficulty. See Joe E. Covington, *An Overview of the Multistate Bar Examination*, in NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 86, at 30:102. Moreover, if scaled scores from the MBE were really inadequate, one would expect states not to allow the transfer of similarly-scaled MPRE scores. No state, though, has such a prohibition. COMPREHENSIVE GUIDE, *supra* note 1, at 21.

117. *The MBE*, *supra* note 3 (stating that MBE "questions . . . are designed to be answered by applying fundamental legal principles rather than local case or statutory law").

118. Given this reasoning, it is even arguable that the MBE requirement fails rational basis review as well. Cf. RHODE, *supra* note 62, at 154 (arguing that "the current licensing system cannot be justified on rational policy grounds"). Although not exactly on point, one state supreme court has concluded that the MBE is not a useful measure of an existing attorney's competence. *In re Stephenson*, 516 P.2d 1387 (Alaska 1973) (holding that a non-passing MBE score should not preclude the admission of an out-of-state attorney).

the MBE re-take rule does not explicitly discriminate on the basis of residency.¹¹⁹ Rather, the rule explicitly discriminates only against out-of-state *lawyers* who may or may not also be out-of-state citizens. Consider, for example, a lawyer who lives in New Jersey but who is admitted and practices law only in New York. If New Jersey were to require all out-of-state lawyers to re-take the MBE, the rule would affect this long-time resident in the same way as it affects out-of-state citizens. As a result, one could argue that the rule does not even implicate the Article IV Privileges and Immunities Clause.¹²⁰

A regulation, however, need not discriminate on its face against out-of-state citizens in order to violate the Privileges and Immunities Clause. In *Chalker v. Birmingham & Northwestern Railway Co.*,¹²¹ the Court held unconstitutional a state's imposition of a higher business tax on people who had their primary offices outside of the state.¹²² Even though the tax provision did not expressly impose higher taxes on out-of-state citizens, the Court held that for Privileges and Immunities purposes "the chief office of an individual is commonly in the State of which he is a citizen."¹²³ Thus, the Court recognized that a statute can be unconstitutional under the Privileges and Immunities Clause even if the statute could disadvantage both out-of-staters and long-time state citizens.¹²⁴

The Court recently reaffirmed this reasoning in *Hillside Dairy, Inc. v. Lyons*.¹²⁵ In that case, out-of-state dairies challenged a California regulation that required in-state milk processors who bought raw milk from out-of-state producers to contribute to a price equalization pool.¹²⁶ The regulation did not refer to out-of-state citizens but rather to out-of-state *producers*, so the Ninth Circuit Court of Appeals dismissed the Privileges and Immunities claim.¹²⁷ The Ninth Circuit reasoned that the regulations "[did] not, on their face, create classifica-

119. The case law treats "citizens" and "residents" as identical for purposes of Privileges and Immunities jurisprudence. *United Bldg. & Constr. Trades Council of Camden & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208, 216 (1984).

120. Indeed, the only case to address this specific attack on the MBE, *Owens v. Supreme Judicial Court*, 1992 WL 12998, at *1 (D. Mass. Jan. 22, 1992), relied on this very argument. *See also* *Russell v. Hug*, 275 F.3d 812, 821 (9th Cir. 2002) (relying on this argument to reject a Privileges and Immunities challenge to a federal district court rule governing attorney admissions); *Kirkpatrick v. Shaw*, 70 F.3d 100, 102–03 (11th Cir. 1995) (same); *Schumacher v. Nix*, 965 F.2d 1262, 1267 (3d Cir. 1992) (similar). The arguments in *Owens*, *Russell*, and *Schumacher*, however, preceded the United States Supreme Court's decision in *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003), which reversed a Ninth Circuit case relying on similar reasoning.

121. 249 U.S. 522 (1919).

122. *Id.* at 525–27.

123. *Id.* at 527.

124. *Id.*; *see also* *United Bldg. & Constr. Trades Council of Camden & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208, 217 (1984) (holding that an "ordinance is not immune from constitutional review [under the Privileges and Immunities Clause] at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged").

125. 539 U.S. 59 (2003).

126. *Id.* at 63–64.

127. *Id.* at 67.

tions based on any individual's residency or citizenship."¹²⁸ The Supreme Court, however, vacated the ruling and remanded the case.¹²⁹ Relying heavily on *Chalker*, the Court held that "the absence of an express statement in the California laws and regulations identifying out-of-state citizenship as a basis for disparate treatment is not a sufficient basis for rejecting [a Privileges and Immunities Clause] claim."¹³⁰

Despite the holdings in *Hillside* and *Chalker*, the Court has not decided what a plaintiff must specifically establish in order to invalidate a statute that does not expressly discriminate on its face. The *Hillside* Court recognized two possibilities: that the Privileges and Immunities Clause applies "to classifications that are but proxies for differential treatment against out-of-state residents, or [alternatively, that it applies to] . . . classification[s] with the practical effect of discriminating against such residents."¹³¹ Unfortunately, the Court did not decide which approach to adopt because either approach was sufficient to permit the claim in *Hillside* to proceed.¹³²

Nonetheless, as was the case in *Hillside*, the MBE requirement constitutes discrimination against out-of-state citizens under either formulation. With respect to the first possible test, bar admission requirements for out-of-state attorneys often serve as a proxy for discrimination against out-of-state citizens. Although evidence of such discrimination will vary among states, history strongly suggests that permanent admission rules protect the existing bar against increased competition from outsiders.¹³³ This history, combined with the lack of a credible justification for re-imposing the MBE exam, creates a powerful argument that the rule is a proxy for discrimination against out-of-state citizens.

The "practical effect" of the rule is also discriminatory. The vast majority of out-of-state lawyers who are affected by the rule usually fall into one of two categories. First, there are lawyers who have recently moved to the state and seek permanent admission. Second, there are lawyers who are out-of-state citizens but want to practice regularly in the state. The rule has the practical effect of making it more difficult for *both* groups of lawyers to gain permanent admission.¹³⁴ And

128. *Ponderosa Dairy v. Lyons*, 259 F.3d 1148, 1156 (9th Cir. 2001).

129. *Hillside Dairy*, 539 U.S. at 62.

130. *Id.*

131. *Id.*

132. *Id.* For an argument that the "practical effects" test is not appropriate in this context, despite the *Hillside* decision, see Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 390 n.22 (2003).

133. See *supra* Part III.B.

134. Cf. HAZARD & HODES, *supra* note 6, § 46.5 (asserting that "[i]n practice, the residency requirement has fallen most heavily on lawyers who wish to relocate after having established themselves"). It is also arguable that, but for rigid bar admission requirements, more out-of-state lawyers would seek admission in other jurisdictions. Thus, one cannot determine the practical effect of the MBE requirement by looking only at who is currently applying for admission. It is quite likely that, if the entry requirements were easier, out-of-state citizen/lawyers would more frequently apply for permanent admission in other jurisdictions.

since both forms of discrimination are unconstitutional—recent migrants (as explained in Part IV.A.2 below) under the Fourteenth Amendment Privileges or Immunities Clause and out-of-state citizens under the Article IV version described here—the facial neutrality of the rule does not save it from a constitutional challenge.

A related objection to the Article IV argument is that, if the Constitution prohibits the application of the MBE re-take rule to newcomers and out-of-state citizens, the rule may end up applying only to long-time state residents, a result that would appear to favor outsiders over existing citizens. Assume, for instance, that a long-time state resident took the bar exam last July and got a satisfactory score on the MBE portion but did so poorly on the essay examination that she failed the bar. Now this long-time citizen seeks to re-take the bar exam and asks to transfer her MBE score from the first exam.¹³⁵ According to the analysis offered here, the Constitution would not compel a state to accept such a transfer, but it would require a state to accept an MBE score from an out-of-state lawyer.

Although this difference in treatment may appear to unfairly benefit out-of-state lawyers, the two test-takers are not similarly situated. Whereas the in-state citizen failed the essay portion of the state bar, the out-of-state lawyer had not even taken that portion of the state's bar and had most likely¹³⁶ passed the essay exam in her home state. Accordingly, the out-of-state lawyer is more similar to in-state lawyers than to in-state residents who have failed the bar.¹³⁷

ii. The Diligent Lawyer Objection

The MBE re-take procedure also does not ensure attorney diligence. For example, it would not offer any evidence that an out-of-state lawyer will keep up-to-date on changes in local law, act ethically, perform *pro bono* work, or remain available for court proceedings. Indeed, the *Piper* Court found that these types of arguments failed to meet “the test of ‘substantiality,’ and that the means

135. See Stephen P. Klein, *On Testing*, in NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 86, at 30:505 (identifying this possibility and suggesting that it would result in unfair outcomes).

136. Some jurisdictions will admit a bar applicant with a poor essay score as long as the applicant's combined essay and multiple choice scores are sufficient to pass. COMPREHENSIVE GUIDE, *supra* note 1, at 22–24. This issue is addressed more fully by the revised Model Rule offered in Part VI, *infra*.

137. Another similar issue relates to the admission of an out-of-state lawyer who also happens to be a long-time in-state resident, such as the previously mentioned New Jersey citizen who is admitted to practice only in New York. If this lawyer wants to become a member of the New Jersey bar, she would not receive any protection from the Privileges and Immunities Clause, whereas a New York citizen/lawyer would receive such protection when seeking to transfer an earlier MBE score to New Jersey. But just because the rule would be constitutional as applied to the long-time New Jersey resident does not mean that it should be constitutional as applied to the New York citizen. The Court has held that an “ordinance is not immune from constitutional review [under the Privileges and Immunities Clause] at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged.” *United Bldg. & Constr. Trades Council of Camden & Vicinity v. Mayor & Council of Camden*, 465 U.S. 208, 217 (1984).

chosen [did] not bear the necessary relationship to the State's objectives."¹³⁸

A court should reach the same result in the context of MBE requirements. The MBE tests no local law whatsoever, so it does not help the state to determine a lawyer's commitment to acquiring and maintaining local law knowledge. With respect to ethics, there is no reason to believe that taking the MBE, which does not test ethics issues, would make someone more inclined to act ethically. Finally, the test has little bearing on whether a lawyer will be available for court proceedings or to conduct *pro bono* work.¹³⁹

iii. The Fading Skills Rationale

Nor is there any basis for the claim that the MBE helps states, particularly those that attract many retirees (e.g., Florida), to assess whether out-of-state lawyers have become less competent over time. If this were the motivation, one has to wonder why no jurisdiction re-tests its own older lawyers who passed the bar examination many years ago. Indeed, states could easily impose recertification requirements.

More importantly, if the MBE really served the purpose of removing the profession's "dead wood," one would expect states to impose the test only on lawyers who had taken it many years ago.¹⁴⁰ In reality, the reverse is true. Many jurisdictions only impose the MBE on lawyers who *recently* graduated law school, but allow more experienced attorneys to receive a waiver of bar examination requirements. No jurisdiction allows a recently admitted lawyer to by-pass the MBE while requiring more experienced attorneys to take the exam. Again, the reason is that no jurisdiction really uses the MBE to screen out older attorneys with fading skills. Its purposes are more pernicious.

In conclusion, the Supreme Court held in *Piper* that a state cannot prohibit out-of-state citizens from gaining bar membership. Since that decision, very little commentary has explored the potential implications of the case for other, less draconian limitations on cross-border practice that do not expressly discriminate on the basis of residency. What one finds is that states have achieved protectionism through these less obvious forms of discrimination but that those

138. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 285 (1985).

139. The Court's decision in *Piper* eliminated yet another potential objection: that this is all a non-issue because most lawyers can easily gain temporary admissions through *pro hac vice*. The Court found the *pro hac vice* alternative to be unacceptable because it "does not allow the non-resident to practice in [the state] on the same terms as a resident member of the bar. . . . Furthermore, the decision on whether to grant *pro hac vice* status to an out-of-state lawyer is purely discretionary." *Id.* at 277 n.2. One could also note that *pro hac vice* admissions offer little help to transactional lawyers who would not ordinarily be appearing before a court and thus would not have a clear source of authority to gain *pro hac vice* admission.

140. In fact, the medical profession follows this very procedure. States allow young doctors who recently passed their licensing exams to obtain a medical license very easily in other states. At the same time, states are more likely to require senior doctors to undergo additional testing. See Barnard & Greenspan, *supra* note 11, at 348.

rules are no less unconstitutional.

This finding is fully consistent with *Toomer v. Witsell*,¹⁴¹ a frequently cited source of modern Article IV analysis. In *Toomer*, the Court reviewed a law that imposed a shrimp-fishing license fee on out-of-state shrimpers that was one hundred times more expensive than state citizens had to pay.¹⁴² The Court held that the law was unconstitutional because there was no legitimate justification for imposing such a large fee on out-of-state residents.¹⁴³ In much the same way, the MBE re-take rule makes it more difficult for out-of-state lawyers to gain permanent admission by forcing them to re-take an exam that in-state lawyers only had to take once. Quite simply, “[t]he Privileges and Immunities Clause was designed primarily to prevent such economic protectionism.”¹⁴⁴

2. THE FOURTEENTH AMENDMENT PRIVILEGES OR IMMUNITIES CLAUSE

The Fourteenth Amendment Privileges or Immunities Clause offers another basis for challenging the constitutionality of re-take rules. Unlike the Article IV Privileges and Immunities Clause, which limits discrimination against out-of-state citizens, this Clause protects people who have recently moved to a jurisdiction. As a result, the Clause is helpful to lawyers who have relocated to a state and want to avoid having to take the jurisdiction’s bar exam.

a. The Recent Revival and Its Implications

Before 1999, the above description of the Fourteenth Amendment Privileges or Immunities Clause would have seemed quite inconsistent with existing precedents. Until then, it had been assumed that the United States Supreme Court’s 1873 *Slaughterhouse* decision¹⁴⁵ left the Clause without significant doctrinal applications.¹⁴⁶ Indeed, the provision had become largely toothless.¹⁴⁷

Despite the long history of disuse, the United States Supreme Court recently

141. 334 U.S. 385 (1948).

142. *Id.* at 395.

143. *Id.* at 397–99.

144. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n.18 (1985). One final objection is that the MBE re-take rule and similar related provisions do not affect the fundamental right to practice law recognized in *Piper*. Rather, these provisions simply impose additional requirements on existing lawyers before they can engage in law practice in another state. The problem with this argument is that it is inconsistent with the existing authority, which suggests that the right to law practice is implicated not only by barring an attorney completely, but by making it more difficult for that lawyer to gain admission in another jurisdiction. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 66–67 (1988).

145. *The Slaughter-House Cases*, 83 U.S. 36 (1873).

146. *See, e.g.*, Kevin Christopher Newsom, *Setting Incorporationism Straight: A Reinterpretation of The Slaughter-House Cases*, 109 *YALE L.J.* 643, 648 n.15 (2000) (citing numerous prominent sources for this proposition).

147. *Id.*

put some bite into the Clause. In *Saenz v. Roe*,¹⁴⁸ the Court explained that the Clause gives newly arrived state citizens an immediate right to be treated on the same terms as long-time state residents.¹⁴⁹ Accordingly, the Court struck down as unconstitutional a California law that effectively gave recent arrivals to the state lower welfare benefits than existing California citizens.¹⁵⁰ The law granted newly-arrived state citizens—those in the state less than a year—welfare benefits up to the amount that they had received in their previous home state, which was frequently below the more generous benefits that California’s longer-term citizens received.¹⁵¹ The Court found that the law discriminated against newly-arrived state citizens, did not satisfy the strict scrutiny that such laws must receive, and therefore violated the Fourteenth Amendment Privileges or Immunities Clause.¹⁵²

Although *Saenz* involved durational residency requirements, the Court gave no reason to conclude that its holding was limited to such requirements. Rather, the Court said more generally that “the right to travel [embodied in the Fourteenth Amendment Privileges or Immunities Clause] embraces the citizen’s right to be treated equally in her new State of residence.”¹⁵³ Indeed, a 1986 opinion that discussed the right to travel (but did not expressly place it in the Fourteenth Amendment) concluded that “the right to migrate protects residents of a State from being disadvantaged, or from being treated differently, simply because of the timing of their migration, from other similarly situated residents.”¹⁵⁴ In short, the Court has not limited its analysis to durational residency requirements.

The first question under the Fourteenth Amendment, therefore, is whether the MBE requirement treats lawyers who are new state residents differently from similarly situated long-time residents.¹⁵⁵ If so, a court must then ask whether the law serves a compelling state interest and whether less restrictive means are available to achieve that interest.¹⁵⁶

As to the first question, the MBE re-take procedure does, in fact, discriminate in favor of existing state citizens. It requires newly-arriving lawyers to achieve a

148. 526 U.S. 489 (1999).

149. *Id.* at 503–04; cf. *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898 (1986).

150. *Saenz*, 526 U.S. at 510–11.

151. *Id.* at 492.

152. *Id.* at 504, 511.

153. *Id.* at 505.

154. *Soto-Lopez*, 476 U.S. at 904 (finding a New York law to be unconstitutional on right to travel grounds where it gave veterans greater opportunities for state employment if the veterans had originally entered the armed forces while living in New York).

155. Note that the emphasis here is on newly-arrived residents because, unlike the out-of-state focus of the Article IV Privileges and Immunities Clause, the Fourteenth Amendment version only limits the extent to which a state may discriminate against *newly-arrived* citizens.

156. *Soto-Lopez*, 476 U.S. at 909–10 (holding that, “if there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’”) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972)).

second satisfactory MBE score in order to receive a law license, whereas long-time state citizens only have to achieve one such score. The re-take procedure thus forces a lawyer who moves to the state to repeat a time-consuming process (studying for and re-taking the MBE) that similarly situated existing residents (i.e., in-state lawyers who have achieved a satisfactory MBE score) do not have to repeat. Moreover, there is a much less restrictive way to achieve the same goal of measuring MBE performance: allowing the transfer of MBE scores.¹⁵⁷

The only reported decision that has applied *Saenz* in the attorney admission context, *Paciulan v. George*,¹⁵⁸ raised a distinguishable issue. *Paciulan* involved a lawsuit by California residents who had been admitted to the bar in other states but not in California.¹⁵⁹ The lawyers contended that a California rule that limited *pro hac vice* admissions to non-resident attorneys was unconstitutional under both Article IV and the Fourteenth Amendment.¹⁶⁰ The Ninth Circuit correctly rejected the Article IV argument on the grounds that the rule *avored* out-of-state residents over in-state residents and therefore did not give rise to the form of discrimination at issue in cases like *Piper*.¹⁶¹

The court also rejected the Fourteenth Amendment Privileges or Immunities Clause claim, arguing that the rule did not discriminate against newly arrived California citizens because it treated all California citizens equally.¹⁶² The court explained that the rule required all California citizens to become members of the bar in order to practice law in the jurisdiction on a permanent basis.¹⁶³ Thus, unlike an MBE re-take procedure, which requires recent arrivals to take an exam twice that long-time citizens only had to take once, the California rule at issue in *Paciulan* had no discriminatory effect. In fact, if California allowed recent arrivals to practice law in the state through regular *pro hac vice* admissions, immigrating lawyers would arguably receive preferential treatment over California lawyers who (for example) had to achieve a higher MBE score to gain

157. It is no defense that the requirement does not actually deter travel. The *Saenz* Court explained:

Were we concerned solely with actual deterrence to migration, we might be persuaded that a partial withholding of benefits constitutes a lesser incursion on the right to travel than an outright denial of all benefits. But since the right to travel embraces the citizen's right to be treated equally in her new State of residence, the discriminatory classification is itself a penalty.

Saenz v. Roe, 526 U.S. 489, 504–05 (1999) (citation omitted). This reasoning seems to undermine at least some of the logic in earlier attorney admission rules cases that rejected the right to travel argument. See, e.g., *Shenfield v. Prather*, 387 F. Supp. 676, 683–86 (N.D. Miss. 1974) (rejecting a constitutional challenge to bar exam requirements for out-of-state lawyers).

158. 229 F.3d 1226 (9th Cir. 2000).

159. *Id.* at 1228.

160. *Id.*

161. *Id.* at 1228–29; see also *Russell v. Hug*, 275 F.3d 812, 821 (9th Cir. 2002) (using a similar argument to reject a challenge to a different attorney admission rule).

162. *Paciulan*, 229 F.3d at 1229.

163. *Id.*

permanent admission to the California bar.

b. The Meaning of “Out-of-State Lawyer” Revisited

One might argue that, as was the case in the Article IV context, there is a definitional problem: out-of-state lawyers are not necessarily newly arrived state citizens. Consider, for example, a New York licensed lawyer who is a long-time New Jersey citizen. This existing New Jersey citizen would be affected by the New Jersey re-take rule if she sought to become a member of the New Jersey bar in exactly the same way as a recent arrival to New Jersey.¹⁶⁴ Thus, one could argue that the re-take procedure does not really discriminate against newly-arrived residents and that the Privileges or Immunities Clause does not apply.¹⁶⁵

As explained earlier, a plaintiff does not need to show that a rule explicitly discriminates against newcomers; a plaintiff need only show that it does so in intent or practical effect.¹⁶⁶ Again, there is ample evidence that the MBE re-take rule constitutes intentional discrimination.¹⁶⁷

Moreover, because of the burdens associated with becoming a member of another bar, out-of-state lawyers who seek admission in a new state are most likely to be newly-arrived citizens of the state where they seek admission. Indeed, bar admission is a time consuming and expensive process, even in states that do not require all newly-arriving lawyers to take the full bar examination. Application fees and bar dues alone often exceed \$1,000.¹⁶⁸ In addition, states frequently require lawyers from other jurisdictions to complete dozens of pages of paperwork in order to apply for admission.¹⁶⁹ Most states also mandate that lawyers re-complete (or supplement) the Character and Fitness report, which requires additional time and another fee, currently \$250.¹⁷⁰ Finally, all states

164. Similarly, consider a law student who passed the New York and New Jersey bar examinations after graduation but ended up practicing and living in New York. If this person subsequently moved to New Jersey, she would not have to re-take the New Jersey bar exam, even though she is a new state citizen.

165. See, e.g., *Russell v. Hug*, 275 F.3d 812, 821 (9th Cir. 2002) (relying on this argument to reject a Privileges and Immunities challenge to a federal district court rule governing attorney admissions); *Owens v. Supreme Judicial Court*, 1992 WL 12998 *1, *1 (D. Mass. Jan. 22, 1992) (same). The problem with *Russell* and *Owens* is that they both derived their argument from *Giannini v. Real*, 911 F.2d 354 (9th Cir. 1990), a Ninth Circuit decision that rejected a constitutional challenge to an attorney admission rule on the grounds that it did not discriminate on its face. *Id.* The *Giannini* court, however, did not have the benefit of *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59 (2003), which explicitly held that a rule does not need to discriminate on its face in order to implicate the Privileges and Immunities Clause. *Id.* at 64.

166. See *supra* notes 121–32 and accompanying text.

167. See *supra* Part III.B.

168. COMPREHENSIVE GUIDE, *supra* note 1, at 35.

169. For example, Massachusetts requires the completion of both its own fourteen page application form as well as the National Conference of Bar Examiners' lengthy character and fitness report. See, e.g., Commonwealth of Mass. Bd. of Bar Exam'rs, *Admission on Motion*, available at <http://www.state.ma.us/bbe/OnMotionAppInst.pdf> (last visited Oct. 9, 2004). The applicant must also obtain letters of reference and other materials. *Id.*

170. See <http://www.ncbex.org/character/Standard01.pdf> (last visited Oct. 9, 2004).

have annual bar dues and many states have continuing legal education requirements,¹⁷¹ which offer additional reasons why an attorney would not likely go through the hassle of obtaining a new bar admission unless she planned on working in the state.

Of course, just because someone works in a state does not necessarily mean that the person is a citizen there, but it is reasonable to conclude that the place where one seeks to be admitted to the bar is “commonly in the State of which he [or she] is a citizen.”¹⁷² In short, the practical effect of out-of-state lawyer admission rules is to influence how easily a newly arrived citizen can become a member of the bar, thus implicating the Fourteenth Amendment Privileges or Immunities Clause.

At first glance, this argument conflicts with the Article IV claim that the MBE re-take rule discriminates against out-of-state citizens (as opposed to newly arrived citizens). As explained earlier, however, the MBE rule actually has the practical effect of and is a proxy for discrimination against *both* recently-arrived state citizens and citizens from different states. Indeed, each of these groups poses an economic threat to existing in-state lawyers. Given that states have traditionally sought to limit that threat through permanent admission rules, it is reasonable to conclude that the rules discriminate against both recent arrivals as well as out-of-state citizens seeking to practice more regularly in a new state.¹⁷³

In short, the MBE re-take rule violates the Fourteenth Amendment Privileges or Immunities Clause. Although the doctrine in this area is still in its infancy, the *Saenz* case offers a compelling framework for concluding that the re-take rule is, in fact, unconstitutional when applied to new state citizens.

171. COMPREHENSIVE GUIDE, *supra* note 1, at 39. Other requirements may include the purchase of malpractice insurance, *pro bono* reporting, and client security fund contributions.

172. *Chalker v. Birmingham & Northwestern Ry. Co.*, 249 U.S. 522, 527 (1919). This argument is one step removed from the contention in *Chalker*. In *Chalker*, the Court accepted the claim that a person is normally a citizen of the state in which she has her principal office. In contrast, a court would have to accept a somewhat more attenuated claim here: that an individual is not only typically a citizen where she primarily practices law (a *Chalker*-type claim), but that she normally practices law where she is admitted to the bar. Although this argument extends a bit beyond the facts in *Chalker*, it seems no less empirically true or more conceptually troubling.

173. The potential wasting of state resources by recent arrivals is also not a legitimate concern. Of course, the *Saenz* Court explained that a state might fear that it will “encourage citizens of other States to establish residency for just long enough to acquire some readily portable benefit, such as a divorce or a college education, that [would] be enjoyed after they return to their original domicile.” *Saenz v. Roe*, 526 U.S. 489, 505 (1999); *see also* *Sosna v. Iowa*, 419 U.S. 393 (1975) (upholding the constitutionality of a residency requirement for divorce). But unlike a divorce or public schooling, a lawyer seeking bar admission does not use any state resources. The attorney admissions process typically imposes fees on applicants that cover any administrative costs. In fact, it is arguable that the state bar enhances its coffers over the long-term by increasing the number of bar dues-paying members. Second, it seems unlikely that people would move to a new state just to have a lower hurdle for bar admission. Indeed, if the Article IV Privileges and Immunities argument has merit, Article IV would require admission on motion even if the lawyer does not move to the state.

3. THE DORMANT COMMERCE CLAUSE

The dormant Commerce Clause, like the Article IV Privileges and Immunities Clause and the Fourteenth Amendment Privileges or Immunities Clause, was designed to limit the extent to which states engage in economic protectionism.¹⁷⁴ As a result, the forced re-taking of the MBE as a condition for admission violates this Clause as well.

a. Making Sense of Dormant Commerce Clause Doctrine

By way of background, the Supreme Court has found that the Commerce Clause not only expressly authorizes Congress to regulate interstate commerce, but it also contains “an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce.”¹⁷⁵ This implicit limitation (the dormant Commerce Clause) essentially “prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.”¹⁷⁶

Although straight-forward in theory, the dormant Commerce Clause has proven quite difficult to apply in practice. Depending on the facts of the case, the courts adopt one of two methods for analyzing a dormant Commerce Clause issue.¹⁷⁷ One method results in the application of a type of strict scrutiny that produces a nearly *per se* invalidation of the relevant rule,¹⁷⁸ whereas the other method requires the application of a balancing test that usually (but not always) results in a court finding the law to be constitutional.¹⁷⁹ The Court has applied stricter scrutiny when the relevant law discriminates against interstate commerce “either on its face or in practical effect.”¹⁸⁰ In that case, the law “is *per se* invalid, save in a narrow class of cases in which the [defendant] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.”¹⁸¹

If the law does not discriminate on its face or in practical effect, the Court has applied a balancing test, often referred to as the *Pike* balancing test for the case

174. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (contending that “[t]he central rationale for the rule against discrimination [in the dormant Commerce Clause] is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent”) (citing *The Federalist* No. 22, pp. 143–145 (Alexander Hamilton) (Clinton Rossiter ed., 1961); JAMES MADISON, *Vices of the Political System of the United States*, in 2 WRITINGS OF JAMES MADISON 362–363 (Gaillard Hunt ed., 1901)).

175. *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652 (1981).

176. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

177. See CHEMERINSKY, *supra* note 96, at 411–12.

178. *Id.* at 412.

179. *Id.* at 411.

180. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

181. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

from which the test arose.¹⁸² Under this analysis, the law survives unless “the burden imposed on . . . [interstate commerce] is clearly excessive in relation to the putative local benefits.”¹⁸³ Unfortunately, the Supreme Court has acknowledged that the line between these two methods of analysis is not entirely clear,¹⁸⁴ and the *Pike* balancing test itself leaves a great deal to judicial discretion.¹⁸⁵

b. Applications to the MBE

To understand which standard applies in the MBE context, one must assess the purpose and practical effect of the MBE requirement. For the reasons already explained, the MBE re-take requirement discriminates against out-of-state interests and adversely affects interstate commerce.¹⁸⁶ Accordingly, the more stringent Commerce Clause test applies, and the MBE requirement fails to satisfy it.¹⁸⁷

The Supreme Court has upheld only one statute under strict dormant Commerce Clause scrutiny. In *Maine v. Taylor*,¹⁸⁸ the Court held that Maine’s ban on out-of-state baitfish served a legitimate local interest—preventing the spread of harmful parasites to Maine’s native fish species—that “could not be served as well by available nondiscriminatory means.”¹⁸⁹

Analogizing parasites to lawyers proves more humorous than legally justifiable. In contrast to Maine’s interest in *Taylor*, states have a very effective way of protecting against the licensing of lawyers with insufficient MBE scores: looking at the lawyers’ MBE scores from their home jurisdictions. The transfer is administratively easy, and it yields no less information about a lawyer’s competence than if the lawyer simply re-takes the same exam.¹⁹⁰ Accordingly, if the MBE re-take procedure implicates strict scrutiny, it should not survive.¹⁹¹

Moreover, even if the *Pike* balancing test were to apply, a court should strike

182. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

183. *Id.* at 142.

184. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986) (acknowledging that “there is no clear line” between the different levels of scrutiny that are applicable in dormant Commerce Clause cases).

185. CHEMERINSKY, *supra* note 96, at 410 (noting that the *Pike* balancing test “gives courts enormous discretion”).

186. *See infra* Parts IV.A.1–2.

187. *See Clark, supra* note 5, at 268 (reaching the same conclusion); Comment, *supra* note 5, at 759–60 (same). For a nice summary of dormant Commerce Clause arguments in the context of multijurisdictional practice rules more generally, see Brief for Amici Curiae American Corporate Counsel Ass’n, Birbrower, Montalbano, Condon & Frank, P.C. v. ESQ Bus. Serv., Inc., 949 P.2d 1 (Cal. 1998) (No. 97-1798).

188. 477 U.S. 131 (1986).

189. *Id.* at 138.

190. Thomas, *supra* note 5, at 251 (offering a similar proposal).

191. The market participant exception to dormant Commerce Clause analysis would not undermine the argument. Although the exception might allow the state to hire only resident lawyers to work in the attorney general’s office, it would not affect the content of permanent admission rules.

down the MBE re-take rule because its detrimental effect on interstate commerce clearly exceeds any benefits that the rule confers on a state. As for the detrimental effect, the MBE rule cuts down on the number of attorneys who can practice freely in the state, which is an impediment to interstate commerce in legal services. Indeed, the ABA's own Commission on Multijurisdictional Practice concluded that "[j]urisdictional restrictions [embodied in permanent admission rules] impede national mobility, because in many cases the process for admitting lawyers to practice in a new jurisdiction is lengthy, expensive, and burdensome."¹⁹²

Nor can the state argue that, under *Pike*, countervailing benefits justify these requirements. The putative benefit, of course, is the assurance of competence, but as has been repeatedly noted, the MBE re-take rule offers no help in this regard beyond a lawyer's previous MBE score. Also, by limiting the number of out-of-state attorneys who can practice in a jurisdiction, a state necessarily reduces the supply of available lawyers and thus likely increases the cost of legal services. When combined with the adverse effect on interstate commerce, the MBE rule does not satisfy even the lower level scrutiny in the *Pike* balancing test.¹⁹³

One possible, albeit unpersuasive, objection is that legal services fail to implicate interstate commerce. The Supreme Court, however, held in *Goldfarb v. Virginia State Bar*¹⁹⁴ that legal services constitute interstate commerce, even when the representation only has a modest connection to another state.¹⁹⁵ For example, in *Goldfarb*, the Court held that the examination of a land title constituted interstate commerce because out-of-state sources had provided a significant percentage of the funds used to purchase the land at issue.¹⁹⁶ Of course, not all legal matters involve a connection to interstate commerce in this way, but restrictions on out-of-state lawyers effectively regulate the ability of an out-of-state lawyer to offer legal services to citizens of other states.¹⁹⁷ This is true regardless of whether the lawyer is moving to the new state or seeking admission in the state while living elsewhere. Either way, restrictions on out-of-state lawyers directly affect interstate commercial activities.¹⁹⁸

192. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 48.

193. *See, e.g.*, Nat'l Revenue Corp. v. Violet, 807 F.2d 285, 289 n.5 (1st Cir. 1986) (concluding that a Rhode Island statute limiting debt collection to Rhode Island attorneys violated the dormant Commerce Clause under the *Pike* balancing test).

194. 421 U.S. 773 (1975).

195. *Id.* at 787–88.

196. *Id.* at 783–84.

197. *See* Comment, *supra* note 5, at 740 (reaching the same conclusion).

198. *Id.*; *see also* Hishon v. King & Spalding, 467 U.S. 69, 73–74 (1984). The rules affect interstate commerce even when the lawyer has moved into the state. These attorneys regularly provide legal services with some interstate component, such as probating a will with beneficiaries in other states, assisting with property purchases on behalf of out-of-state buyers, or serving as local counsel in litigation involving at least one out-of-state disputant. As a result, bar admission rules implicate interstate commerce in this way as well.

The First Circuit's decision in *National Revenue Corp. v. Violet*,¹⁹⁹ lends considerable support to the dormant Commerce Clause argument. In *Violet*, the court found that a Rhode Island statute, which defined debt collecting as law practice and limited such collecting to licensed Rhode Island lawyers, was unconstitutional under both the dormant Commerce Clause's strict level of scrutiny *and* under the *Pike* balancing test.²⁰⁰ Particularly instructive was the court's reasoning. It explained that:

By defining all debt collection as the practice of law, and limiting this practice to members of the Rhode Island bar, Rhode Island effectively [barred] out-of-staters from offering a commercial service within its borders and confer[red] the right to provide that service—and to reap the associated economic benefit—upon a class largely composed of Rhode Island citizens.²⁰¹

This decision is helpful for two reasons. First, it suggests that rules affecting the ability of out-of-state lawyers to practice in a state impact interstate commerce and implicate the dormant Commerce Clause. Moreover, *Violet* suggests that such rules give rise to strict dormant Commerce Clause scrutiny even when they do not explicitly discriminate against out-of-state citizens. According to the First Circuit, it is enough that the challenged rule grants privileged status to a group composed “largely” of in-state citizens. In the same way, the MBE re-take rule implicates strict scrutiny because it grants a privilege—needing only one satisfactory MBE score—to a class composed largely of in-state citizens.

To make the point even clearer, consider a hypothetical rule that prohibits people from sitting for the California bar exam until they graduate from a *California* law school. In some ways, this rule would be even more justifiable than the MBE re-take provision, given that law schools (unlike the MBE) usually offer at least some exposure to local law. The law school rule would thus have some relationship to the legitimate state interest of ensuring local law knowledge. Moreover, the rule would not be an absolute prohibition against out-of-state citizens, just like the MBE re-take rule is not an absolute prohibition against those citizens. The law school rule is obviously more burdensome—it would force a lawyer to repeat law school in California—but it is conceptually identical to the MBE re-take rule: it asks out-of-state lawyers to repeat a process that those lawyers already completed successfully. In both cases, repetition of the process serves no other purpose but to make it more difficult for out-of-state lawyers to gain permanent admission. If the hypothetical California law school rule would fail constitutional scrutiny—and it is hard to imagine that it could survive—the

199. 807 F.2d 285 (1st Cir. 1986).

200. *Id.* at 289 n.5, 290.

201. *Id.* at 290.

MBE re-take rule should fail as well.²⁰²

B. THE MULTISTATE ESSAY EXAMINATION AND THE MULTISTATE PERFORMANCE TEST

The MEE and MPT raise related, but factually distinct, constitutional concerns. The MEE, which fifteen jurisdictions have adopted,²⁰³ consists of a series of essay questions that are identical no matter which jurisdiction administers the examination.²⁰⁴ Similarly, the MPT, currently used in thirty jurisdictions,²⁰⁵ contains the same problems in each state.²⁰⁶ Unlike the MBE, however, the NCBE does not grade the MEE and MPT.²⁰⁷ Rather, each jurisdiction grades its own applicants' answers. Because of the state-based nature of the grading, one might conclude that a jurisdiction should be allowed to force out-of-state lawyers to re-take these portions of the bar examination.

In reality, because the MEE and MPT are uniform throughout the country, a state that administers the MEE or MPT could easily accept MEE or MPT answer books from other jurisdictions and apply the grading criteria that the state used for its own administration of the exam. The jurisdiction could then assign scores to the MEE and MPT portions that are consistent with the scores that it gave out during the actual administration of the MEE and MPT. It could next combine the MEE and MPT with the MBE score in the same way that it does with its own bar applicants and determine whether the out-of-state lawyer qualifies for admission.

Such a procedure might place some burdens on states, but the burdens would not be particularly onerous. For example, graders would have to re-acquaint themselves with old exam questions and, depending on the rigor of the jurisdiction's exam grading process, ensure that the scores are consistent with similar essay exam answers from the original scoring.²⁰⁸ These extra grading

202. Although this Article focuses on three constitutional provisions, one could imagine additional constitutional arguments. For example, one could argue that the MBE re-take rule does not satisfy rational basis review under both the Equal Protection Clause and the Due Process Clause. *See, e.g.,* *Schwartz v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232 (1957) (holding that the state's refusal to let an applicant sit for the bar examination because of his previous involvement with Communist Party-related activities and other similar issues had no rational basis and violated the Due Process Clause).

203. COMPREHENSIVE GUIDE, *supra* note 1, at 21.

204. *The Multistate Essay Examination*, *supra* note 30.

205. COMPREHENSIVE GUIDE, *supra* note 1, at 21.

206. *The Multistate Performance Test*, *supra* note 36.

207. *Id.*; *The Multistate Essay Examination*, *supra* note 30.

208. This process would also require states to retain essay exams for some period of time, not only to compare newly transferred essay exam answers to previous exams but to ensure that the state can transfer the MEE and MPT answers of lawyers seeking to be admitted to a new jurisdiction. Storage of old examinations should not be terribly difficult or costly for most jurisdictions. Only nine jurisdictions had more than 2,000 test-takers during all of 2003. NCBE STATISTICS, *supra* note 21, at 10–12. If a state were to retain examinations for twenty years, it would not be difficult for a state to store 40,000 thousand essay answers. From my own experience, I know that about one thousand essay examinations fit in one file cabinet in the corner of my office. A large room would probably offer sufficient space to retain all essay examinations over a two decade time

responsibilities, however, could be compensated for through increased fees for out-of-state attorneys seeking admission by motion.²⁰⁹ Perhaps most importantly, the essay-grading burdens do not mitigate the constitutional problem. The Constitution does not permit an otherwise unconstitutional statute to survive just because of additional and relatively small administrative burdens.²¹⁰

In the end, the re-imposition of multistate tests makes little sense. Indeed, states do not typically require doctors, especially junior doctors, to re-take multistate licensing exams.²¹¹ Yet lawyers receive exactly the opposite treatment, with most states requiring newly licensed lawyers to endure the burden and expense of re-taking multistate exams like the MBE, the MEE, and the MPT. This approach is ultimately both poor public policy and unconstitutional economic protectionism.

V. CONSTITUTIONAL PROBLEMS WITH STATE WRITTEN EXAMINATIONS

The discussion so far has focused on multistate tests. But many states also require lawyers to take state written essay and multiple choice exams. Unlike multistate tests, lawyers have not previously taken another state's self-written exam, so imposing such an exam would not appear to discriminate in favor of in-state lawyers.²¹² The present section examines these state written exams and concludes that, although the argument is more subtle, these tests also have constitutional problems. The discussion focuses on two different types of state written exams—those that test widely accepted legal concepts and those that test the jurisdiction's own substantive law.

period. Moreover, given the increasing use of computers to take exams, it is foreseeable that many state essay exams may soon be stored electronically, thus further reducing any storage concerns. Moreover, the storage costs even in states with more bar exam takers could presumably be compensated for by increased examination costs. Of course, the best solution would be to have the NCBE grade MEE and MPT answers, but states appear to have been reluctant to relinquish this control.

209. *See Toomer v. Witsell*, 334 U.S. 385, 398–99 (1948) (noting that a state may “charge non-residents a differential . . . [to] compensate the State” for any additional burdens associated with allowing non-residents to obtain a license in the state).

210. *See Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 290 (1st Cir. 1986) (finding that administrative inconveniences do not excuse a state from dormant Commerce Clause scrutiny).

211. Barnard & Greenspan, *supra* note 11, at 347–48.

212. One exception would be if a state imposed an exam only on out-of-state attorneys and not on first-time applicants. For example, a special “attorney exam” would become problematic if applied in this way because it would create the potential for a more rigorous assessment of out-of-state lawyers. At least one such prominent exam, the California attorney's exam, does not appear to present this problem because it consists of the same questions that regular bar takers must answer. *See* <http://www.calbar.ca.gov/calbar/pdfs/admissions/75sf.pdf> (last visited Nov. 6, 2004). If, however, a state were to employ an attorney's exam that requires a greater knowledge of state law than the state's general bar examination, a court could easily conclude that the requirement is unconstitutional under either or both Privileges and Immunities Clauses as well as the dormant Commerce Clause.

A. STATE TESTING OF NATIONAL CONCEPTS

Many state written examinations focus on widely accepted legal concepts. For example, Colorado's Board of Law Examiners instructs authors of essay questions "not [to] ask questions which have as their answer law peculiar to Colorado. *The Colorado bar exam tests general law principles.*"²¹³ Similarly, California's state written examination consists of many questions that have nothing to do with nuances in California law. Most of the essay questions are supposed to "be answerable on the basis of legal principles of general applicability rather than with reference to specific provisions of California law."²¹⁴

By forcing out-of-state lawyers to take these exams, states are engaging in protectionism that should raise serious constitutional concerns. In particular, the rules have the purpose and practical effect of discriminating in ways that are inconsistent with Article IV, the Fourteenth Amendment, and the dormant Commerce Clause.²¹⁵

In addition to historical context,²¹⁶ which offers ample evidence of protectionism, the most important reason to believe that these exams have the intent and practical effect of limiting the number of in-state attorneys is that they do not advance their only conceivable purpose: ensuring competence. Since no jurisdiction admits lawyers to the bar without demonstrating competence in widely accepted legal concepts and analysis, it is difficult to understand what purpose

213. Letter from Alan Ogden, Executive Director, State of Colorado Board of Law Examiners (1999) (on file with the author) (emphasis added).

214. State Bar of Cal. Office of Admissions, *Instructions for Drafting California Bar Examination Questions and Analyses*, at 2 (on file with author; received February 2003). Exceptions include questions concerning Community Property, Professional Responsibility, and Wills and Succession. *Id.*

215. It is interesting to note that the dormant Commerce Clause not only reinforces the Privileges and Immunities Clause in its attempt to minimize discrimination against out-of-state interests, but it does so using doctrinal formulations that resemble the Privileges and Immunities doctrines. The similarities are so close that two current Justices have called for eliminating the dormant Commerce Clause in favor of the Privileges and Immunities analysis. *See, e.g.,* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 612 (1997) (Thomas, J., dissenting); *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 200 (1995) (Scalia, J., concurring). *But see* Denning, *supra* note 132, at 391 n.22 (contending that the analyses are, in fact, different). Although somewhat beyond the scope of this article, it is worth noting that there are certain types of cases, perhaps including the types of cases described here, that do not fall neatly into the categories covered by the Privileges and Immunities Clauses, but nonetheless discriminate against out-of-state interests. That is, some regulations may discriminate against out-of-state interests and thus interfere with interstate commerce without necessarily discriminating against out-of-state citizens or newly arrived citizens. In such cases, it is helpful to have the separate protection afforded by the dormant Commerce Clause. *See* ERWIN CHERMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 446 (2d ed. 2002) (noting that the "Privileges and Immunities Clause can be used only if there is discrimination against out-of-staters . . . [whereas] [t]he dormant Commerce Clause . . . can be used to challenge state and local laws that burden interstate commerce regardless of whether they discriminate against out-of-staters."). The dormant Commerce Clause, in other words, may be necessary because the Privileges and Immunities Clauses do not sufficiently protect interstate commerce. *See generally* Denning, *supra* note 132.

216. *See supra* Part III.B.

these state written exams serve. States would be hard-pressed to demonstrate how the tests improve the assessment of out-of-state lawyers' competence beyond the information that is already available: passage of another state's bar (including MBE score and essay performance, which may include the MEE), a record of successful practice in another jurisdiction, academic records, and supplements to the character and fitness reports.

This argument, of course, rests on the assumption that state written exams that test national legal concepts do not, in fact, enhance the assessment of a lawyer's competence. In fact, several studies support the idea that bar examinations are not an accurate measure of attorney competence.²¹⁷ The assumption also finds support from states that lack rigorous re-testing requirements; these jurisdictions have not experienced a greater incidence of incompetence or disciplinary complaints.²¹⁸ Finally, as mentioned earlier, the European Union has not documented any problems with incompetent lawyers even though it allows lawyers to practice with few restrictions in other member nations.²¹⁹

In short, there is little empirical or intuitive support for the idea that state written exams that re-test widely accepted legal concepts enhance a jurisdiction's assessment of an out-of-state attorney's competence.²²⁰ Absent other justifications, one must conclude that the intention and practical effect of these exams is to protect the local bar from out-of-staters. If true, such exams should be subjected to strict scrutiny and should be struck down as unconstitutional under any or all of the three relevant provisions.

Even if the goal and practical effect of these exams is *not* to interfere with interstate legal services, constitutional problems remain. Under the dormant Commerce Clause, state rules may be unconstitutional if "the burden imposed on . . . [interstate commerce] is clearly excessive in relation to the putative local benefits."²²¹ Given the lack of evidence that these tests ensure competence, it would not be difficult to prove that the exams impose such a burden.²²²

B. STATE TESTING OF LOCAL LAW

State written questions that test state law are also problematic. In particular, there is no evidence that a lawyer's knowledge of state-specific law (or lack

217. See Shepherd, *supra* note 74, at 126 n.98 (citing numerous articles in support of this proposition). These studies are particularly helpful, because they suggest that the bar exam is not a useful measure of competence for non-lawyers seeking admission. The present discussion requires a much more limited claim: that the state written exams are not useful for examining the competence of already-licensed attorneys.

218. See MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 48 ("There is nothing to suggest that in states with admission on motion, particular regulatory problems are disproportionately presented by lawyers who gain admission by this process.").

219. See Shine, *supra* note 75, at 208; Terry, *supra* note 58, at 1084.

220. See Thomas, *supra* note 5, at 245–47 (making a similar observation).

221. Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970).

222. *Id.*

thereof) is a better indicator of an attorney's competence than nationally based examinations that the attorney already has passed.

To underscore this point, consider two lawyers: one who recently passed the Massachusetts bar exam, which includes a state law component, and another attorney with considerable real estate experience in a different jurisdiction but who has no familiarity whatsoever with Massachusetts law. If someone needed to complete a complicated real estate transaction in Massachusetts, she would do well to choose the experienced out-of-state lawyer because that attorney would be much more likely to have the skills necessary to handle the transaction competently. The recent bar admittee would have had relatively little exposure to the necessary law even after taking a state-based bar exam. Although the out-of-state lawyer would not be familiar with the nuances of Massachusetts law, she would be in a much better position to figure it out than a recently admitted lawyer or, for that matter, a very experienced Massachusetts lawyer with no real estate background. Put simply, everything a jurisdiction would want to know about a lawyer's competence is available through much less burdensome means.²²³

One might complain that this comparison is unfair because an experienced attorney from another jurisdiction will often appear more capable than a recently-admitted member of the bar. But a comparison between out-of-state and in-state attorneys with limited experience also fails to undermine the argument. For example, there is very little reason to believe that an inexperienced Massachusetts attorney will be any better than an inexperienced New Hampshire attorney in handling a complicated real estate matter. One might, for example, prefer the New Hampshire attorney if that lawyer had at least some real estate experience whereas the Massachusetts lawyer had none. There is, therefore, nothing about a state-law-specific test on local law that would enable a bar examiner to determine anything beyond the kind of general legal competence that more national concept testing already achieves.²²⁴

Another reason to be skeptical of state law exams is that, if knowledge of state law were actually necessary to demonstrate competence, current exams are far too general. For example, if a state had odd nuances in property law, we would expect the state to require real estate attorneys to pass a state-law-specific real estate exam. We would similarly expect the state to require family law

223. As explained earlier, the attorney's MBE scores, essay performance (either MEE or state written essay performance in another jurisdiction), academic history, career history, updated character and fitness report, and disciplinary record would offer equally reliable—if not more reliable—information about the applicant's competence than an examination on some very small subset of state law, most of which is unlikely to be relevant to the out-of-state lawyer's area of practice.

224. William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 647 (2003) (asserting that "it is difficult to take seriously the idea that a member of a particular state's bar can be presumed to have a better knowledge of its law—the principal rationale for the exclusion of out-of-state lawyers").

practitioners to pass a local family law exam and the litigator to pass an exam on local practice rules. No state, however, has any such requirements for lawyers.²²⁵

Similarly, jurisdictions commonly allow lawyers and judges to handle in-state litigation that turns (as a result of choice of law rules) on the law of other jurisdictions. If knowledge of local law is so essential, it is rather perplexing that courts permit these cases to proceed with only the involvement of local lawyers. Indeed, one would expect courts to require the use of lawyers from another jurisdiction when that jurisdiction's law is implicated.

The reason for these omissions is obvious: no jurisdiction truly believes that a lawyer's basic competence turns on the particular substantive legal knowledge that she has acquired. Although a sophisticated and experienced local lawyer may indeed have such knowledge, the knowledge itself does not reflect competence. Rather, a competent lawyer is one who has the necessary analytical and reasoning skills to figure out the law.²²⁶ In short, when imposed on existing attorneys, state law exams do not appear to be tied to their stated goal of ensuring competence.²²⁷ They instead have the purpose and practical effect of inhibiting the interstate practice of law, a finding that suggests that these requirements are unconstitutional.

The hypothetical California rule requiring graduation from a California law school is again instructive. If California were to justify its rule on the grounds that it could not trust another state's law school to train competent lawyers, that justification would be conceptually identical to what many states say about sister states' bar results: they do not trust them as accurate assessments of competence. In both situations, though, there is no evidence to support that distrust. And in both cases, the real motivation is more clearly to protect the in-state bar from competition.

Of course, lawyers do not have a right to be admitted to other state bars just because one state has deemed them fit to practice law.²²⁸ But just because a

225. Although states may test local law on their exams, a bar applicant could still pass the exam without any knowledge of those local subjects by demonstrating excellent knowledge on the other tested subjects.

226. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 cmt. 2 (2003) (stating that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge"); Simon, *supra* note 224, at 646-47 (making a similar observation).

227. If there were such a correlation, one has to wonder why states permit admission by motion at all. Indeed, lawyers admitted according to such procedures have not demonstrated any knowledge of state law, so if state law is so important to competence, why should these lawyers ever be admitted? Similarly, if local law knowledge were essential to competence, why do states not re-test lawyers when local law changes in important ways? Finally, given the assumed importance of state law, one would expect law schools to make state-based course work a much more central part of the curriculum than they currently do. Indeed, it is the rare school that requires any state-law specific course work in order to graduate.

228. *Leis v. Flynt*, 439 U.S. 438, 443 (1979) (asserting that "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another"). *But see id.* at 445-57 n.5 (asserting that "no State may arbitrarily reject a lawyer's legitimate attempt to pursue . . . his calling [through *pro hac vice*]") (Stevens, J., dissenting).

lawyer does not have an automatic right to admission in sister states does not mean that a jurisdiction can impose more stringent requirements on out-of-state lawyers (i.e., forced re-taking of exams already passed) than it does on its own attorneys.²²⁹

That said, it is certainly conceivable to have jurisdiction-specific exams that would satisfy constitutional scrutiny when imposed on out-of-state attorneys. For example, if a state's law (e.g., Louisiana's) is so different from other jurisdictions, a state written exam for out-of-state lawyers would make some sense. As the present discussion demonstrates, however, most state written exams do not currently reveal any additional information about an out-of-state attorney's competence beyond what states already can glean from the attorney's passage of another jurisdiction's exam.

The preceding analysis has focused on the forced re-taking of various aspects of the bar examination. Other features of permanent admission rules, though, also raise constitutional questions, including reciprocity provisions (i.e., rules that permit admission on motion only for attorneys who come from states that offer a reciprocal privilege for out-of-state attorneys),²³⁰ re-completing the entire character and fitness report (as opposed to a cheaper and less time-consuming update), ABA accreditation requirements, permanent federal court admissions that require admission to the local state bar,²³¹ and requirements that the out-of-state attorney maintain an office within the jurisdiction.²³² Although these issues arise somewhat less frequently than the issues that this Article addresses, they raise similarly troubling questions.

In the end, many requirements imposed on out-of-state lawyers who seek permanent admissions are unconstitutional. One reason that few courts have reached this conclusion is that there is rarely any consideration of the specific examinations that states impose on out-of-state lawyers. A close inspection of these tests, however, reveals that the requirements are not only unreasonable as a matter of public policy in their current form, but they fail to comply with key constitutional provisions designed to prevent economic protectionism.

229. See Clark, *supra* note 5, at 264.

230. See RHODE, *supra* note 62, at 154 (arguing that "reciprocity rules are difficult to justify from any consumer protection perspective"); Jonathan B. Chase, *Does Professional Licensing Conditioned upon Mutual Reciprocity Violate the Commerce Clause?*, 10 VT. L. REV. 223 (1985) (similar); Comment, *supra* note 5, at 756-57, 759 (asserting that such rules are "a blatant example of the protection of local attorneys without regard to individual competence of the out-of-state attorney"); cf. *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (striking down as unconstitutional a reciprocity provision in the context of milk sales).

231. Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 2 rep. note cmt. b (2000) (arguing that such requirements "seem particularly inappropriate in the context of a system of national courts").

232. See Comment, *supra* note 5, at 755. *But see* *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3d Cir. 1997) (upholding New Jersey's former requirement that all attorneys maintain an office within the state).

VI. A PROPOSAL FOR A CONSTITUTIONAL MODEL RULE

Given the constitutional infirmities with existing rules, there is a need for a Model Rule to govern the admission of out-of-state lawyers that passes constitutional muster. The following proposal takes the ABA's recently adopted Model Rule²³³ and modifies it (indicated by the italicized portions) to make it constitutionally compliant. The goal of the proposed revision is to create a mechanism by which less experienced attorneys can gain permanent admissions without having to re-take the bar examination.

MODEL RULE ON ADMISSION BY MOTION

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction.

The applicant shall:

- (a) have been admitted to practice law in another state, territory, or the District of Columbia;
- (b) hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated;
- (c) have *either*:
 1. been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed; *or*
 2. *previously passed another jurisdiction's bar examination with results indicating that the applicant has legal skills equivalent to those of newly admitted attorneys in this jurisdiction.*
- (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
- (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;
- (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
- (g) designate the Clerk of the jurisdiction's highest court for service of process.

2. For the purposes of this rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2)(e) and (f) that were performed in advance of bar admission in the

233. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 47–48.

jurisdiction to which application is being made be accepted toward the durational requirement:

- (a) Representation of one or more clients in the practice of law;
- (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
- (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
- (d) Service as a judge in a federal, state, territorial or local court of record;
- (e) Service as a judicial law clerk; or
- (f) Service as corporate counsel.

3. For the purposes of this Rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.

5. *When considering an applicant under section 1(c)(2), the Board of Bar Examiners (BBE) should presume that the applicant has legal skills equivalent to those of newly admitted attorneys in this jurisdiction unless the attorney's previous test performance indicates to the contrary. In making this determination, the BBE should review the applicant's Multistate Bar Examination score (MBE) as well as any written examination answers. If this review does not yield clear guidance, the BBE should follow these additional procedures:*

- (a) *If the applicant previously took the Multistate Essay Examination (MEE) or Multistate Performance Test (MPT) and this jurisdiction employed the MEE or MPT at that time, the BBE should review the applicant's answers according to the standards the BBE used during that previous MEE or MPT administration.*
- (b) *If the applicant previously took the MEE or MPT and this jurisdiction did not employ the MEE or MPT at that time, the BBE should review the applicant's answers in light of the analyses provided by the National Conference of Bar Examiners and any state variations that the applicant's jurisdiction employed.*
- (c) *If the applicant took a state written examination, the BBE should review the applicant's answers in light of any model answers or analyses that the scoring jurisdiction can provide.*

These changes attempt to correct the unconstitutionality of the existing Model Rule. In particular, the revisions would prevent states from automatically requiring inexperienced out-of-state attorneys to re-take the bar examination. The proposal recognizes that an attorney's performance on another state's exam can

offer as much evidence of the attorney's competence as the new jurisdiction's exam.²³⁴

The proposed changes still leave open the possibility of protectionism. For example, state bars could rigorously interpret the phrase "legal skills equivalent to newly admitted attorneys in this jurisdiction" in such a way as to admit few out-of-state attorneys by motion. To avoid this result, the proposal creates a presumption in favor of admission and forces a state's bar examiner to engage in a detailed review of previous test results in order to overcome that presumption.²³⁵

Although the modifications make the rule constitutionally compliant with respect to less experienced attorneys, the rule actually exceeds what the Constitution requires with respect to the more experienced attorneys described in section 1(c)(1). That section not only suggests that jurisdictions accept the scores of experienced out-of-state attorneys; it recommends that states admit those attorneys without even reviewing their previous test scores. A minimally constitutionally compliant rule could eliminate section 1(c)(1) and make section 1(c)(2) the only basis for admission. For the reasons articulated by the ABA's Commission on Multijurisdictional Practice, however, the current version of the rule makes excellent public policy sense.²³⁶

Similarly, the proposed modification only ensures constitutionality; it does not necessarily offer the best public policy solution. For example, there is a strong argument that all attorneys—regardless of how long they have practiced—should be able to gain admission by motion in other jurisdictions without having to produce their previous test results.²³⁷ Such a rule could be achieved by deleting requirement 1(c), which says that an applicant for admission by motion must have practiced law in an American jurisdiction for five of the last seven years. That change, although arguably more desirable, appears to exceed what the Constitution requires. Thus, the proposal offered here serves only as a constitutionally required first step toward a rule that frees lawyers from the artificial restrictions that states currently impose.

234. See *supra* notes 216–19 and accompanying text. Of course, the proposed Rule does not account for admission procedures that exist in some jurisdictions. For example, a Wisconsin attorney who received admission through that state's diploma privilege would not benefit from the proposed Rule. Such a result, though, does make some sense. In contrast to attorneys from other states, a diploma privilege-admitted attorney has no paper trail of exam performance and thus arguably offers other jurisdictions a more limited basis for assessing competence, at least with respect to recently admitted attorneys. There may also be problems for Louisiana attorneys, because the state does not require the MBE.

235. A much easier way to resolve this problem is to let the NCBE grade MEE and MPT answers. Although there has been some discussion of this idea, Marygold Shire Melli, *The Multistate Essay Examination*, in NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 86, at 50:106, surprisingly little has come of it.

236. MULTIJURISDICTIONAL PRACTICE REPORT, *supra* note 8, at 47–49.

237. See, e.g., Clark, *supra* note 5, at 274–76; Thomas, *supra* note 5, at 250–51; *National Bar Examination*, in NAT'L CONFERENCE OF BAR EXAM'RS, *supra* note 86, at 74:201–07.

VII. CONCLUSION

For years, commentators have lamented the protectionism that has infected the rules governing the admission of out-of-state lawyers.²³⁸ Despite this attention, admission rules are still too protective of in-state interests. This glacial movement toward change is unsurprising. The history of bar reform suggests that necessary changes often occur only after significant litigation.²³⁹ Given this history, constitutional challenges may offer the best chance of reforming existing state rules.

The unconstitutionality of these rules is particularly apparent given the underlying objectives of the Article IV Privileges and Immunities Clause, the Fourteenth Amendment Privileges or Immunities Clause, and the dormant Commerce Clause. It is well-settled that these clauses have helped to create a national union free from state-based economic protectionism.²⁴⁰ Although attorney admission rules alone may not pose a major threat to national economic unity, the same could be said of many rules that the courts have struck down as unconstitutional. The problem is that protectionism often takes the form of seemingly minor regulations. State rules that make it unnecessarily difficult for lawyers to practice in other jurisdictions are exactly the kind of seemingly minor protectionism that, in the interests of economic and national unity, the Constitution has deemed impermissible.

Rule changes are not only desirable to ensure constitutionality, but they are also important for a legal system that has become too expensive for ordinary people to access. By enlarging the number of lawyers who can supply legal services, the recommended reforms will help to reduce the cost of legal services and make these services more widely available. They would also enable clients to have more freedom in the selection of legal representatives. Put simply, current rules do clients no favors by excessively cabining legal work within the borders of a single state.

This discussion also implicates the conflicting values of state control over the legal profession and the protection of interstate commerce. The interests of the national economy should increasingly trump state bar regulatory controls, especially given the growing interstate dimensions of legal services. The result would be bar rules that better reflect client needs and the role of lawyers in a modern global economy.

238. *See supra* note 5.

239. *See* Barnard & Greenspan, *supra* note 11, at 357 n.73.

240. *See, e.g.,* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 390 (1994) (contending that “[t]he central rationale for the rule against discrimination [in the dormant Commerce Clause] is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent”) (citing THE FEDERALIST NO. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); MADISON, *supra* note 174, at 362–63.