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# WHAT PRICE THE BAR? EXAMINING THE CONSTITUTIONALITY OF THE VIRGINIA BAR ADMISSION REQUIREMENTS IN *FRIEDMAN V. SUPREME COURT OF VIRGINIA*

The privileges and immunities clause in article IV of the United States Constitution ("privileges and immunities clause") guarantees citizens of each state the right to enjoy the privileges and immunities of citizens in all other states.[1] In determining the clause's scope of protection, the United States Supreme Court continuously has attempted to define the rights that the privileges and immunities clause guarantees to state citizens.[2] Recently,

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1. U.S. CONST. art. IV, § 2, cl. 1. The United States Supreme Court has determined that the term "citizen" in article IV of the United States Constitution generally is interchangeable with the term "resident." Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978). A person that is not a citizen of the United States, however, may not claim the protection of the privileges and immunities clause in article IV (privileges and immunities clause). *See* R. ROTUNDA, J. NOWAK, & J. YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 12.7, at 649 (1986) (privileges and immunities clause protects only United States citizens). A corporation is not a citizen of the United States under the privileges and immunities clause. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868). Additionally, the privileges and immunities clause does not protect resident aliens. *See* R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra*, § 12.7, at 650 n.13 (privileges and immunities clause does not protect noncitizen residents). Resident aliens, however, may derive comparable protection from the equal protection clause of the fourteenth amendment to the United States Constitution. *See id.* (fourteenth amendment limits citizenship classifications that burden resident aliens).

2. *See* Corfield v. Coryell, 6 F. Cas. 546, 551 (E.D. Pa. 1823) (No. 3,230) (privileges and immunities clause protects fundamental privileges and immunities that citizens living under free governments traditionally have enjoyed); C. GERSTENBERG, AMERICAN CONSTITUTIONAL LAW: TEXT AND LEADING CASES 55 (1941) (courts have defined scope of privileges and immunities clause protection on case-by-case basis). Courts have determined that the privileges and immunities clause guarantees nonresidents of a state several rights. C. GERSTENBERG, *supra*, at 55. The privileges and immunities clause protects a nonresident's right to government protection and right to acquire and possess property. *Id.* Additionally, the privileges and immunities clause guarantees a nonresident's right to pass through or reside in any other state for trade, agriculture, or professional pursuits, a nonresident's right of habeas corpus, and a nonresident's right to bring an action of any kind in another state's courts. *Id.* In addition, the privileges and immunities clause protects a nonresident's right to take, hold, and dispose of real or personal property. *Id.* at 56.

Although courts have determined that the privileges and immunities clause protects the fundamental rights of citizens living under free governments, the "fundamental rights" that the privileges and immunities clause guarantees are broader in scope than the fundamental rights that the due process and equal protection clauses protect. R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 1, § 12.7, at 651. Fundamental rights under the due process and equal protection clauses, such as the right to vote and the right to travel, always compel strict judicial scrutiny of government regulation, but a court will uphold under the privileges and immunities clause any right that affects the general well-being of all the nation's citizens. Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 383 (1978). For example, the Supreme Court has determined that, because private sector employment is essential to the economic vitality of the nation, the privileges and immunities clause protects private sector

in *Supreme Court of New Hampshire v. Piper*[3] the United States Supreme Court determined that the privileges and immunities clause protects the privilege of practicing law.[4] The Supreme Court in *Piper* reasoned that, absent substantial justification, a state rule requiring all members of the state bar to reside in the state deprived nonresident lawyers of the privilege of practicing law in the state on the same terms as residents of the state.[5] The Supreme Court held that a state rule requiring state residency violates the privileges and immunities clause.[6] Although the Supreme Court has determined that the privileges and immunities clause protects the privilege of practicing law, the Supreme Court has not determined whether a state rule that prohibits nonresidents from gaining admission to a state bar without taking the state bar examination ("admission on motion") violates the privileges and immunities clause. In *Friedman v. Supreme Court of Virginia*[7] the United States Court of Appeals for the Fourth Circuit considered whether a state rule that prohibits nonresidents from gaining admission to a state bar on motion violates the privileges and immunities clause.[8]

In *Friedman* the plaintiff, Myrna E. Friedman, was a member of the District of Columbia bar who, while living in Virginia, had practiced law in the District of Columbia.[9] In January 1986, however, Ms. Friedman accepted a position as Associate General Counsel for a Virginia corporation.[10] While working for the Virginia corporation, she married and moved to Maryland, which was her husband's home.[11] Subsequently, Ms. Friedman

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employment. United Building & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984). The regulation of private employment, however, does not violate a fundamental right that the due process or equal protection clauses guarantee. R. ROTUNDA, J. NOWAK, & J. YOUNG, *supra* note 1, § 12.7, at 651.

3. 470 U.S. 274 (1985).

4. Supreme Court of N.H. v. Piper, 470 U.S. 274, 279-83 (1985). In *Supreme Court of New Hampshire v. Piper* the United States Supreme Court recognized that the practice of law is vital to the national economy. *Id.* at 281; *see infra* notes 20, 28, 31-33 and accompanying text (discussing *Friedman* court's treatment of *Piper*); *infra* notes 50-53 and accompanying text (discussing Supreme Court's reasoning and holding in *Piper*).

5. *See Piper*, 470 U.S. at 288 (because New Hampshire failed to show substantial reasons for discriminating against nonresidents and substantial relationship between discrimination and reasons for discrimination, New Hampshire rule violated privileges and immunities clause); *see infra* note 53 and accompanying text (discussing *Piper*'s two-part privileges and immunities clause analysis). In *Piper* the complaint alleged that, under the privileges and immunities clause, Rule 42 of the New Hampshire Supreme Court was unconstitutional. *Piper*, 470 U.S. at 276-77. The plaintiff claimed that the rule was unconstitutional because the rule required applicants to the New Hampshire state bar either to reside in New Hampshire or to file a statement of intent to become a New Hampshire resident. *Id.*, n.1.

6. *Piper*, 470 U.S. at 288.

7. 822 F.2d 423 (4th Cir.), *prob. juris. noted*, 108 S. Ct. 283 (1987).

8. Friedman v. Supreme Court of Va., 822 F.2d 423, 424 (4th Cir. 1987).

9. *Id.*

10. *Id.* In *Friedman* Ms. Friedman, in January 1986, became Associate General Counsel for ERC International, Inc. in Vienna, Virginia. *Id.* When Ms. Friedman began working in Vienna, Ms. Friedman resided in Arlington, Virginia. *Id.*

11. *Id.* In *Friedman* Ms. Friedman applied to the Virginia bar in June 1986 after moving to Maryland with her husband. *Id.*

applied to the Supreme Court for the commonwealth of Virginia for admission on motion to the Virginia bar.[12] Under Rule 1A:1(c) of the Virginia Supreme Court ("Rule 1A:1(c)"), however, an attorney who applies to the Virginia bar for admission on motion must be a permanent resident of the commonwealth of Virginia.[13] The Virginia Supreme Court ("Virginia") denied Ms. Friedman's application for admission on motion because Ms. Friedman did not meet the residency requirement of Rule 1A:1(c).[14]

After Virginia denied Ms. Friedman's application for admission on motion, Ms. Friedman commenced an action against Virginia under section 1983 of Title 42 of the United States Code in the United States District Court for the Eastern District of Virginia, claiming that Rule 1A:1(c) of the Virginia bar admission requirements violated the privileges and immunities clause.[15] The district court determined that Rule 1A:1(c) violates the privileges and immunities clause because Rule 1A:1(c) creates an intolerable burden on a nonresident's privilege of practicing law in Virginia.[16] The

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12. *Id.*

13. Va. Sup. Ct. Rules, Rule 1A:1(c); *see* Friedman v. Supreme Court of Va., 822 F.2d 423, 424 n.1 (4th Cir. 1987) (reprinting and discussing elements of Virginia Rule 1A:1).

14. *Friedman*, 822 F.2d at 424. Virginia Supreme Court Rule 1A:1 allows an applicant to the Virginia bar to be admitted to the state bar on motion if the applicant follows certain procedural rules. *Id.*; Va. Sup. Ct. Rules, Rule 1A:1. In addition, the Supreme Court of Virginia must decide that the applicant morally is suitable to practice law; that the applicant has gained enough experience practicing law that requiring the applicant to take the bar examination would be unreasonable; that the applicant has become a permanent resident of Virginia ("Rule 1A:1(c)"); and that the applicant will practice full-time as a member of the Virginia bar ("Rule 1A:1(d)"). Va. Sup. Ct. Rules, Rule 1A:1; *see Friedman*, 822 F.2d at 424-25 n.1 (4th Cir. 1987) (reprinting and discussing elements of Rule 1A:1).

Several courts that have considered the constitutionality of Rule 1A:1 of the Virginia Supreme Court Rules have established that the rule serves a valid state purpose and does not violate either the due process clause or the commerce clause of the United States Constitution. *See* Goldfarb v. Supreme Court of Va., 766 F.2d 859, 865 (4th Cir. 1985) (rejecting challenge to Rule 1A:1(d) on commerce clause grounds), *cert. denied*, 474 U.S. 1086 (1986); Brown v. Supreme Court of Va., 359 F. Supp. 549, 562 (E.D. Va. 1973) (rejecting equal protection challenge to Rule 1A:1 of Virginia Supreme Court Rules), *aff'd mem.* 414 U.S. 1034 (1973); *In re* Brown, 213 Va. 282, 284, 191 S.E.2d 812, 814 (1972) (Rule 1A:1(d) validly requires applicant that wants to practice law in Virginia to maintain office in Virginia and regularly to practice law in Virginia). The Supreme Court's decision in *Piper* made more promising the prospects for a privileges and immunities challenge to Rule 1A:1 because *Piper* established that the privileges and immunities clause protects the practice of law. *See* Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985) (practice of law falls within scope of privileges and immunities clause); Note, *A Constitutional Analysis of State Bar Residency Requirements under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1464 (1979) (although equal protection doctrine did not provide feasible basis for challenge to bar residency requirements, privileges and immunities clause offers strong basis on which to challenge residency rules).

15. *Friedman*, 822 F.2d at 424. In *Friedman* Ms. Friedman filed suit in the United States District Court for the Eastern District of Virginia and requested the court to declare invalid Rule 1A:1(c). *Id.*

16. *See id.* at 425 (discussing district court's holding in *Friedman*). The district court in *Friedman* determined that Rule 1A:1(c) impermissibly interferes with a nonresident attorney's

district court. therefore, entered summary judgment for Ms. Friedman.[17] Virginia appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit.[18]

On appeal, the Fourth Circuit considered whether Rule 1A:1(c) violates the protection that the privileges and immunities clause affords those who practice law.[19] In considering Rule 1A:1(c), the Fourth Circuit initially recognized that the U.S. Supreme Court has determined that the privileges and immunities clause protects the privilege of practicing law.[20] The *Friedman* court, furthermore, rejected Virginia's argument that the Supreme Court never has recognized that citizens have a fundamental right to practice law without taking a bar examination.[21] The Fourth Circuit, in rejecting Virginia's argument, reasoned that the Supreme Court has not limited the protection of the privileges and immunities clause to those rights that the Supreme Court has declared fundamental under the fourteenth amendment.[22] The *Friedman* court recognized that the U.S. Supreme Court has granted privileges and immunities clause protection to several economic interests that are not fundamental rights that the fourteenth amendment protects.[23]

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privilege to practice law because, although attorneys that reside in Virginia enjoy the privilege of becoming members of the Virginia bar on motion, nonresident attorneys must take the bar examination to obtain membership in the Virginia bar. *Id.*

17. *See id.* at 424 (discussing district court's holding in *Friedman*).

18. *Id.* at 425.

19. *Id.*

20. *Id.* The *Friedman* court, in determining that the privileges and immunities clause protects an individual's right to practice law, emphasized that the United States Supreme Court has ruled that the privileges and immunities clause protects more than the fundamental rights that the fourteenth amendment guarantees. *Id.* at 426. The *Friedman* court, for example, recognized that the privileges and immunities clause guarantees nonresidents of a state the right to do business within that state on the same terms as the citizens of that state. *Id.*; *see* Toomer v. Witsell, 334 U.S. 385, 396 (1948) (privileges and immunities clause guarantees nonresidents of state privilege of doing business on terms of substantial equality with residents of that state). Citing *Supreme Court of New Hampshire v. Piper* the *Friedman* court reasoned that legal practice is important to the national economy and furthers the goal of the framers of the Constitution to fuse the states into a compatible federal union. *Friedman*, 822 F.2d at 426; *see* Supreme Court of N.H. v. Piper, 470 U.S. 274, 281-82 (1985) (lawyers play valuable role in nation's economy and valuable noneconomic role in representing persons with unpopular claims); *see Toomer*, 334 U.S. at 395 (framers of privileges and immunities clause intended to fuse sovereign states into one nation).

21. *Friedman*, 822 F.2d at 425. In *Friedman* Virginia relied on the Supreme Court's decision in *Leis v. Flynt* to support its argument that the United States Constitution guarantees no fundamental right to practice law without taking a bar examination. *Id.*; *see* Leis v. Flynt, 439 U.S. 438, 438 (1979) (due process clause of fourteenth amendment does not give nonresident lawyer right to appear before state's courts for particular case without taking state's bar examination).

22. *See Friedman*, 822 F.2d at 426 (determining that Supreme Court has applied privileges and immunities clause protection to several rights that are not "fundamental" under fourteenth amendment).

23. *Id.* In recognizing that the U.S. Supreme Court has extended the scope of privileges and immunities clause protection beyond the scope of fundamental rights under the fourteenth amendment, the Fourth Circuit in *Friedman* cited *Hicklin v. Orbeck*, *Toomer v. Witsell*, and

The *Friedman* court also recognized that, although the right to practice law is not fundamental, the U.S. Supreme Court in *Piper* extended privileges and immunities clause protection to the right to practice law.[24]

After recognizing that the privileges and immunities clause protects a citizen's privilege to practice law without taking a bar examination, the *Friedman* court considered whether Rule 1A:1(c) violates the protection that the privileges and immunities clause affords those who practice law.[25] In analyzing the effects of Rule 1A:1(c), the *Friedman* court first determined that applying Rule 1A:1(c) to nonresident attorneys results in discriminatory treatment of nonresident attorneys.[26] The *Friedman* court reasoned that Rule 1A:1(c) requires nonresidents, but not residents, to pay a bar examination fee, to prepare for a bar examination, to expect a period of delay before admission to the bar that adversely may affect an applicant's legal practice, and to risk failing the bar examination.[27] In addition, the *Friedman* court reasoned that Rule 1A:1(c)'s residency requirement discourages nonresident attorneys from professionally competing with Virginia attorneys and induces nonresidents to purchase homes in Virginia.[28] The Fourth Circuit determined that Rule 1A:1(c) is facially discriminatory because the rule prohibits nonresidents that wish to practice law in Virginia from practicing without taking the bar examination, but does not prohibit Virginia residents from practicing without taking the bar examination.[29] The *Friedman* court reasoned that, because of the facially discriminatory nature of Rule 1A:1(c), the rule

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*Ward v. Maryland. Id.*; *see* Hicklin v. Orbeck, 437 U.S. 518, 524 (1978) (privileges and immunities clause protects nonresident of state's right to pursue "common calling" in that state); Toomer v. Witsell, 334 U.S. 385, 403 (1948) (privileges and immunities clause protects commercial shrimping in marginal sea); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1871) (privileges and immunities clause protects rights of citizen of one state to engage in any lawful commerce, trade, or business in another state).

24. *Friedman*, 822 F.2d at 426; *see* Supreme Court of N.H. v. Piper, 470 U.S. 274, 280-81 (1985) (to hold that privileges and immunities clause protects practice of law is consistent with holdings in *Ward*, *Toomer*, and *Hicklin*).

25. *Friedman*, 822 F.2d at 426-30.

26. *Id.* at 427.

27. *Id.* After recognizing that Rule 1A:1(c) placed additional burdens on nonresident attorneys, the *Friedman* court concluded that the combined effect of Rule 1A:1(c)'s burdens on nonresident attorneys is to deter attorneys from practicing in Virginia. *Id.*

28. *Id.* In recognizing that Rule 1A:1(c) discourages nonresident attorneys from professionally competing with Virginia attorneys, the *Friedman* court suggested that Virginia may have enacted Rule 1A:1(c) to protect the Virginia economy, which is a state justification for discrimination against nonresidents that the Supreme Court has rejected. *See id.* at 427 n.5 (discussing Supreme Court's reference in *Piper* to state rules that protect resident lawyers from professional competition of nonresident lawyers); *Piper*, 470 U.S. at 285 n.18 (economic protectionism is not substantial reason for state discrimination against nonresident attorneys).

29. *Friedman*, 822 F.2d at 426-27. The *Friedman* court suggested that, although Rule 1A:1 as a whole may have discriminatory effects on resident lawyers practicing in Virginia, paragraph (c) of Rule 1A:1, which Ms. Friedman challenged, only discriminates against nonresidents. *Id.* The *Friedman* court determined that the effect of other provisions of Rule 1A:1 on Virginia residents does not alter Rule 1A:1(c)'s facial discrimination against nonresidents. *Id.*

became subject to scrutiny under the privileges and immunities clause.[30]In a two-part privileges and immunities clause analysis of Rule 1A:1(c), the *Friedman* court first explained that, despite the rule's discriminatory effects, Rule 1A:1(c) could withstand privileges and immunities clause scrutiny if Virginia could show a substantial state reason for Rule 1A:1(c)'s disparity in treatment between resident and nonresident attorneys.[31] In response, Virginia suggested that the goal of improving the quality of Virginia lawyers justifies requirement of a bar examination for all nonresident attorneys seeking to practice in Virginia.[32] Addressing Virginia's argument, however, the *Friedman* court found no relation between state residence and attorney competence.[33] Additionally, Virginia cited Rule 1A:1(d) of the Virginia Supreme Court Rules (Rule 1A:1(d)), which requires attorneys applying for admission on motion to establish a full-time practice in Virginia, as a substantial state reason for discrimination against nonresident attorneys.[34] Virginia argued that requiring residency under Rule 1A:1(c) facilitates compliance with Rule 1A:1(d), because a resident of Virginia would be more likely than a nonresident of Virginia to commit to a full-time practice in the state.[35] The *Friedman* court, however, reasoned that the presumption that a Virginia resident attorney is more likely to honor his vow to practice law full-time in Virginia than a nonresident is insupportable.[36] The Fourth

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30. *Id.* at 426. In questioning whether Rule 1A:1(c) was subject to the privileges and immunities clause, the Fourth Circuit in *Friedman* determined that the commonwealth of Virginia, by enacting Rule 1A:1(c), chose to discriminate against nonresidents of Virginia. *Id.* The *Friedman* court concluded that, because of the rule's facial discrimination and the disproportionate burden that the rule's discrimination places on nonresidents, Rule 1A:1(c) falls within the scope of the privileges and immunities clause. *Id.*

31. *Id.* at 428. The *Friedman* court relied on the United States Supreme Court's decisions in *Supreme Court of New Hampshire v. Piper* and *United Building and Construction Trades Council v. Mayor of Camden* in applying the *Friedman* court's two-part analysis of the privileges and immunities clause. *Id.*; *see* Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985) (state may discriminate against nonresidents only if state can show substantial reasons for discrimination and substantial relationship between state's reasons and discrimination); United Bldg. and Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 218 (1984) (same); *see also* Toomer v. Witsell, 334 U.S. 385, 396 (1948) (in examining cases under privileges and immunities clause, courts should inquire whether valid independent reasons for discrimination exist and whether discrimination bears close relationship to reasons for discrimination).

32. *Friedman*, 822 F.2d at 428.

33. *Id.* at 429. In a footnote to its opinion, the *Friedman* court adopted the Supreme Court's conclusion in *Piper* that no relationship exists between a lawyer's residence in a state and lawyer competence. *Id.* at 429 n.6. The *Friedman* court also noted that Virginia suggested no connection between a lawyer's residence in the state and a lawyer's competence. *Id.* The *Friedman* court concluded, therefore, that Virginia cannot impose "quality control" over its attorneys by restricting the ability of nonresidents of Virginia to practice law within Virginia's borders. *Id.* at 429.

34. *Id.* at 429; *see* Va. Sup. Ct. Rules, Rule 1A:1(d) (requiring applicants for admission on motion to establish full-time practice in Virginia).

35. *Friedman*, 822 F.2d at 429.

36. *Id.* at 429. The *Friedman* court could find no evidence to support a conclusion that a Virginia nonresident would be less truthful than a Virginia resident in establishing an intention to practice full-time in Virginia. *Id.*

Circuit determined that, because Virginia offered no evidence supporting Virginia's theory, the goal of attorney commitment to full-time practice does not justify discrimination against nonresidents.[37]

After determining that Virginia demonstrated no substantial reason for discriminating against nonresident attorneys, the *Friedman* court addressed the second prong of its privileges and immunities clause analysis.[38] According to the Fourth Circuit, the second prong of privileges and immunities clause scrutiny requires a state to establish a substantial relationship between the state's goals in discriminating against nonresidents and the effects of the state's discrimination against nonresidents.[39] The *Friedman* court suggested that, in considering whether a state has demonstrated a substantial relationship between the state's objectives in regulating the practice of law and the state's discrimination against nonresidents, courts may consider less restrictive means available to the state for accomplishing the same objectives.[40] The *Friedman* court, therefore, considered whether Virginia could adopt less restrictive means than a residency requirement for admission on motion to accomplish its goal of a competent and committed bar.[41] The Fourth Circuit suggested that the state might require members of the bar to renew their commitments to practice full-time in Virginia each year.[42] The *Friedman* court also suggested that a full-time practice requirement, like the full-time practice requirement in Rule 1A:1(d) of the Virginia Supreme Court Rules, effectively encouraged Virginia attorneys to reside in Virginia.[43] The Fourth

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37. *Id.*

38. *Id.*; *see supra* note 31 (discussing origin of two-part privileges and immunities clause analysis).

39. *Friedman*, 822 F.2d at 429; *see supra* note 31 (discussing origin of two-part privileges and immunities clause analysis).

40. *Friedman*, 822 F.2d at 428. In deciding that courts can consider whether a state had less restrictive means than discrimination by which to accomplish a state goal, the *Friedman* court determined that Rule 1A:1(c) was overbroad because Virginia, in attempting to achieve Virginia's goal of genuine full-time Virginia practice for all Virginia bar members, discriminated against nonresident attorneys without evidence that nonresident lawyers would be any more likely than resident lawyers to be honest about their intention to practice full-time in Virginia. *Id.* at 429; *see supra* notes 34-35 and accompanying text (Virginia suggested that goal of encouraging compliance with Rule 1A:1(d)'s requirement of full-time practice in Virginia justified Rule 1A:1(c)'s discriminatory effect on nonresident attorneys). The *Friedman* court suggested that a less restrictive means than preventing nonresidents from becoming members of the Virginia bar would accomplish the valid goal of encouraging full-time Virginia practice for all Virginia bar members. *Friedman*, 822 F.2d at 429.

41. *Friedman*, 822 F.2d at 429.

42. *Id.* According to the *Friedman* court, a rule requiring an attorney to commit yearly to practicing law full-time in Virginia would place no additional burden on nonresidents of Virginia, but would accomplish the state's goal of facilitating compliance with Rule 1A:1(d) of the Virginia Supreme Court Rules. *Id.* at 429-30. The *Friedman* court reasoned that a rule requiring an attorney to commit yearly to practicing law full-time in Virginia would encourage compliance with Rule 1A:1(d) because lawyers, for ethical reasons, more seriously would commit to practicing law full-time in Virginia if they annually had to renew their promise to adhere to Rule 1A:1(d). *Id.*

43. *Id.* at 429. The *Friedman* court cited *Goldfarb v. Supreme Court of Virginia* to

Circuit recognized that the full-time practice requirement of Rule 1A:1(d) necessitates that nonresidents live in locations convenient to their Virginia legal practices.[44] The *Friedman* court concluded that Rule 1A:1(d) achieves Rule 1A:1(c)'s goal of nonresident commitment to the practice of law in Virginia without simultaneously violating the privileges and immunities of nonresidents.[45] Additionally, the Fourth Circuit recommended that Virginia require a yearly renewal of an attorney's affidavit attesting to the attorney's maintenance of an office in Virginia.[46] After explicating the alternatives that are available to Virginia in achieving Virginia's goal of a committed and competent bar, the Fourth Circuit determined that Virginia had not established a substantial relationship between its goals of improving the quality of Virginia lawyers and encouraging full-time practice in Virginia and Rule 1A:1(c)'s discriminatory effect on nonresident attorneys.[47] Because the *Friedman* court determined that a substantial relationship between Virginia's goals and Rule 1A:1(c)'s discriminatory effect did not exist, the Fourth Circuit concluded that Virginia Rule 1A:1(c) violates the privileges and immunities clause. The Fourth Circuit, therefore, affirmed the district court's decision to grant Ms. Friedman's motion for summary judgment.[48]

The Fourth Circuit's decision that Virginia Rule 1A:1(c) violates the privileges and immunities clause is consistent with the United States Supreme Court's decision in *Piper*.[49] In *Piper* the Supreme Court considered whether the Rules of the Supreme Court of New Hampshire, requiring that all applicants for membership in the New Hampshire bar be residents of New Hampshire, violated the privileges and immunities clause.[50] The Court in *Piper* determined that the New Hampshire rule deprived nonresidents of New Hampshire of the privilege of practicing law in New Hampshire on

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support its conclusion that Rule 1A:1(d)'s full-time practice requirement does not discriminate unfairly against nonresident attorneys. *Id.*; *see* Goldfarb v. Supreme Court of Va., 766 F.2d 859, 862-65 (4th Cir. 1985) (Rule 1A:1(d) is not form of economic protectionism violating commerce clause).

44. *Friedman*, 822 F.2d at 429-30.

45. *Id.* at 429; *see supra* note 43 (discussing *Friedman* court's reliance on *Goldfarb v. Supreme Court of Virginia* in concluding that Rule 1A:1(d) does not violate privileges and immunities clause).

46. *See Friedman*, 822 F.2d at 430 (yearly renewal of affidavits is less drastic means of requiring full-time practice than residency requirement). Without explanation, the *Friedman* court determined that, with the full-time practice requirement of Rule 1A:1(d), yearly renewal of an attorney's affidavit attesting to the maintenance of a law office in Virginia was a less restrictive means of encouraging genuine Virginia practice for all Virginia bar members than Rule 1A:1(c)'s residency requirement. *Id.*

47. *Id.*

48. *Id.*

49. *See infra* notes 51-53 and accompanying text (discussing Supreme Court's holding in *Piper*).

50. Supreme Court of N.H. v. Piper, 470 U.S. 274, 276-77 (1985). In *Piper* the complaint alleged that Rule 42 of the New Hampshire Supreme Court Rules, which required that applicants to the New Hampshire bar either be residents of New Hampshire or file a statement of intent to become a resident, violated the privileges and immunities clause. *Id.*

the same terms as New Hampshire residents.[51] The Supreme Court recognized that the privileges and immunities clause guarantees the citizens of one state the privilege of doing business in a second state on an equal basis with citizens of the second state.[52] The Court in *Piper* concluded that New Hampshire had not demonstrated that a substantial reason existed for excluding all nonresident attorneys from becoming members of the New Hampshire bar.[53] Although the *Friedman* court relied heavily on the Supreme Court's reasoning in *Piper*, the *Friedman* court failed to recognize a crucial distinction between the facts in *Friedman* and the facts in *Piper*.[54] Although, in *Piper*, the New Hampshire rules completely prohibited nonresidents of New Hampshire from becoming members of the New Hampshire bar,[55] Virginia Rule 1A:1(c) completely did not prohibit nonresident attorneys from practicing law in the state as members of the state bar.[56] Rule 1A:1(c)

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51. *Id.* at 280.

52. *Id.* In concluding that the privileges and immunities clause protects the privilege of doing business, the Supreme Court in *Piper* deferred to its decision in *Toomer v. Witsell*. *Id.*; *see* Toomer v. Witsell, 334 U.S. 385, 396 (1948) (privileges and immunities clause protects citizen of State A's privilege of doing business in State B on same terms as citizen of State B). Comparing the practice of law to occupations reviewed in previous cases, the Supreme Court in *Piper* reasoned that the practice of law is vital to the national economy. *Id.* at 280-81. The Court in *Piper* determined that lawyers, in addition to their importance to the economy, also occupy an important noneconomic position in the United States because nonresident lawyers often provide otherwise unavailable representation to parties with unpopular claims. *Id.* at 281-82.

53. *Piper*, 470 U.S. at 288. In finding that New Hampshire unconstitutionally had discriminated against nonresident attorneys, the Supreme Court in *Piper* determined that a state may justify discrimination against nonresidents only by demonstrating that a substantial state reason exists for the difference in treatment between residents and nonresidents of a state. *Id.* at 284. The *Piper* court also established that a state must demonstrate a substantial relationship between the discrimination and the state's purpose for the discrimination. *Id.* In *Piper* the defendant, the state of New Hampshire, argued that nonresident members of the New Hampshire bar generally would be less likely than New Hampshire residents to learn and remain familiar with New Hampshire rules and procedure, to observe the New Hampshire canon of ethics, to be accessible to New Hampshire court proceedings, and to do *pro bono* work in New Hampshire. *Id.* at 285. The Court in *Piper* determined that New Hampshire demonstrated neither a substantial reason for discriminating against nonresident lawyers nor a substantial relationship between New Hampshire's purposes and discrimination against nonresident lawyers. *Id.* at 288.

54. *See infra* notes 55-56 and accompanying text (discussing crucial distinction between *Friedman* and *Piper*).

55. N.H. Sup. Ct. Rules, Rule 42(3). The New Hampshire rule did not prevent completely nonresidents from practicing law in New Hampshire. *Id.* The New Hampshire rules permitted nonresident lawyers to practice in New Hampshire for a single case without becoming members of the New Hampshire Bar. N.H. Sup. Ct. Rules, Rule 33(1). The Supreme Court in *Piper*, however, determined that New Hampshire's requirement that an attorney reside in New Hampshire to practice as a member of the New Hampshire bar violated the privileges and immunities clause by preventing nonresident lawyers from practicing within the state's borders on the "same terms" as resident attorneys. *Piper*, 470 U.S. at 277 n.2; *see infra* note 74 and accompanying text (discussing *Piper*'s "same terms" interpretation of privileges and immunities clause).

56. *See* Va. Sup. Ct. Rules, Rule 1A:1(c) (applicants for admission on motion to Virginia bar must be permanent residents of Virginia).

only prevented nonresidents of Virginia from becoming members of the Virginia bar without taking the bar examination.[57] This distinction between *Piper* and *Friedman* raises the question of whether requiring nonresident attorneys to take a bar examination substantially burdens nonresident attorneys and prevents nonresident attorneys from practicing law on the same terms as resident attorneys.[58]In determining whether requiring nonresident attorneys to take a bar examination unfairly burdens nonresident attorneys, the *Friedman* court recognized that the bar examination sufficiently burdened the free practice of law to prevent nonresidents from practicing law in Virginia on the same terms as residents of Virginia.[59] Not all courts, however, agree with the Fourth Circuit that a bar examination's burdens on nonresidents violate the privileges and immunities clause.[60] For example, in *Sestric v. Clark*,[61] the United States Court of Appeals for the Seventh Circuit considered whether an Illinois rule that prohibited both residents and nonresidents of Illinois from practicing law in Illinois without taking the Illinois bar examination violated the privileges and immunities clause.[62] Like the plaintiff in *Friedman*, the plaintiff in *Sestric*, an attorney who lived outside the state, argued that the state rule prohibited nonresidents from exercising their privilege of practicing law across state borders.[63] The *Sestric* court distinguished between state rules involving "admission on

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57. *Id.*

58. *See* Sestric v. Clark, 765 F.2d 655, 658 (7th Cir. 1985) (right to practice law without taking bar examination is not "privilege" that privileges and immunities clause protects), *cert. denied*, 474 U.S. 1086 (1986).

59. *See* Friedman v. Supreme Court of Va., 822 F.2d 423, 427 (4th Cir. 1987) (Rule 1A:1(c) is facially discriminatory against nonresident attorneys); *supra* notes 27, 29-30 and accompanying text (discussing *Friedman* court's determination that Rule 1A:1(c) imposes facially discriminatory burden on nonresident attorneys).

60. *See Sestric*, 765 F.2d at 657 (state may not require attorneys to reside in state to become members of state bar); *infra* notes 64-68 and accompanying text (discussing Seventh Circuit's reasoning in *Sestric*).

61. 765 F.2d 655 (7th Cir. 1985).

62. Sestric v. Clark, 765 F.2d 655, 656 (7th Cir. 1985). In *Sestric v. Clark*, in addition to considering whether Illinois' residence requirement for admission on motion to the Illinois bar violated the privileges and immunities clause, the United States Court of Appeals for the Seventh Circuit considered whether the Illinois rule requiring residency for admission on motion violated the commerce clause and the equal protection clause of the United States Constitution. *Id.* at 656-57.

63. *Id.* at 656. In *Sestric* under Rule 705 of the Illinois Supreme Court Rules (Rule 705), the plaintiff could have become a member of the Illinois bar without taking the Illinois bar examination if the plaintiff continuously had practiced for five of the last seven years as a member of another state's bar. *Id.* at 657. The Illinois Supreme Court Rules required residents of Illinois to take the Illinois bar examination before applying to Illinois' bar. *Id.* at 658. In *Sestric* the plaintiff brought suit in the United States District Court for the Central District of Illinois to invalidate Rule 705. *See id.* at 659 (discussing plaintiff's suit in district court). The plaintiff alleged that Rule 705 violated the privileges and immunities clause. *See id.* (discussing plaintiff's suit in district court). After the district court decided that Rule 705 did not violate the privileges and immunities clause, Sestric appealed to the Seventh Circuit. *See id.* (discussing district court's dismissal of plaintiff's complaint).

examination," which require an attorney to reside in a state before seeking admission to the state bar after taking the bar examination, and state rules allowing "admission on motion," which require an attorney that does not wish to take the bar examination to reside in the state before applying for membership in the state bar.[64] The *Sestric* court acknowledged that a state may not require residency as a prerequisite for membership in its state bar.[65] The Seventh Circuit, however, reasoned that a state rule that denies a nonresident admission on motion does not absolutely prohibit the nonresident from becoming a member of the state bar.[66] The *Sestric* court determined that the rule denying a nonresident admission on motion only prevents the nonresident from becoming a bar member without taking the bar examination.[67] As a result, the *Sestric* court concluded that the Supreme Court's reasoning in *Piper* did not apply to a state rule requiring residency for admission to a state bar on motion.[68]

Despite apparent similarities between the situation in *Sestric* and the situation in *Friedman*, the state Supreme Court Rules in *Sestric* and *Friedman* differ in two significant ways.[69] For example, although the Virginia rule prohibited Ms. Friedman from practicing law in Virginia on the same

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64. *Id.* at 658. In *Sestric* the Seventh Circuit determined that Rule 705, by requiring attorneys to reside in Illinois for admission to the Illinois bar on examination, denied nonresident attorneys the privilege of practicing law in Illinois. *Id.* The *Sestric* court, however, determined that states which refuse to admit to their bars nonresident attorneys that do not take the state's bar examination do not deny nonresident attorneys any constitutional privilege. *Id.*

65. *Sestric*, 765 F.2d at 657. The *Sestric* court cited *Supreme Court of New Hampshire v. Piper* in concluding that a state may not require attorneys to reside in a state to become members of the state bar. *Id.*; *see* Supreme Court of N.H. v. Piper, 470 U.S. 274, 288 (1985) (state rule requiring members of state bar to reside in state violated privileges and immunities clause).

66. *Sestric*, 765 F.2d at 657.

67. *Id.* The *Sestric* court determined that Rule 705 completely did not deny admission to the bar to nonresidents of Illinois. *Id.* Nonresidents could become members of the bar as long as the nonresidents took and passed the Illinois bar examination. *Id.*

68. *Id.* at 658. The *Sestric* court suggested that the privilege of practicing law without taking the bar examination is more similar to the privilege of pursuing a recreational sport across state borders, which the privileges and immunities clause does not protect, than to the privilege of practicing law, which the privileges and immunities clause does protect. *Id.*; *see* Baldwin v. Fish & Game Comm'n of Montana, 436 U.S. 371, 388 (1978) (state may discriminate against nonresident elk hunters that do not reside in state because elk hunting is recreation, not means of livelihood). The *Sestric* court compared bar membership without taking the bar examination with recreational sport because the *Sestric* court reasoned that, like elk hunting, the privilege of bar admission on motion is not "fundamental" to privileges and immunities clause protection. *Sestric*, 765 F.2d at 658.

69. *See infra* notes 70-81 and accompanying text (discussing distinctions between Illinois Supreme Court Rules in *Sestric* and Virginia Supreme Court Rules in *Friedman*); *see* Ill. Sup. Ct. Rule 705 (only nonresidents that have practiced continuously for five of last seven years in jurisdiction to whose bar they belong may join Illinois bar without taking and passing Illinois bar examination); Va. Sup. Ct. Rule 1A:1 (applicant to Virginia bar that resides in Virginia and practices law full-time in Virginia may apply for admission to Virginia bar on motion).

terms as a Virginia resident, the Illinois rule did not prevent nonresidents of Illinois from practicing law in Illinois on the same terms as an Illinois resident.[70] Virginia Rule 1A:1, while permitting Virginia residents that meet all of the rule's requirements to become members of the Virginia bar without taking and passing the Virginia bar examination, requires nonresidents to take the bar examination.[71] The Illinois rule, in contrast, did not prohibit the plaintiff in *Sestric* from practicing law in Illinois on the same terms as most Illinois residents.[72] The Illinois rule denied both nonresidents and all Illinois residents, except those new residents meeting the rule's continuous practice exception, the right to become members of the Illinois bar without taking the Illinois bar examination.[73] The Supreme Court in *Piper* decided that the privileges and immunities clause guarantees nonresident attorneys the right to practice law in a state on the same terms as a state resident.[74] Even the *Sestric* court recognized that, if the Illinois rule had prohibited nonresidents from applying for admission on motion but allowed all Illinois residents to become members of the bar on motion, the Illinois rule would have violated the privileges and immunities clause.[75]

In addition to this difference between the Illinois and Virginia rules, the Illinois and Virginia rules differ because, while the Virginia rule requires attorneys to practice full-time in Virginia, the Illinois rule does not.[76]

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70. *See infra* notes 71-81 and accompanying text (discussing distinctions between Illinois Supreme Court Rules and Virginia Supreme Court Rules).

71. Va. Sup. Ct. Rules, Rule 1A:1; *see supra* note 14 (discussing content of Rule 1A:1).

72. *See Sestric*, 765 F.2d at 658 (Illinois Rule 705 only deprived plaintiff nonresident attorney of right, which only some state residents have, to become member of bar on motion).

73. *Id.* at 657; *see* Ill. Sup. Ct. Rule 705 (only nonresidents that have practiced continuously for five of last seven years in jurisdiction to whose bar they belong may join Illinois bar without taking and passing Illinois bar examination); *supra* note 63 and accompanying text (discussing content of Illinois Rule 705).

74. Supreme Court of N.H. v. Piper, 470 U.S. 274, 277 n.2 (1985). In *Piper* the New Hampshire rules permitted the plaintiff nonresident attorney to practice law in the state only for particular cases. *Id.* The *Piper* court emphasized that, although the rules did not completely prevent the plaintiff from practicing law in New Hampshire, the New Hampshire rules did prohibit the plaintiff from practicing law in New Hampshire on the same terms as attorneys that resided in the state. *Id.* The Supreme Court in *Piper* determined that the plaintiff's opportunity to practice in New Hampshire for single cases is not equivalent to a state resident's ability to practice as a member of the state bar. *Id.* Adopting and expanding the *Piper* court's reasoning, the Fourth Circuit in *Friedman* determined that a nonresident attorney's opportunity to become a member of the state bar by taking the state bar examination is not equivalent to a resident attorney's ability to become a member of the state bar without taking the bar examination. Friedman v. Supreme Court of Va., 822 F.2d 423, 427 (4th Cir. 1987).

Other Supreme Court decisions interpreting the privileges and immunities clause support the *Piper* court's broad "same terms" interpretation of the privileges and immunities clause. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (privileges and immunities clause places citizens of each state upon same footing as citizens of other states); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1873) (under privileges and immunities clause, states must extend same rights that states grant to their own citizens to citizens of other states that cross states' boundaries).

75. *Sestric*, 765 F.2d at 659.

76. *Friedman*, 822 F.2d at 428.

Virginia's additional requirement that nonresident attorneys practice full-time in Virginia increases the burden on nonresidents of practicing in Virginia relative to the burden on residents.[77] Unlike a nonresident of Illinois applying for membership in the Illinois bar, a nonresident of Virginia applying to the Virginia bar may not profit by maintaining practices in two different states because the Virginia rules require him to practice full-time in Virginia.[78] Virginia Rules 1A:1(c) and (d) insure that a nonresident attorney suffers a greater net burden than a resident attorney suffers because, while the burdens on resident and nonresident attorneys are in other respects equal, the nonresident attorney must take the Virginia bar examination to gain admission to the state bar.[79] In contrast, a resident and nonresident of Illinois both must take and pass the Illinois bar examination, but the nonresident bears a lesser burden because he may maintain two practices.[80] The crucial distinctions between the situation in *Sestric* and the situation in *Friedman*, therefore, outweigh the distinctions the *Sestric* court made between admission to state bars on motion and admission on examination because, unlike Illinois, Virginia prohibits nonresident attorneys from practicing law in Virginia on the same terms as resident attorneys.[81]

Because the bar admission requirements in *Friedman* prohibited nonresidents from practicing law in Virginia on the same terms as residents and because Rule 1A:1(d) required nonresidents to maintain a full-time practice in Virginia, the *Friedman* court correctly concluded that Virginia Rule 1A:1(c) violated the privileges and immunities clause.[82] Like the *Friedman* court, at least one other court has determined that residency requirements for admission on motion to a state bar violate the privileges and immunities

77. *See id.* (courts cannot infer that nonresident applicants seek to supplement established practice in another state by becoming members of Virginia bar). The *Sestric* court reasoned that Illinois' residency requirement does not burden nonresidents more than the state's residency requirement burdens residents of Illinois. *Sestric*, 765 F.2d at 660. The Seventh Circuit suggested that, although a nonresident of Illinois may maintain practices in two states and must pass the Illinois bar examination, a new resident admitted to the Illinois bar on motion must sacrifice one of his practices to move to the state, become a resident, and establish a new practice. *Id.* The *Sestric* court, therefore, reasoned that, in comparison to new residents, nonresidents do not suffer a greater burden under the Illinois rule than all residents suffer. *Id.* The *Sestric* court determined that the additional burden that Illinois Rule 705 places on new residents suggested that Rule 705 did not discriminate against nonresidents in violation of the privileges and immunities clause. *See id.* (Rule 705 does not produce obviously unreasonable results by requiring nonresidents to take Illinois bar examination).

78. *Friedman*, 822 F.2d at 428; *see supra* note 77 (discussing *Sestric* court's comparison of burdens that residency requirement for admission on motion places on nonresident attorneys and on resident attorneys).

79. *See supra* notes 70-78 and accompanying text (Virginia Rule 1A:1(c) significantly differs from Illinois rule in *Sestric*).

80. *Id.*

81. *See supra* note 64 (discussing distinctions that *Sestric* court found between admission on motion and admission on examination); *supra* notes 70-78 (discussing differences between *Sestric* rule and *Friedman* rule).

82. *See supra* notes 70-78 and accompanying text (discussing distinction between *Friedman* and *Sestric*).

clause.[83] In *In re Jadd*[84] the Supreme Judicial Court for the state of Massachusetts considered whether Massachusetts' requirement that nonresident attorneys pass the Massachusetts bar examination before becoming members of the Massachusetts bar violated the privileges and immunities clause.[85] In *Jadd* the plaintiff, a resident of New York, claimed that a Massachusetts rule which required nonresident attorneys to take the Massachusetts bar examination before becoming members of the Massachusetts bar violated the privileges and immunities clause.[86] After recognizing that the privileges and immunities clause protects the privilege of practicing law,[87] the *Jadd* court considered whether the privileges and immunities clause gives nonresident attorneys the right to practice law in Massachusetts without taking the Massachusetts bar examination.[88] The *Jadd* court suggested that new residents' admission on motion to the Massachusetts bar implied a lack of state concern about potential Massachusetts bar members' insufficient knowledge of Massachusetts law.[89] The *Jadd* court reasoned that, because new residents could seek admission on motion, Massachusetts discriminated against nonresident attorneys not because of their potential lack of knowl-

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83. *See infra* notes 88-91 (discussing court's reasoning in *In re Jadd*).

84. 391 Mass. 227, 461 N.E.2d 760 (1984).

85. *In re* Jadd, 391 Mass. 227, ____, 461 N.E.2d 760, 761 (1984).

86. *Id.* at ____, *461 N.E.2d at 761. In In re Jadd* the plaintiff lived in New York and was a member of both the New York bar and Florida bar. *Id.* The plaintiff in *Jadd* filed a request for a special hearing before one justice of the Supreme Judicial court for the state of Massachusetts to determine the question of the constitutionality of a Massachusetts rule requiring residency for admission on motion. *Id.* The justice to whom the plaintiff made his request brought the issue before the entire Supreme Judicial Court. *Id.*

87. *Id.* at ____, *461 N.E.2d at 762. The Supreme Judicial Court of Massachusetts decided In re Jadd* before the United States Supreme Court in *Supreme Court of New Hampshire v. Piper* determined that the privileges and immunities clause protects the practice of law. *Id.* The *Jadd* court cited the United States District Court decision in *Piper* and several state cases to support its conclusion that the privileges and immunities clause protects the practice of law. *Id.* at ____, 461 N.E.2d at 762-63; *see* Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (privileges and immunities clause protects privilege of practicing law).

88. *Jadd*, 391 Mass. at ____, 461 N.E.2d at 765-66. The *Jadd* court reviewed possibly substantial state reasons for discriminating against nonresident attorneys. *Id.* at ____, 461 N.E.2d at 764-65. The *Jadd* court considered the state's arguments that residency in a state indicates familiarity with the state's legal practice and evidences an attorney's desire to learn state procedure. *Id.* The *Jadd* court also considered whether a residency requirement significantly simplifies the service of process and whether court appearances are more difficult if a state's attorneys reside outside the state's borders. *Id.* Last, the *Jadd* court considered whether requiring an attorney to reside in the state in which he practices aids in investigating the background of the attorney. *Id.* The *Jadd* court rejected all of the state's justifications for discriminating against nonresident attorneys and proposed possibilities less drastic than a residency requirement for meeting the same objectives. *Id.*

89. *Id.* at ____, *461 N.E.2d at 766. The Massachusetts rule in Jadd* allowed all residents, even new residents, to apply for admission on motion to the Massachusetts bar. *Id.* The *Jadd* court reasoned that Massachusetts, in permitting new residents to become members of the state bar without taking the bar examination, contradicted Massachusetts' concern that its attorneys must be familiar with Massachusetts law. *Id.*

edge, but solely because of their lack of residence in Massachusetts.[90] The *Jadd* court concluded that Massachusetts' residency requirement for attorneys that wish to practice law in Massachusetts without taking the Massachusetts bar examination violated the rights of all nonresident attorneys to practice law in Massachusetts on equal terms with resident attorneys.[91] The *Jadd* court's reasoning applies directly to *Friedman* because, in both *Friedman* and *Jadd*, state rules prohibited nonresident attorneys from practicing law in the state on the same terms as resident attorneys.[92] Like the Massachusetts rule in *Jadd*, Virginia Rule 1A:1 permitted new residents to join the Virginia bar without taking the Virginia bar examination, but required nonresidents to take and pass the bar examination before joining the Virginia bar.[93] Like the *Friedman* court, the *Jadd* court concluded that a state rule prohibiting nonresidents from practicing law in another state on the same terms as residents of that state violates the privileges and immunities clause guarantee that the citizens of each state will enjoy the privileges of the citizens of all other states.[94]

In addition to the similarities between the reasonings of the *Jadd* court and the *Friedman* court, the practical implications of the Fourth Circuit's decision in *Friedman* suggest that the Fourth Circuit correctly determined that states should not be able to base admission on motion to state bars on residency in the state.[95] If states could discriminate against nonresidents, attorneys that live only a few miles over the border of a state unfairly would encounter obstacles to bar membership in that state simply because they did not reside in the state.[96] Under the *Friedman* decision, however, attorneys that live in Maryland or Washington, D.C., only a few miles from Virginia, can enjoy bar membership on the same terms as Virginia residents.[97] Although at least one authority has suggested that nonresident

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90. *Id.* Like the Fourth Circuit in *Friedman*, the *Jadd* court determined that the state residency requirement was facially discriminatory. *See* Friedman v. Supreme Court of Va., 822 F.2d 423, 426-27 (4th Cir. 1987) (Virginia Rule 1A:1(c) facially discriminated against nonresident attorneys because Rule 1A:1(c) burdened nonresidents solely because nonresidents did not reside in state); *In re* Jadd, 391 Mass. 227, ____, 461 N.E.2d 760, 766 (1984) (Massachusetts rule facially discriminated against nonresident attorneys, not because of lack of legal knowledge, but because of lack of residence in Massachusetts).

91. *Jadd*, 391 Mass. at ____, 461 N.E.2d at 766.

92. *See supra* notes 88-91 and accompanying text (discussing *Jadd* court's reasoning and holding); *supra* notes 20-48 and accompanying text (discussing *Friedman* court's reasoning and holding).

93. *See supra* notes 14, 71 and accompanying text (discussing effect of Rule 1A:1(c) on both residents and nonresidents of Virginia who meet all other requirements of Rule 1A:1).

94. *See supra* notes 88-91 and accompanying text (discussing *Jadd* court's reasoning and conclusions).

95. *See infra* notes 96-100 and accompanying text (discussing practical implications of *Friedman* court's holding).

96. *See supra* notes 9-13 and accompanying text (discussing difficulties that Virginia Rule 1A:1(c) posed to plaintiff in *Friedman*, who always had lived and practiced in or near Washington, D.C.).

97. *Id.*

attorneys' distant locations from state courthouses might cause uncertainty and delay in court business,[98] Virginia Rule 1A:1(d)'s requirement that Virginia bar members practice full-time in Virginia reduces this risk.[99] If an attorney residing outside Virginia's borders must spend his work day in Virginia, the attorney is both less likely to live a great distance from his work location and less likely to be inaccessible to Virginia courts.[100] As a result, Rule 1A:1(d) eliminates any threat to the efficient practice of law in Virginia that nonresidence of Virginia bar members might pose.

In *Friedman*, the Fourth Circuit determined that, under the privileges and immunities clause, states cannot require nonresident attorneys to take a state bar examination before practicing in the state, if the state allows resident attorneys to practice law in the state without taking the bar examination and if the burden that the state imposes on nonresidents exceeds the burden on residents.[101] Although the *Friedman* court departed from the reasoning of at least one other circuit, the *Friedman* court correctly relied on the Supreme Court's analysis in *Piper* in concluding that Virginia could not base admission on motion to the state bar on state residency.[102] By allowing nonresident lawyers to practice law in Virginia on the same terms as lawyers that are Virginia residents,[103] the *Friedman* court prohibits the state from discriminating against nonresident attorneys. Additionally, the conclusion of at least one other court that a state cannot base admission on motion to the state bar on state residency supports the soundness of the *Friedman* court's holding.[104] Finally, the practical implications of the *Friedman* holding indicate its usefulness and applicability.[105] Because of the Fourth Circuit's application of the Supreme Court's holding in *Piper*, the price of the Virginia bar is no longer too great for nonresidents of Virginia.

MELISSA J. HALSTEAD-WHITE

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98. *See* Supreme Court of N.H. v. Piper, 470 U.S. 274, 296 (1985) (Rehnquist, J., dissenting) (state should be able to require members of state bar to reside in state to avoid uncertainties and delays that distantly located counsel cause).

99. *See supra* notes 75-77 and accompanying text (discussing content and effect of Rule 1A:1(d)).

100. *See supra* notes 76-77 and accompanying text (discussing effect of Rule 1A:1(d) on attorneys that wish to maintain multi-state practices).

101. *See supra* notes 20-48 and accompanying text (discussing *Friedman* court's holding and reasoning).

102. *Id.*; *see supra* notes 64-68 and accompanying text (discussing *Sestric* court's holding and reasoning).

103. *See supra* note 74 and accompanying text (discussing *Piper* court's "same terms" analysis of privileges and immunities clause).

104. *See supra* notes 88-91 and accompanying text (discussing *Jadd* court's holding and reasoning).

105. *See supra* notes 26-29 and accompanying text (discussing discriminatory effects of Rule 1A:1(c)); *supra* notes 87-91 (discussing *Jadd* court's holding); *supra* notes 95-100 (discussing practical implications of *Friedman* court's holding).

## ADDENDUM

The United States Supreme Court recently reviewed the Fourth Circuit's decision in *Friedman v. Supreme Court of Virginia.* In *Supreme Court of Virginia v. Friedman,* 108 S. Ct. 2260 (1988), the United States Supreme Court affirmed the Fourth Circuit's holding that Rule 1A:1(c) violated the privileges and immunities clause. *Id.* at 2265. The Supreme Court in *Friedman* determined that by requiring nonresident applicants to the Virginia bar to take the bar examination while allowing residents of Virginia to become members of the Virginia bar without taking the bar examination, Virginia failed under *Piper* to allow nonresidents of Virginia to practice law in Virginia on substantially equal terms with Virginia resident attorneys. *Id.* Additionally, in determining that Virginia had presented no substantial reasons for discriminating against nonresident attorneys, the Supreme Court noted that by requiring applicants to the Virginia bar to maintain a full-time practice in Virginia, Rule 1A:1(d) ensured that nonresident attorneys will maintain a sufficient interest in Virginia law. *Id.* at 2266. Consequently, the Supreme Court concluded that Virginia had failed to justify Rule 1A:1(c)'s discriminatory effect on nonresident attorneys. *Id.*