

# ON WISCONSIN: THE VIABILITY OF DIPLOMA PRIVILEGE REGULATIONS UNDER DORMANT COMMERCE CLAUSE REVIEW

DANIEL B. NORA\*

I. THE DORMANT COMMERCE CLAUSE: DEVELOPMENT, REVIEW, AND JURISPRUDENCE .....	451
A. Development of the Dormant Commerce Clause .....	451
B. Modern Dormant Commerce Clause Analysis.....	454
1. Facially Discriminatory Laws .....	455
2. Effectively Discriminatory Laws.....	457
3. Non-Discriminatory Laws with an Incidental Effect on Commerce.....	458
II. PREVIOUS CHALLENGES TO DIPLOMA PRIVILEGE STATUTES AND RESTRICTIONS OF LEGAL PRACTICE BASED ON RESIDENCY OR ORIGIN .....	461
A. Montana’s Diploma Privilege: <i>Huffman v. Montana Supreme Court</i> .....	462
B. Challenges to Restrictions of Legal Practice based on Residency or Origin.....	465
III. <i>WIESMUELLER V. KOSOBUCKI</i> .....	468
A. Background.....	468
B. The Seventh Circuit’s Latest Opinion.....	469
IV. THE EVOLUTION OF THE WISCONSIN DIPLOMA PRIVILEGE .....	473
V. PASSING JUDGMENT “ON WISCONSIN” .....	475
A. Strict Scrutiny is Inappropriate .....	476
B. Unconstitutionality Under <i>Pike</i> .....	479
C. Potential Reforms.....	486
VI. CONCLUSION.....	488

## INTRODUCTION

Lobbying for the abolition of the diploma privilege in Wisconsin is “slightly less popular than the 21-year drinking age is to teenagers.”<sup>1</sup>

---

\* J.D. candidate, Notre Dame Law School, B.A. University of Illinois. “To thy happy children of the future, those of the past send greetings.” I thank Professor Jay

Diploma privilege is a device that confers bar admission to graduates of American Bar Association (ABA)-accredited Wisconsin law schools in lieu of a bar examination.<sup>2</sup> Although a once popular means of bar regulation, with as many as thirty-three jurisdictions having some form of diploma privilege,<sup>3</sup> the movement away from diploma privilege is well documented. At the turn of the twentieth century, the privilege's earliest critics called for its abolition, citing a lack of uniformity in law schools' curricula, discrimination against private law schools, discrimination against state residents who studied at out-of-state institutions, detrimental effects on standards of practice, and circumvention of the states' control of the bar.<sup>4</sup> By 1921, the ABA declared that "graduation from a law school should not confer the right of admission to the bar, and . . . every candidate should be subjected to an examination by a public authority to determine his fitness."<sup>5</sup> Gradually, these concerns—coupled with a belief that the bar was overcrowded and a perceived decrease in attorney income—led to states' abolition of diploma privilege and heightened bar-admission standards.<sup>6</sup> West Virginia was the most recent state to abolish its version of the privilege (doing so in 1988), leaving Wisconsin as the only state to offer diploma privilege for admission to its state bar.<sup>7</sup> Despite this seemingly national disapproval, support for the diploma privilege remains strong in Wisconsin, and there is no indication that any state body will seek its termination.

Wisconsin's diploma privilege provides in part:

An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally,

---

Tidmarsh for his guidance throughout this project, and I thank Laura Crylen for sharing her thoughts at this project's inception.

1. Steven Levine, *End Separate-But-Equal-Bar Admission*, WIS. LAW., Vol. 75, No. 12 (Dec. 2002), available at [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118).

2. WISCR 40.03 (2009).

3. Mark Hansen, *Wisconsin Bar Weighs a Degree of Change*, A.B.A.J., Apr. 2007, available at [http://www.abajournal.com/magazine/article/wisconsin\\_bar\\_weighs\\_a\\_degree\\_of\\_change/](http://www.abajournal.com/magazine/article/wisconsin_bar_weighs_a_degree_of_change/).

4. Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 647 (2000).

5 *Id.* (quoting Elihu Root et. al., *Report to the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 Rep. Annual Meeting A.B.A. 679, 688 (1921)).

6. See Michael S. Ariens, *American Legal Ethics in an Age of Anxiety*, 40 ST. MARY'S L.J. 343, 415 (2008).

7. Deborah Ziff, *State's Longtime Diploma Privilege Challenged*, WIS. ST. J., Sept. 13, 2009, available at [http://host.madison.com/wsj/news/local/education/university/article\\_e45f22e3-7cb0-5c2e-8b92-8b81bbdd8061.html](http://host.madison.com/wsj/news/local/education/university/article_e45f22e3-7cb0-5c2e-8b92-8b81bbdd8061.html).

approved by the American bar association [sic] shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

(1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.

(2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.

(a) Elective subject matter areas; 60-credit rule. Not less than 60 semester credit shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings of each approved law school in this state.

(b) Mandatory subject matter areas; 30-credit rule. Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibility to the legal profession, pleading and practice, real property, torts, and wills and estates.<sup>8</sup>

---

8. WISCR 40.03 (2009).

Accordingly, one who graduates from one of Wisconsin's two ABA-accredited law schools, the University of Wisconsin Law School and Marquette University Law School, will be granted bar admission without sitting for the bar exam, provided that he or she satisfies subdivisions (1) and (2).<sup>9</sup> However, one who graduates from an out-of-state institution will be required to pass the Wisconsin bar examination.<sup>10</sup>

In 2007, Christopher L. Wiesmueller, a student at Oklahoma City University School of Law, brought a § 1983 claim against the members of Wisconsin's Board of Bar Examiners and the Supreme Court of Wisconsin. Wiesmueller asserted that Wisconsin's diploma privilege discriminated against interstate commerce because it afforded a diploma privilege in lieu of a bar examination only to individuals graduating from Wisconsin's law schools.<sup>11</sup> Although Wiesmueller's case went before the Seventh Circuit twice, he ultimately settled the suit with the state in March of 2010.<sup>12</sup>

This note offers a review of the diploma privilege, both conceptually and as practiced in Wisconsin, and of the constitutional arguments for and against it that may be made under the Dormant Commerce Clause. It will provide a survey of Dormant Commerce Clause jurisprudence, previous challenges to diploma privilege statutes, and challenges to statutes regulating the availability of legal services based upon origin. It will also consider Wisconsin's diploma privilege and its surrounding litigation, both in this context as well as the privilege's legislative evolution. Such consideration suggests that the law, as currently written, violates the Dormant Commerce Clause. While there does not appear to be any constitutional prohibition on the diploma privilege as a concept, Wisconsin's version is ineffective at promoting its objective and would greatly benefit from textual reform.

---

9. *Id.*

10. WI SCR 40.03-04 (2009).

11. *Wiesmueller v. Kosobucki*, 492 F. Supp. 2d 1036 (7th Cir. 2007).

12. Bruce Vielmetti, *Marquette, UW Law Grads Retain Diploma Privilege in Wisconsin*, MILWAUKEE J. SENTINEL, Mar. 24, 2010, available at <http://www.jsonline.com/news/wisconsin/89040482.html>. Mr. Wiesmueller elected to settle the suit for \$7,500 after U.S. District Judge Barbara Crabb stripped the class of certification due to concerns over his ability to adequately represent the interests of a federal class. *Wiesmueller v. Kosobucki*, 2009 WL 4722197 (2009).

## I. THE DORMANT COMMERCE CLAUSE: DEVELOPMENT, REVIEW, AND JURISPRUDENCE

The Dormant Commerce Clause (or Negative Commerce Clause) is a legal concept derived from the Commerce Clause in Article I of the United States Constitution.<sup>13</sup> While the states' police powers enable them to regulate a substantial part of everyday life, among Congress's enumerated powers is the regulation of interstate commerce among the several states.<sup>14</sup> Certainly, congressional regulation of commercial activity may displace state regulation. However, does such a grant of authority inhibit states' actions to regulate commerce where Congress has taken no action? The text of the Constitution is silent in this regard, and the Constitution "does not say what the states may or may not do in the absence of congressional action."<sup>15</sup> Accordingly, some have argued that "the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States . . . . [S]uch regulations are valid unless they come in conflict with a law of Congress."<sup>16</sup> However, this argument has not prevailed, and the Commerce Clause "has been deemed to include both an affirmative grant of power to Congress to regulate commerce and a negative aspect limiting States' intrusion into that sphere."<sup>17</sup> This note will examine the development of the Dormant Commerce Clause and consider the present tests employed by courts.

### A. Development of the Dormant Commerce Clause

The Framers of the Constitution recognized the potential conflict between state and federal commercial regulation. Hypothetically, each state could ban or inhibit the products of other states and undertake other action that could otherwise frustrate congressional regulatory schemes.<sup>18</sup> In the Federalist No. 42, James Madison acknowledged that such practices would "nourish unceasing animosities, and not improbably terminate in serious interruptions of the public tranquility."<sup>19</sup> Moreover, in debating whether to permit states to lay duties of tonnage without congressional

---

13. U.S. CONST. art. I, §8, cl. 3. ("[The Congress shall have the power to] regulate commerce with foreign nations, and among the several states, and with Indian tribes."). It should be noted that there is no explicit textual basis for the Dormant Commerce Clause apart from the Interstate Commerce Clause. This notation is shorthand for how courts deal with a subject of state laws that has an effect upon interstate commerce. The development of this legal concept is discussed *infra*.

14. *Id.*

15. *H.P. Hood & Sons v. Dumond*, 336 U.S. 525, 535 (1949).

16. *Thurlow v. Massachusetts*, 46 U.S. 504, 579 (1847).

17. NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, *UNDERSTANDING CONSTITUTIONAL LAW* § 6.01, at 193 (3d ed. 2005).

18. *Id.*

19. *THE FEDERALIST* NO. 42, at 268 (James Madison) (Clinton Rossiter ed., 1961).

interference, delegates to the Constitutional Convention acknowledged this concern.<sup>20</sup> Madison was “convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority.”<sup>21</sup> Conversely, Roger Sherman argued that such concerns were unfounded, as “[t]he power of the United States to regulate trade being supreme can control interferences of the State regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction.”<sup>22</sup> While the delegates ultimately resolved this issue through the inclusion of the language “[n]o state shall, without the consent of Congress, lay any duty of tonnage,”<sup>23</sup> the Constitutional Convention failed to definitively address the issue of state regulation in the absence of congressional regulation.

Chief Justice John Marshall, although refraining from using the phrase “Dormant Commerce Clause,” was the first to discuss the possible negative implications of the Commerce Clause in *Gibbons v. Ogden*.<sup>24</sup> In *Gibbons*, the petitioner, who operated a steamboat service under a congressional license, challenged the constitutionality of a New York monopoly, arguing that Congress had exclusive national power over interstate commerce under Art. 1, §8, and that a contrary conclusion could potentially frustrate congressional regulation.<sup>25</sup> While the case was ultimately decided on Supremacy Clause grounds,<sup>26</sup> Chief Justice Marshall noted that “[t]here is great force in this argument, and the Court is not satisfied that it has been refuted.”<sup>27</sup> Moreover, Chief Justice Marshall opined in dicta that the power to regulate interstate commerce “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.”<sup>28</sup> Thus, it appeared for a time as though the power to regulate interstate commerce lay exclusively within congressional prerogatives.

However, post-Marshall-era opinions were conflicted as to whether the Commerce Clause possessed a dormant aspect. In *Thurlow v. Massachusetts*,<sup>29</sup> Chief Justice Roger B. Taney advanced the opposite view. He argued that “the State may nevertheless, for the safety or

---

20. MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 625 (1937), available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_10\\_3s2.html](http://press-pubs.uchicago.edu/founders/documents/a1_10_3s2.html).

21. *Id.*

22. *Id.*

23. U.S. CONST. art. I, §10.

24. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

25. *Id.* at 209.

26. *Id.* at 210.

27. *Id.* at 209.

28. *Id.* at 189; see also *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245, 252 (1829) (“We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek, can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject.”).

29. 46 U.S. 504 (1847).

convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territories; and such regulations are valid unless they come in conflict with a law of Congress.”<sup>30</sup> Yet a mere two years later, Justice McLean, speaking for the majority of the Court, asserted that Congress had the exclusive power to regulate commerce, couched within states’ rights to protect the health or safety of their citizens.<sup>31</sup>

Finally, *Cooley v. Board of Wardens* presented the Court with the question of the extent of state power over commerce in the face of congressional silence.<sup>32</sup> In *Cooley*, the Court chose not to treat the challenged pilotage law as an exercise of police power, but instead recognized that its coverage of navigation regulated commerce within the scope of congressional power.<sup>33</sup> However, rather than creating a definitive rule as to whether the regulation of commerce lay exclusively within congressional prerogatives, the *Cooley* Court “adopted an intermediate approach, concluding that whether congressional power was exclusive varied with the circumstances of particular cases.”<sup>34</sup> Would the need for national uniformity or the need for local accommodation prevail? Ultimately, the matter rested on the nature of the subjects being regulated.<sup>35</sup> “Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.”<sup>36</sup> Accordingly, *Cooley* rejected a bright line or uniform rule, and provided an intermediate approach in which the nature of the matter to be regulated would be considered in light of a national/local dichotomy.<sup>37</sup>

In practice, however, the *Cooley* approach proved unwieldy. The test failed to suggest criteria for distinguishing between the national and local spheres—thus producing vague opinions whose precedential value was dubious<sup>38</sup>—and did not implement legislative motive as a factor to guide a court’s assessment.<sup>39</sup> Accordingly, the implementation of *Cooley’s*

---

30. *Id.* at 579.

31. REDLICH ET AL., *supra* note 17, § 6.02(1), at 195 (construing *Smith v. Turner*, 48 U.S. 283, 400 (1849)).

32. *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1851).

33. *See id.* at 315–17.

34. REDLICH ET AL., *supra* note 17, § 6.02(2), at 196.

35. *Id.*

36. *Cooley*, 53 U.S. at 319.

37. REDLICH ET AL., *supra* note 17, § 6.02(2), at 196; *see also* Doug Linder, *Exploring Constitutional Conflicts: Commerce Clause Limitations on State Regulation*, University of Missouri-Kansas City Law School, <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/statecommerce.htm> (last visited Mar. 7, 2011) (asserting that *Cooley* represents the first case in which the Court engaged in a balancing act of local and national interests).

38. REDLICH ET AL., *supra* note 17, § 6.02(2), at 196.

39. *Id.*

national/local dichotomy created myriad seemingly conflicting opinions well into the twentieth century.<sup>40</sup> Eventually, the Court would abandon *Cooley* and articulate a test based on whether a state statute regulated interstate commerce directly or indirectly.<sup>41</sup> However, like *Cooley*, this dichotomy proved unworkable, as “it was uncertain in application and ignored matters of degree that are often critical.”<sup>42</sup>

Next, the Court began to implement a balancing test when considering claims brought under the Dormant Commerce Clause. *Southern Pacific Co. v. Arizona* presented a case in which the state of Arizona, in an effort to reduce railroad accidents, regulated the number of passenger rail cars a person or corporation could operate.<sup>43</sup> Finding that the statute placed too heavy a burden on interstate commerce by way of interstate rail service, the Court said that it must consider “the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved” justified the state law.<sup>44</sup> Accordingly, *Southern Pacific* marks a jurisprudential shift from dichotomous classification to a balancing of the regulation’s effects.

#### B. Modern Dormant Commerce Clause Analysis

Although the Court has adopted a variation of the *Southern Pacific* balancing test, the Court’s recent jurisprudence centers on two considerations that effectively create three categories of review. The first consideration is whether a state regulation discriminates on its face or in its

---

40. Compare, e.g., *Munn v. Illinois*, 94 U.S. 113, 135 (1877) (upholding state authority to set the rates of warehouses used in interstate commerce, as the location of the warehouses in Illinois “is a thing of domestic concern”), *Chicago, Quincy & Burlington R.R. Co. v. Iowa*, 94 U.S. 155, 163 (1877) (regulation of railroad situated within a single state is a matter of domestic concern), and *Erie R.R. Co. v. Bd. of Pub. Util. Cmm’rs*, 254 U.S. 394 (1921) (upholding a state law ordering the elimination of dangerous grade crossings) with *St. Louis & Pacific Ry. v. Illinois*, 118 U.S. 577 (1886) (statute regulating rate for interstate rail transportation as rate regulation was a subject requiring national uniformity) and *Seaboard Air Line Ry. Co. v. Blackwell*, 244 U.S. 310 (1917) (striking down a Kentucky law that caused excessive rail stoppings).

41. See, e.g., *Disanto v. Pennsylvania*, 273 U.S. 34 (1927); see generally James W. Ely Jr., “*The Railroad System Has Burst Through State Limits*”: *Railroads and Interstate Commerce, 1830–1920*, 55 ARK. L. REV. 933 (2003).

42. REDLICH ET AL., *supra* note 17, § 6.02(3), at 198; see also *Disanto*, 273 U.S. at 44 (Stone, J., dissenting).

43. *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945). But see *Linder*, *supra* note 37 (asserting that *Cooley* represents the first case in which the court engaged in a balancing act of local and national interests).

44. *S. Pac. Co.*, 325 U.S. at 770; see also *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (Illinois mud flap regulation held unconstitutional as it unreasonably burdened commerce while providing little safety benefit); *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (striking down an Iowa prohibition on truck length).



effect against interstate commerce (out-of-state entities). This creates two categories, in which 1) a law is facially discriminatory, or 2) it is discriminatory in its purpose or effect. While these two categories differ, since the discrimination is transparent in “facial” cases but not in “purpose” or “effect” cases, placement in either of these categories nevertheless subjects a regulation to strict scrutiny, under which the law is likely to be found unconstitutional.<sup>45</sup> Second, if the law does not discriminate but pursues legitimate objectives with only an incidental impact on commerce, a court will weigh the state’s interest against the burden the law imposes on interstate commerce.<sup>46</sup> “Whereas a discriminatory statute is presumptively invalid, a non-discriminatory law is likely to be upheld unless the burden on commerce greatly outweighs some legitimate state benefit.”<sup>47</sup>

### 1. Facially Discriminatory Laws

The Dormant Commerce Clause prohibits states from regulating commerce in a way that facially discriminates against out-of-state competition. Where the regulation’s language manifests such discrimination, the Dormant Commerce Clause is easily applied. In such cases, a state is required to demonstrate that it seeks to further a legitimate state purpose, and that it has employed the least restrictive alternative in regulating the commercial activity—a test that resembles strict scrutiny.<sup>48</sup> These facially discriminatory statutes almost invariably fail to pass muster.

In cases where facially discriminatory language exists, a state must provide an adequate reason for its discriminatory law. In *Philadelphia v. New Jersey*, the Court considered a New Jersey statute that forbade the importation of out-of-state waste into its landfills.<sup>49</sup> New Jersey claimed that the statute was necessary to preserve its landfill space for its own citizens.<sup>50</sup> However, Justice Stewart, writing for the majority, noted that “[o]n its face, [the statute] imposes on out-of-state commercial interests the full burden of conserving the State’s remaining landfill space,”<sup>51</sup> and “discriminating against articles of commerce coming from outside the State [is prohibited] unless there is some reason, apart from their origin, to treat them differently.”<sup>52</sup> As the Court could find no such reason, it struck the statute down.<sup>53</sup>

---

45. See, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (distinguishing between patent and non-patent discrimination).

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

47. REDLICH ET AL., *supra* note 17, § 6.03, at 200.

48. REDLICH ET AL., *supra* note 17, § 6.04, at 200.

49. *Philadelphia*, 437 U.S. at 617.

50. See *id.* at 628.

51. *Id.*

52. *Id.* at 627.

53. *Id.*

A state will, however, often obscure its true motive behind some pretext, and the “Supreme Court must then detect and expose the subterfuge.”<sup>54</sup> Consider *Minnesota v. Barber*, where the Court analyzed a Minnesota statute prohibiting the sale of meat unless the state of Minnesota inspected the animal within twenty-four hours of its slaughter.<sup>55</sup> Even though Minnesota claimed that it sought to protect its citizens’ health, the Court concluded that the statute’s true purpose was to advantage local slaughterers.<sup>56</sup> Accordingly, the Court considered Minnesota’s stated purpose illusory and did not allow the statute to pass constitutional review.<sup>57</sup>

Moreover, a state must demonstrate that the regulation employs the least restrictive alternative in regulating the economic activity.<sup>58</sup> For example, in *Dean Milk Co. v. Madison*, the Court considered a Madison, Wisconsin ordinance making it unlawful to sell milk unless it had been pasteurized and bottled within five miles of the city.<sup>59</sup> Thus, Dean Milk—a company located in Winnebago County, Illinois, less than 100 miles away from the city—was prohibited from selling milk in that market. The mere fact that Madison claimed that the ordinance was a “health measure” did not insulate it from scrutiny; “[l]ess burdensome alternatives, such as inspection of plaintiff’s plants by city officials . . . could have served local health interests.”<sup>60</sup>

Accordingly, state statutes that facially discriminate against out-of-state actors, or prevent access to local markets,<sup>61</sup> almost invariably fail to pass a legitimate state purpose/least restrictive means (strict scrutiny) line of analysis. The sole exception to this general rule presented itself in *Maine v. Taylor*, a case in which Maine prohibited the importation of out-of-state bait fish in order to prevent the spread of parasites.<sup>62</sup> In that case, the Court found that Maine had a legitimate interest in protecting its marine ecology<sup>63</sup> and that no alternative remedy existed.<sup>64</sup> Yet it is questionable

54. REDLICH ET AL., *supra* note 17, § 6.04, at 200. See generally *Philadelphia*, 437 U.S. at 625–27.

55. *Minnesota v. Barber*, 136 U.S. 313 (1890).

56. See *id.* at 329.

57. *Id.* at 329–30.

58. See *Hunt v. Wash. Apple Adver. Comm’n.*, 432 U.S. 333, 353 (1977).

59. *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

60. REDLICH ET AL., *supra* note 17, § 6.04, at 201; see also *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 361 (1992) (asserting that a State cannot justify discrimination against out-of-staters by disadvantaging other communities within a state).

61. See generally *Hughes v. Oklahoma*, 441 U.S. 322 (1978) (striking down a state statute regulating transportation of minnows due to a lack of impartiality in distributing the burden among citizens of the United States).

62. 477 U.S. 131 (1986).

63. *Id.* at 148.

64. *Id.* at 151.

whether any facially discriminatory statute not related to health will pass muster.

## 2. Effectively Discriminatory Laws

More frequently, challenges under the Dormant Commerce Clause come from facially neutral statutes. The Dormant Commerce Clause test for effectively discriminatory regulations is fundamentally identical to the review of facially discriminatory statutes.<sup>65</sup> *Hunt v. Washington State Apple Advertising Commission* presents a prototypical example of such a statutory challenge.<sup>66</sup> In *Hunt*, a North Carolina statute mandated that apples sold within North Carolina could display only United States grades.<sup>67</sup> Thus, Washington-grown apples were prohibited from displaying state inspection certificates, whose inspection requirements could be considered more rigorous than the national inspection standards.<sup>68</sup> While the North Carolina statute did not facially discriminate against out-of-state interests—North Carolina producers were also prohibited from displaying alternative stickers—the statute was found to deny Washington apple growers the competitive advantage that the Washington inspection system would otherwise confer upon them.<sup>69</sup> Although the Court found that the North Carolina legislature harbored a discriminatory motive, the Court found it unnecessary to rely solely on that finding.<sup>70</sup> Rather, the Court noted, “the burden falls on the State to justify [the discrimination] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.”<sup>71</sup> Accordingly, where a state is unable to demonstrate that there is a legitimate interest and that the regulation employs the least restrictive means, facially neutral but discriminatory laws will be struck down.

Despite this rigorous standard, challenges to statutes that are purportedly “facially neutral, yet discriminatory” provide a minimal record of success. This may be attributable to an increased level of difficulty in demonstrating a discriminatory intent by the legislature or the existence of in-state losers, which provides a potential defense to a Dormant Commerce Clause claim. First, in *Exxon Corp. v. Governor of Maryland*,<sup>72</sup> the Court upheld a statute that, among other things, prohibited petroleum producers or refiners from operating retail gas stations within Maryland. When out-of-state producers

---

65. *Or. Waste Sys., Inc. v. Dept. of Env'tl. Quality of Or.*, 511 U.S. 93, 99 (1994) (finding a cost-based surcharge on out-of-state waste to be unconstitutional).

66. 432 U.S. 333 (1977).

67. *Id.*

68. *Id.* at 352.

69. *Id.*

70. *Id.*

71. *Id.* at 353.

72. 437 U.S. 117 (1978).

challenged the statute as an unfair burden on interstate commerce,<sup>73</sup> the Court found that the regulation 1) did not offer a blanket exclusion against interstate marketers, 2) did not specifically burden interstate dealers' conduct of business, and 3) did not treat in-state retailers and out-of-state retailers differently.<sup>74</sup> The mere fact that out-of-state losers existed did not automatically invoke the protections of the Dormant Commerce Clause; rather, the clause is intended to "[protect] the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."<sup>75</sup> Moreover, in-state losers may also share the burdens suffered by out-of-state interests and serve as political surrogates for the out-of-state interests harmed by state regulations.<sup>76</sup> For example, in *Minnesota v. Clover Leaf Creamery Co.*, the Court examined a case in which a Minnesota dairy regulation generally burdened the plastics industry to the benefit of the paper and plywood industry.<sup>77</sup> However, any adversely affected out-of-state interests could seek to advance their interests through in-state surrogates who were similarly disadvantaged by the regulation.<sup>78</sup> Thus, it is more difficult to invoke the protections of the Dormant Commerce Clause in the absence of language that overtly discriminates against out-of-state interests or the national market. Not only is it more difficult to prove a discriminatory motive, but the existence of in-state losers may dissuade a court from finding for a party challenging a potentially discriminatory regulation.

### 3. Non-Discriminatory Laws with an Incidental Effect on Commerce

States may pass regulations that have the unintended consequence of burdening interstate commerce. If a challenged law does not discriminate, but pursues legitimate objectives with only an incidental impact on commerce, a court will weigh the State's interest against the burden the law

---

73. *Id.* at 118.

74. *See id.* at 125–36.

75. *Id.* at 127–28; *see also* REDLICH ET AL., *supra* note 17, § 6.04, at 203 (suggesting that the discrepancy between the *Hunt* and *Exxon* decisions may be attributed to a public policy favoring the promotion of national uniformity. Whereas the Court was sensitive to a statute that specifically targeted Washington-produced apples, no such "threat" existed in the Maryland statute). *But see Exxon Corp.*, 437 U.S. at 135 (Blackmun, J., dissenting) ("The effect is to protect in-state retail service station dealers from the competition of the out-of-state businesses. This protectionist discrimination is not justified by any legitimate state interest that cannot be vindicated by more evenhanded regulation.").

76. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). *But see Philadelphia v. New Jersey*, 437 U.S. 617(1978) (holding a law invalid despite the existence of in-state losers within New Jersey).

77. *Clover Leaf*, 449 U.S. at 456.

78. *Id.* at 472.

imposes on interstate commerce.<sup>79</sup> Accordingly, a court employs a balancing test that “compares benefits to legitimate state purpose against burdens on commerce.”<sup>80</sup> This balancing test was articulated in *Pike v. Bruce Church*, and asserts that “[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”<sup>81</sup> Where the *Pike* balancing test is employed, the balancing act generally favors upholding the state statute.<sup>82</sup> While *Pike* balancing jurisprudence suggests that there is some sort of scale or metric by which a court may weigh safety benefits against commerce costs, *Pike* balancing, like its predecessors, is an imprecise test that offers no definitive answer as to what level of “incidental effect on commerce” is constitutionally permissible.

Despite this seemingly lax standard, the Court has struck down non-discriminatory laws with incidental effects on commerce. Indeed, the *Pike* Court struck down an Arizona statute regulating the manufacture and sale of fruits and vegetables.<sup>83</sup> While the Court noted the general tendency to uphold laws unless their burden on interstate commerce was clearly excessive in relation to the putative local benefits, it stated:

While the order issued under the Arizona statute does not impose such rigidity on an entire industry, it does impose just such a straitjacket on the appellee company with respect to the allocation of its interstate resources. Such an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people. If the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders.<sup>84</sup>

Thus, the Court determined that the regulation's impact on commerce outweighed the state's stated interest: “to protect and enhance the reputation of growers within the State.”<sup>85</sup>

---

79. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

80. REDLICH ET AL., *supra* note 17, § 6.05, at 204.

81. *Pike*, 397 U.S. at 142.

82. *See id.* at 142.

83. *Id.* at 138, 146 (discussing a statute that prohibited the packaging of Arizona-grown produce outside the state).

84. *Id.*

85. *Id.* at 143.

*Pike* also signals the Court's willingness to examine ulterior motives behind "non-discriminatory" laws.<sup>86</sup> The opinion's use of the words "interest is minimal at best—certainly less substantial than a State's interest in securing employment for its people"<sup>87</sup> is not only significant for noting the minimal benefit conferred by the statute. It also represents a judicial admonishment based on the Court's long-standing "suspicion [of] state statutes requiring business operations to be performed in the home State that could be more efficiently be performed elsewhere."<sup>88</sup> Moreover, subsequent Supreme Court decisions cast doubt on the validity of regulations that, despite being subjected to *Pike* balancing, appear to possess suspect ulterior or "illusory motives."<sup>89</sup> In *Kassel v. Consolidated Freightways Corp.*, the Court examined an Iowa statute prohibiting the use of 65-foot double-trailer trucks within its borders.<sup>90</sup> *Kassel* restated the principle that a State must demonstrate a legitimate interest in order for a law to come into harmony with the Commerce Clause.<sup>91</sup> Despite Iowa's efforts to justify its statute, observation of the available facts suggested that lawmakers possessed an ulterior motive.<sup>92</sup> The Court determined that this ulterior motive (limiting traffic on Iowa's highways), "being protectionist in nature, is impermissible under the Commerce Clause."<sup>93</sup> Accordingly, even where regulations are subject to *Pike* balancing, a court may seek out impermissible ulterior motives behind the "non-discriminatory laws."

While such an endeavor may further blur the lines between the competing standards of review, Justice Brennan's concurrence in *Kassel* provides an alternative, and perhaps simplified, framework under which Dormant Commerce Clause challenges to state regulations may be taken into account.<sup>94</sup> Justice Brennan said that a court must take into account three principles:

- (1) The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation.
- (2) The burdens imposed on commerce must be balanced against the local benefits actually sought to be achieved by the State's lawmakers, and not against those suggested after the fact by

---

86. This may further blur the line between the later two categories of Dormant Commerce Clause review. Indeed, at least one court has acknowledged that there is no clear line separating effects that constitute a case of nearly per se invalidity and those requiring a balancing approach. *See* *Wiesmueller v. Kosobucki*, 571 F.3d 699, 703 (7th Cir. 2009).

87. *Pike*, 397 U.S. at 146.

88. *Id.* at 145.

89. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 671 (1981); *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978).

90. *Kassel*, 450 U.S. at 662.

91. *Id.* at 662–63.

92. *See id.* at 663.

93. *Id.* at 664.

94. *Id.* at 679 (Brennan, J., concurring).

counsel. (3) Protectionist legislation is unconstitutional under the Commerce Clause, even if the burdens and benefits are related to safety rather than economics.<sup>95</sup>

This framework pays deference to the respective roles of the legislature and the judiciary, while honoring the benefits or objectives sought by a state's lawmakers.<sup>96</sup> Further, Justice Brennan's analysis ensures that the constitutionality of a state regulation will be determined by the "judgments made by the State's lawmakers,"<sup>97</sup> rather than "the vagaries of litigation" created by a state's lawyers' in court.<sup>98</sup> To consider anything else, Brennan said, would answer the wrong question,<sup>99</sup> and where a regulatory purpose is protectionist in nature, such a regulation is impermissible.<sup>100</sup> As such, the alternative approach offered by Justice Brennan may be a more efficient means of analysis.

## II. PREVIOUS CHALLENGES TO DIPLOMA PRIVILEGE STATUTES AND RESTRICTIONS OF LEGAL PRACTICE BASED ON RESIDENCY OR ORIGIN

Diminished use of the diploma privilege has resulted in limited opportunities for courts to review challenges to diploma privilege statutes. Indeed, Montana appears to be the only other state to have its previous statute challenged, albeit on equal-protection grounds.<sup>101</sup> However, case law is rife with individuals challenging statutes that limit the availability of legal practice based on residence or origin. Most frequently, disadvantaged attorneys bring their claims under the potentially less stringent Privileges and Immunities standard,<sup>102</sup> but there are also Dormant Commerce Clause cases. Admittedly, analysis of these cases provides a limited amount of guidance. However, the Montana case is helpful, as its differing opinions parallel the constitutional arguments that can be made under the Dormant Commerce Clause. Further, the general survey of cases discussing

---

95. *Id.* at 679–80 (Brennan, J., concurring) (emphasis added).

96. *See id.* at 680–81 (Brennan, J., concurring); *see also* *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 473 (1981).

97. *Kassel*, 450 U.S. at 680 (Brennan, J., concurring).

98. *Id.*

99. *See id.* at 681.

100. *Id.* at 686; *see also id.* at 675–77.

101. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175 (D. Mont. 1974) *aff'd*, 419 U.S. 955 (1974).

102. The Privileges and Immunities Clause provides a singularly different test than the Dormant Commerce Clause. It requires 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." Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985) (discussed *infra*); *see also* Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admissions Rules for Out of State Lawyers*, 18 GEO. J. LEGAL ETHICS, 135, 159–63 (2004) (arguing that the regulation of out-of-state bar admissions violates the Privileges and Immunities Clause).

restrictions on legal practice under both clauses is not farfetched, as courts may cite decisions under either of the closely related provisions where the discrimination may potentially fall within the scope of both clauses.<sup>103</sup>

A. Montana's Diploma Privilege: *Huffman v. Montana Supreme Court*

In *Huffman v. Montana Supreme Court*,<sup>104</sup> James L. Huffman, a graduate of the University of Chicago Law School and a Montana resident, contended that Montana's statutorily enacted diploma privilege violated the Equal Protection Clause of the Fourteenth Amendment.<sup>105</sup> Acknowledging that Equal Protection jurisprudence indicated that two potential standards of reviews could be employed, the court addressed whether the diploma privilege's statutory classification was predicated upon certain "suspect" criteria or affected "fundamental rights."<sup>106</sup>

Concluding that the classification was neither predicated upon suspect criteria nor burdensome to fundamental rights, a majority of the three-judge federal district court concluded that the less stringent standard, rational basis review, was applicable.<sup>107</sup> While the *Huffman* court acknowledged that the practice of law is a right, it refrained from classifying law practice as a fundamental right.<sup>108</sup> It stated: "Certainly a real and substantial distinction exists between one's wealth, race, nationality, or alienage . . . and one's choice of institutions at which to study law"; nor did the diploma privilege implicate any fundamental right.<sup>109</sup> The court believed that Huffman's case was not one "where one who has established his learning qualifications and moral character has been deprived of any right. . . . The object of the classification under scrutiny . . . is to ensure that the courts and people of Montana are represented by attorneys who are of sound

---

103. See *Sestric v. Clark*, 765 F.2d 655, 664 (7th Cir. 1985) (noting the relationship between the two clauses).

104. 372 F. Supp. at 1175.

105. *Id.* at 1176.

106. *Id.* at 1177; see also *McGowan v. Maryland*, 366 U.S. 420, 425 (1960) ("The constitutional safeguard [of the Equal Protection Clause] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective.").

107. *Huffman*, 372 F. Supp. at 1177.

108. *Id.* at 1178.

109. *Id.*; see also *Baird v. State Bar of Ariz.*, 401 U.S. 1, 8 (1970) ("The practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character."). But see *Shapiro v. Thompson*, 394 U.S. 618 (1969) (declaring unconstitutional certain Connecticut and District of Columbia statutes which denied welfare assistance to persons who had not resided within the respective jurisdictions for at least one year preceding the application for assistance); *Corfield v. Coryell*, 6 Fed. Cas. 546, 552 (C.C.E.D. Pa. 1823) (enumerating the right to acquire and possess property of every kind, and the "right of a citizen of one state to pass through, or reside in any other state, for purposes of *trade*, agriculture, *professional pursuits*, or otherwise" as fundamental rights) (emphasis added).



ethical character and of competent legal skills.”<sup>110</sup> Citing a general trend for rational basis review for bar regulation statutes,<sup>111</sup> the court noted that graduates of the University of Montana Law School “must complete the required course of instruction with its emphasis on Montana law.”<sup>112</sup>

Moreover, the court addressed the dissent’s call for strict scrutiny. Despite the dissent’s assertion that the diploma privilege violated an individual’s fundamental right to travel,<sup>113</sup> the majority relied on a strict interpretation of a Supreme Court decision holding unconstitutional residence requirements that directly impinge on the fundamental right to travel.<sup>114</sup> Because the Huffman court believed the diploma privilege did not directly impinge upon the plaintiff’s fundamental right of interstate travel, the state needed satisfy only rational basis review.<sup>115</sup>

Finally, the *Huffman* court argued (in dicta and somewhat unsatisfactorily) that Montana’s diploma privilege satisfied strict scrutiny.<sup>116</sup> It asserted that the state “met the showing of a compelling governmental interest in the quality and integrity of the persons whom it licenses to practice law and [that it] may impose regulations which promote that interest.”<sup>117</sup> Conspicuously absent, however, is any discussion of strict scrutiny’s second prong. Did Montana’s diploma privilege employ the least restrictive means?

Judge East’s *Huffman* dissent argued that Montana’s diploma privilege failed to satisfy either strict scrutiny or rational basis review.<sup>118</sup> Judge East said that the diploma privilege should be subjected to strict scrutiny, as it infringed upon the fundamental right to travel, and the privilege failed this standard of review.<sup>119</sup> While the state has a legitimate objective in regulating the bar, Judge East said, its policy choices are permissible only “so long as an individual’s federal constitutional guarantees are not thereby infringed.”<sup>120</sup> Judge East discussed the courts’ long-standing tradition of honoring the fundamental right to travel among the states for purposes of

---

110. *Huffman*, 372 F. Supp. at 1178. See *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (asserting that durational residence laws penalize persons who have traveled from one place to another to establish new residence during qualifying period).

111. See *Smith v. Davis*, 350 F. Supp. 1225, 1229 (S.D.W. Va. 1972); *Hackin v. Lockwood*, 361 F.2d 499, 502 (9th Cir. 1966); *Schwartz v. Bd. of Bar Exam’rs of N.M.*, 353 U.S. 232, 239 (1957).

112. *Huffman*, 372 F. Supp. at 1179 (noting that Montana statutes and cases were actively examined in the supplementary materials for most courses).

113. *Id.* at 1185 (East, J., dissenting); see also *Shapiro*, 394 U.S. at 629–30 (discussing the fundamental right to travel).

114. *Huffman*, 372 F. Supp. at 1185.

115. *Id.* at 1182–83.

116. *Id.* at 1183.

117. *Id.*

118. *Id.* at 1184–85.

119. *Id.* at 1185.

120. *Id.* at 1184.

trade,<sup>121</sup> and asserted that the State of Montana's justification, based on the bar applicant's knowledge of the diploma privilege's favored treatment, emphasized "the unhappy fact of provincialism—come to us or else."<sup>122</sup> Effectively, the Montana statute required an individual like the plaintiff to choose between the exercise of his right to travel under the constitution and his right to equal treatment under the law.<sup>123</sup> Although Montana had an interest in the regulation of the bar, the state failed to show a compelling state interest in placing the burden on the plaintiff.<sup>124</sup>

Further, Justice East contended that the majority misinterpreted the Supreme Court's expansive opinions in *Shapiro v. Thompson* and *Dunn v. Blumstein*.<sup>125</sup> He wrote:

*Shapiro* and *Dunn* protect the fundamental right to travel from sustaining burdens not imposed on other residents in like standing, rather than some right to the necessities of life or to vote. The aggrieved parties were, as is the plaintiff here, actual residents of the given state who had exercised their right to travel and were penalized in sharing legal entitlements offered by the state with other residents in like standing equally under the law. The same rationale applies whether it be in the state's exercise of police powers, taxation, provisions for state grants of welfare, school benefits or licenses to engage in lawful pursuits. So here the requirement of the Bar examination is a state imposed burden upon the plaintiff's exercise of his right to freely travel to Montana and receive equal treatment with other residents in like standing under the laws of that state.<sup>126</sup>

As *Shapiro* and *Dunn* concerned the right to travel, not the voting rights and necessities of life emphasized by the majority, the majority opinion, Judge East said, misconstrued the Supreme Court's rulings.<sup>127</sup> Accordingly, the fact that the plaintiff possessed the same academic qualifications as Montana law school graduates did invoke the right to travel and rendered the majority opinion untenable.

The *Huffman* dissent also maintained that Montana's diploma privilege statute failed to satisfy even rational basis review.<sup>128</sup> It acknowledged that Montana possessed a legitimate, although not compelling, interest in bar regulation, thus satisfying the first prong of rational basis review.<sup>129</sup>

121. *Id.* at 1185–86.

122. *Huffman*, 372 F. Supp. at 1186 (East, J., dissenting).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* (emphasis added).

127. *Id.*

128. *Id.* at 1186.

129. *Id.*

However, the only true academic qualification discussed in the rule was that the bar applicants be “graduate[s] of a law school approved by the [ABA].”<sup>130</sup> Arguing that the statutorily created classification did not confer a tangible benefit to the state that could justify the legislation, Judge East said:

It is indeed a delicate and ticklish posture for one to compare the relative merits and qualities of academic accomplishments held by the graduate of one ABA approved law school over those of another. . . . I cannot agree that the comparison of the curriculum of one ABA approved law school’s catalogue with another’s is a reasonable rationality upon which to waive the requirement of taking a bar examination in favor of the graduates of one such approved law school and in turn demand and require such an examination by graduates of all other such approved law schools.<sup>131</sup>

Moreover, while the Supreme Court of Montana played an advisory role over the state bar, “the Supreme Court holds no lawful authority or direction over the faculty, course of study or the end product of the Montana Law School whatsoever,” Judge East maintained.<sup>132</sup> Thus, as the state’s claimed benefit was dubious at best, the classification failed to satisfy the second prong of the reasonable rationality test.

#### B. Challenges to Restrictions of Legal Practice based on Residency or Origin

Ample case law exists concerning regulations of bar admission, or legal practice, based on residency or origin.<sup>133</sup> While this subject matter’s Privileges and Immunities Clause jurisprudence is well developed, its commercial cousin’s case law is comparatively scarce. Comparison of these closely related provisions is warranted, however, as courts may cite decisions under either provision if the discrimination may potentially be within the scope of both clauses.<sup>134</sup> These cases show a general judicial trend of disfavor towards such residency based regulations.

*Supreme Court of New Hampshire v. Piper* provided the first challenge to residency based bar regulation.<sup>135</sup> In *Piper*, the New Hampshire bar denied admission to Kathryn Piper, a Vermont resident who had already passed the New Hampshire bar exam, because of a requirement that all bar

---

130. *Id.* at 1184.

131. *Id.* at 1185.

132. *Id.*

133. *See, e.g.,* Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 284 (1985); Barnard v. Thornstenn, 489 U.S. 546 (1989).

134. *See* Sestric v. Clark, 765 F.2d 655, 664 (7th Cir. 1985).

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

examinees be in-state citizens.<sup>136</sup> Drawing from bountiful case law prohibiting occupational regulations based on residency,<sup>137</sup> the Court held the statute to be unconstitutionally discriminatory under the Privileges and Immunities Clause.<sup>138</sup> The Court applied the logic of *Piper* in *Barnard v. Thorstenn*,<sup>139</sup> holding unconstitutional a regulation requiring that a lawyer reside within the Virgin Islands for a year before becoming eligible for bar admission.<sup>140</sup>

Further, in *Supreme Court of Virginia v. Friedman*, the Court examined a Virginia rule that permitted Virginia residents to obtain admission to the Virginia Bar by motion while requiring non-resident out-of-state lawyers to pass the Virginia bar exam.<sup>141</sup> “Under this rule, an attorney who was admitted in Maryland but who lived in Virginia 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.”<sup>142</sup> As in *Piper* and *Thorstenn*, the Virginia rule unconstitutionally discriminated against out-of-state citizens and was therefore unconstitutional.<sup>143</sup>

While the Supreme Court has yet to examine a bar admissions claim under the Dormant Commerce Clause, two circuits have had the opportunity to discuss the Dormant Commerce Clause’s implications on statutes restricting the availability of legal services.<sup>144</sup> First, the Seventh Circuit considered a complaint citing the Dormant Commerce Clause in *Sestric v. Clark*.<sup>145</sup> In *Sestric*, Anthony Sestric, an attorney from Missouri, challenged an Illinois statute that waived the bar exam requirement for certain new residents of Illinois but required non-residents to pass the state bar examination before being allowed to practice law in Illinois.<sup>146</sup> Analyzing the potential economic impact of this law, Judge Posner wrote that “far from having placed an unreasonable burden on the interstate mobility of lawyers, Illinois may well have increased that mobility. . . . [T]he waiving of a condition for a class of new residents merely makes it easier for lawyers to change states.”<sup>147</sup> As there was no indication that the statute discriminated against interstate commerce, the subject of the

---

136. *Id.* at 276.

137. *Id.* at 279–81.

138. *Id.* at 287–88.

139. 489 U.S. 546 (1989).

140. *Id.* at 558–59.

141. 487 U.S. 59 (1988).

142. Perlman, *supra* note 102, at 152–53.

143. 487 U.S. at 66–67.

144. Legal services constitute interstate commerce where they have a modest connection to another state. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787–88 (1975).

145. *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985).

146. *Id.*

147. *Id.* at 661 (emphasis added).

Dormant Commerce Clause, the Seventh Circuit upheld the statute.<sup>148</sup> However, in *National Revenue Corp. v. Violet*, the First Circuit found that a Rhode Island statute, which defined debt collection as law practice and limited such collecting to licensed Rhode Island lawyers, discriminated against interstate commerce.<sup>149</sup> The *Violet* Court stated:

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.<sup>150</sup>

Thus, *Violet* acknowledges that rules affecting out-of-state lawyers' ability to practice within a jurisdiction impacts interstate commerce and implicates the Dormant Commerce Clause. Yet *Violet* is particularly noteworthy, as the First Circuit determined that a regulation is capable of being subjected to, and subsequently failing, either of the Dormant Commerce Clause tests.<sup>151</sup>

Accordingly, "*Violet* suggests that such rules give rise to strict [D]ormant Commerce Clause scrutiny even when they do not explicitly discriminate against out-of-state citizens."<sup>152</sup> This means that a statute may manifest effective discrimination merely where it "grants privileged status to a group composed 'largely' of in-state citizens."<sup>153</sup> Thus, while the Supreme Court has yet to pass judgment on a bar admissions claim under the Dormant Commerce Clause, two circuit courts have recognized similar regulations' potential impact on interstate commerce, and such regulations may fail one of the Dormant Commerce Clause tests.<sup>154</sup>

Although none of these cases may be considered dispositive, the judicial disfavor over restricting bar admission based on residency or origin is well documented. The Supreme Court has already invalidated using state citizenship as a requirement for bar admission,<sup>155</sup> and two circuits have had the opportunity to examine the Dormant Commerce Clause implications of restrictions predicated on the origin of legal services.<sup>156</sup>

---

148. *Id.* at 664–65.

149. 807 F.2d 285 (1st Cir. 1986) (emphasis added).

150. *Id.* at 290.

151. *Id.* at 289 n.5, 290 (citations omitted).

152. Perlman, *supra* note 102, at 167.

153. *Id.*

154. To the extent that *Sestric* upheld the Illinois regulation, it is essential to note that the 7th Circuit said that the regulation could have increased the interstate mobility of lawyers. *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985).

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

156. *Sestric*, 765 F.2d at 655; *Violet*, 807 F.2d at 285.

III. *WIESMUELLER V. KOSOBUCKI*

## A. Background

In 2007, Christopher L. Wiesmueller, a student at Oklahoma City University School of Law, brought a §1983 claim against the members of Wisconsin's Board of Bar Examiners, as well as the members of the Supreme Court of Wisconsin.<sup>157</sup> Wiesmueller alleged that Wisconsin's diploma privilege discriminated against interstate commerce because it afforded bar admission in lieu of a bar examination only to lawyers graduating from one of Wisconsin's two ABA accredited law schools.<sup>158</sup> Additionally, Wiesmueller sought class certification for all out-of-state law school graduates who sought to practice within Wisconsin.<sup>159</sup> The United States District Court for the Western District of Wisconsin denied Wiesmueller's motion for summary judgment, denied Wiesmueller's motion for class certification, and granted defendants' motion to dismiss.<sup>160</sup>

Wiesmueller appealed both the dismissal of his claim and the denial of class certification.<sup>161</sup> The Seventh Circuit agreed with Wiesmueller and remanded the case.<sup>162</sup> After passing the Wisconsin bar examination, thereby mooting his claim, Wiesmueller moved, on remand, to vacate the earlier decision dismissing his claims on their merits and moved for class substitution of plaintiffs as well as class certification.<sup>163</sup> Included within this proposed class were:

[A]ll persons who (1) graduated or will graduate with a professional degree in law from any law school outside Wisconsin accredited by the American Bar Association; (2) apply to the Wisconsin Board of Bar examiners for a character and fitness evaluation to practice law in Wisconsin before their law school graduation or within thirty days of their graduation; and (3) have not yet been admitted to the Wisconsin bar.<sup>164</sup>

Although the District Court granted both the motions for plaintiff substitution and class certification, the court dismissed the action for failure to state a claim.<sup>165</sup> Bar applicants subsequently appealed this dismissal, whereupon the Seventh Circuit reversed and remanded the matter to the

---

157. *Wiesmueller v. Kosobucki*, 492 F. Supp. 2d 1036 (W.D. Wis. 2007).

158. *Id.* at 1036.

159. *Id.* at 1037.

160. *Id.* at 1039–40.

161. *Wiesmueller v. Kosobucki*, 513 F.3d 784 (7th Cir. 2008).

162. *Id.* at 787.

163. *Wiesmueller v. Kosobucki*, 251 F.R.D. 365, 366 (W.D. Wis. 2008), *rev'd and remanded* 571 F.3d 699 (7th Cir. 2009).

164. *Id.* at 367.

165. *Id.* at 368.

district court once again.<sup>166</sup>

### B. The Seventh Circuit's Latest Opinion

Following dismissal for failure to state a claim,<sup>167</sup> the substitute plaintiffs and the class they represented appealed to the Seventh Circuit.<sup>168</sup> Appellants argued that the “‘diploma privilege’ discriminates against graduates of out-of-state law schools who would like to practice law in Wisconsin.”<sup>169</sup> Specifically, plaintiffs contended that they were set at a disadvantage vis-à-vis graduates of Wisconsin law schools, who comprise two-thirds of the admitted bar, by virtue of the requirement that out-of-state law school graduates take the bar examination before they be admitted to the state bar.<sup>170</sup> The defendants acknowledged that the bar examination imposed certain burdens on out-of-state law graduates, but responded that “as a qualification for practice in the state[,] the study of law in a Wisconsin law school [was] a reasonable substitute for passing the bar exam . . . .”<sup>171</sup> Additionally, the defendant responded that the plaintiffs lacked standing due to the nature of the relief sought: injunction against the words “in this state” from Wis. Sup. Ct. R. 40.03.<sup>172</sup>

The Seventh Circuit first sought to address the desired form of relief. The court quickly noted that Wis. Sup. Ct. R. 40.03 made “no reference to Wisconsin law, and none of the listed course names [had] ‘Wisconsin’ or any cognate in it.”<sup>173</sup> While the defendants maintained that the certified class could not achieve relief through the expungement of the words “in this state,” as plaintiffs failed to satisfy the educational requirements imposed by subsection (2) of the privilege, the court said that the defendants erred in assuming the educational requirements implicated the study of Wisconsin law.<sup>174</sup> Indeed, the required curriculum included:

(a) Elective subject matter areas; 60-credit rule. Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors’ rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law,

---

166. *Wiesmueller v. Kosobucki*, 547 F.3d 740 (7th Cir. 2008).

167. *Wiesmueller v. Kosobucki*, 667 F. Supp. 2d 1001 (W.D. Wis. 2009).

168. *Wiesmueller v. Kosobucki*, 571 F.3d 699 (7th Cir. 2009).

169. *Id.* at 701.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 702.

174. *Id.*

ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings of each approved law school in this state.

(b) Mandatory subject matter areas; 30-credit rule. Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibility to the legal profession, pleading and practice, real property, torts, and wills and estates.<sup>175</sup>

Judge Posner wrote that “so far as appears, every class member could establish that his or her law school studies conformed to the requirements set forth in the rule except that the law school was in another state.”<sup>176</sup> Despite this distinction, the court asserted that the Constitution does not require Wisconsin to extend diploma privilege to all graduates of accredited law schools, for “[l]eveling down is a permissible form of compliance with a command to end unequal treatment.”<sup>177</sup> The court refrained from commenting on what form of relief would be required, but noted that “the loss of an opportunity to compete for a position . . . is injury enough to support standing . . . .”<sup>178</sup>

Progressing to the merits of the case, the court engaged in Dormant Commerce Clause review. While acknowledging that a statute’s facial discrimination against interstate commerce was nearly a case of *per se* invalidity, the court suggested the statute was not facially discriminatory.<sup>179</sup> Indeed, Wisconsin’s version of diploma privilege does not explicitly reference interstate commerce or any other interaction among the several states.<sup>180</sup> Accordingly, the court moved to a discussion of the effects diploma privilege has on interstate commerce.<sup>181</sup>

The court acknowledged that a regulation’s constitutionality largely depends on the magnitude of its effect on interstate commerce.<sup>182</sup> The

---

175. WI SCR 40.03(2)(a)–(b) (2009). For a complete listing of Wisconsin’s diploma privilege, see *supra* text accompanying note 8.

176. *Wiesmueller*, 571 F.3d at 702.

177. *Id.*

178. *Id.* at 703.

179. *Id.* at 704.

180. See WI SCR 40.03 (2009).

181. *Wiesmueller*, 571 F.3d at 703.

182. See *id.*



commercial implications of diploma privilege were obvious to the court,<sup>183</sup> and the Seventh Circuit noted that where a regulation's effect is to favor in-state economic interest over out-of-state interests, courts have generally struck down the statute without further inquiry.<sup>184</sup> But where a statute regulates even-handedly and only has incidental effects on interstate commerce, the court should examine "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits"; that is, a balancing test is required.<sup>185</sup> However, the Seventh Circuit noted that there is no clear line separating effects that constitute a case of nearly per se invalidity and those requiring a balancing approach.<sup>186</sup> While the diploma privilege favored the economic interest of Wisconsin law schools, it appeared to have only incidental effects on interstate commerce and regulated evenhandedly.<sup>187</sup> Moreover, Wis. Sup. Ct. R. 40.03 was not limited to Wisconsin residents, and Wisconsin law schools admitted students from other states.<sup>188</sup>

Despite a minimal record, the Seventh Circuit strongly suggested that Wisconsin's diploma privilege should be subjected to the *Pike* balancing approach.<sup>189</sup> While this challenge appeared to be a case of first instance, the Seventh Circuit had previously applied this principle to regulations of bar admission.<sup>190</sup> Indeed, the court said, "A state's right to regulate admission to the practice of law in the state is unquestioned, even though the result is to impede the interstate mobility of lawyers. But since that is a consequence, the regulation must be at least minimally reasonable."<sup>191</sup> Judge Posner went on to emphasize the word "minimally," noting that "[t]he judiciary lacks the time and the knowledge to be able to strike a fine balance between the burden that a particular state regulation lays on interstate commerce and the benefit of that regulation to the state's legitimate interests."<sup>192</sup> Further, "The effect on commerce of the discriminatory diploma privilege may be small and, if so, not much would be required to justify it."<sup>193</sup>

The opinion went on to chastise the district court for its premature dismissal of Wiesmueller's claim. This dismissal led the court to an

---

183. See *id.* at 705; see also *Sestic v. Clark*, 765 F.2d 655, 661 (7th Cir. 1985).

184. *Wiesmuller*, 571 F.3d at 703.

185. *Id.*

186. *Id.* This would necessarily constitute the difference between the "Effectively Discriminatory Laws" and "Laws with an Incidental Effect on Commerce." See *supra* Part I.B.2–3.

187. *Wiesmueller*, 571 F.3d at 703.

188. *Id.* at 703–04.

189. *Id.* at 704.

190. *Id.*; see also *Sestic v. Clark*, 765 F.2d 655, 661–64 (7th Cir. 1985).

191. *Wiesmueller*, 571 F.3d at 704.

192. *Id.*

193. *Id.* at 705.

“evidentiary vacuum” in which:

[T]he scanty record that the plaintiffs were not allowed to amplify [suggests] that Wisconsin law is no greater part of the curriculum of the Marquette and Madison law schools than it is of the law schools of Harvard, Yale, Columbia, Virginia, the University of Texas, Notre Dame, the University of Chicago, the University of Oklahoma, and the University of Northern Illinois (which happens to be within a stone’s throw of Wisconsin, as are the four law schools in Minneapolis-St. Paul).<sup>194</sup>

While the court noted that the two Wisconsin schools were “doubtless among the nation’s best,”<sup>195</sup> the scarce record suggested that diploma privilege created an arbitrary distinction between graduates of Wisconsin law schools and those from other accredited schools.<sup>196</sup> Moreover, the opinion drew possible comparisons to the plaintiff in *Hunt* and took note of one out-of-state graduate’s difficulty in passing the Wisconsin bar.<sup>197</sup> All the while, a distinction existed in which Wisconsin law schools received various benefits while burdening interstate commerce.<sup>198</sup> Yet the premature dismissal denied the plaintiffs the opportunity to try their case and raised concerns that there may be nothing to justify this distinction at all.<sup>199</sup>

The defendants raised several arguments in support of diploma privilege. First, the defendants contended that Wis. Sup. Ct. R. 40.03 required Wisconsin law schools to include Wisconsin law.<sup>200</sup> However, the Seventh Circuit noted that absent from the provision was any reference to Wisconsin law and that the statutory language “rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state” suggested a national rather than local orientation.<sup>201</sup> The defendants also asserted that in promulgating the rule, the Supreme Court of Wisconsin reserved for itself a supervisory role in the curriculum of Wisconsin law schools, thus ensuring curricula rich in Wisconsin law.<sup>202</sup> Judge Posner noted, however, that there was no hint in the record that the Supreme Court of Wisconsin played any such role.<sup>203</sup> Indeed, equally plausible was the possibility that the Supreme Court of Wisconsin delegated such authority to the two law

---

194. *Id.* at 704.

195. *Id.* at 706.

196. *Id.* at 704.

197. *See id.* at 704–05; *see also* *Hunt v. Wash. State Apple Adver. Com’n*, 432 U.S. 333 (1977); Hansen, *supra* note 3.

198. *See Wiesmueller*, 571 F.3d at 704–06.

199. *Id.* at 705, 707.

200. *Id.* at 705.

201. *Id.* at 705–06.

202. *Id.* at 706.

203. *Id.*

schools themselves.<sup>204</sup> Finally, the defendants argued that diploma privilege should be upheld on the basis of the “market participant” exception.<sup>205</sup> However, the court once again asserted that the claim’s premature dismissal left an insufficient record for the court to issue a ruling and noted that Marquette’s status as a private institution would further complicate this question.<sup>206</sup>

For the aforementioned reasons, the Seventh Circuit reversed and remanded the case to the Western District of Wisconsin. The parties settled in March 2010.<sup>207</sup>

#### IV. THE EVOLUTION OF THE WISCONSIN DIPLOMA PRIVILEGE

Wisconsin’s diploma privilege possesses a history dating back to later half of the nineteenth century. Its history suggests that Wisconsin initially enacted the diploma privilege as a means of promoting formal legal education.<sup>208</sup> While the diploma privilege’s statutory language has undergone two significant modifications, there is no indication that these modifications enhanced or altered the privilege’s purpose. Nor do these modifications appear to make Wisconsin-trained lawyers any more capable of practicing Wisconsin law within the state.

Initially, law practice was open to all citizens, and Wisconsin’s bar regulation, like other states’, consisted merely of an oral examination conducted by a judge.<sup>209</sup> These examinations were largely informal, and an infamous story about Abraham Lincoln conducting one such examination while bathing persists in the legal community to this day.<sup>210</sup> In an effort to improve the quality of the bar, numerous states sought to incentivize formal legal education and conferred automatic bar admission to graduates of the states’ law schools.<sup>211</sup> When the University of Wisconsin Law Department opened in 1868, offering a one year course of study,<sup>212</sup> the Wisconsin

---

204. *Id.*

205. *Id.*

206. *Id.* at 706. While addressing the intricacies of the market participant exception is worthwhile, specifically addressing its applicability to Marquette University Law School in this context is beyond the scope of this note. Moreover, this consideration also raises the question of the viability of a separate institution’s potential claim that Wisconsin’s diploma privilege is a protectionist measure aimed at benefitting the state’s two law schools.

207. Vielmetti, *supra* note 12.

208. Levine, *supra* note 1.

209. Moran, *supra* note 4, at 645–46.

210. *Id.* at 646.

211. *Id.* But see George Neff Stevens, *Diploma Privilege, Bar Examination or Open Admission: Memorandum Number 13*, 46 B. EXAMINER 15, 18–19 (1977) (asserting that raising standards was not the true objective of the early law school drive for the diploma privilege).

212. Univ. Wis.-Madison, *Events in the History of UW Law School*, <http://www.law.wisc.edu/about/lore/events.html> (last updated July 4, 2007).

legislature moved quickly to establish diploma privilege in order to “encourage lawyers-to-be to receive a formal legal education instead of just ‘reading law.’”<sup>213</sup> By 1870, the state of Wisconsin offered diploma privilege to graduates of the University of Wisconsin Law School.<sup>214</sup>

Wisconsin’s diploma privilege has undertaken two significant statutory changes before achieving its current form.<sup>215</sup> The first pertains to the expansion of the diploma privilege. Marquette acceded to the privilege in 1935.<sup>216</sup> Prior to this ascension, Marquette was among diploma privilege’s most ardent critics,<sup>217</sup> and its faculty actively lobbied for the abolition of the privilege for University of Wisconsin graduates.<sup>218</sup> Indeed, in 1926 one Marquette law professor “wrote that his faculty and students recognized ‘the consequences on the morale . . . of the extension of this privilege . . . and far from desiring it will oppose by all legitimate means within [our] power the receipt of such a gift of the Greeks.’”<sup>219</sup> However, in 1931, Wisconsin opened the privilege to graduates of any law school within the State.<sup>220</sup> Yet Marquette’s opposition continued after the 1931 amendment, whereupon Dean Clifton Williams wrote the Committee on the Admission to the bar, saying, “You are authorized to state anywhere at any time that Marquette University Law School is opposed to the diploma privilege.”<sup>221</sup> Despite this continued opposition, 1933’s “Fons Bill” explicitly revised the diploma privilege statute as to explicitly extend the privilege to Marquette students.<sup>222</sup> Two years later, Marquette’s position changed.<sup>223</sup> The extent to which this change in behavior was coerced, through an acknowledgment of the competitive disadvantage faced by Marquette graduates, or welcomed as validation of Marquette’s equal status with the University of Wisconsin Law School is subject to debate.<sup>224</sup> However, the amendments of the 1930s represent a significant expansion of the privilege while maintaining its central tenets.

Second, in 1971 the state, motivated by the University of Wisconsin’s decision to change the upper-level curriculum to a strictly elective

---

213. Levine, *supra* note 1.

214. WIS. STAT. § 79 (1870).

215. WIS. STAT. § 757.282 (1977).

216. *A History of the Organized Bar in Wisconsin*, Wisconsin State Bar Ass’n, ch. 13 available at <http://www.wisbar.org/AM/Template.cfm?Section=BarHistory&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48667> (last visited Mar. 7, 2011) (hereinafter *A History*).

217. See Levine, *supra* note 1; Moran, *supra* note 4, at 648.

218. Levine, *supra* note 1.

219. Moran, *supra* note 4, at 648.

220. WIS. STAT. § 256.28(1) (1931).

221. *A History*, *supra* note 216, at ch. 13.

222. *Id.*

223. *Id.*

224. See generally Levine, *supra* note 1.

nature,<sup>225</sup> amended the diploma privilege to include the thirty-credit rule.<sup>226</sup> This rule may be considered “the central requirement for admission to the Wisconsin bar on diploma privilege,”<sup>227</sup> and requires students seeking bar admission through the diploma privilege to take the ten specific courses listed in Wis. Stat. 40.03(2)(b).<sup>228</sup> Prior to the enactment of these reforms, Wisconsin’s lawmakers entrusted the law schools’ faculties to determine how best to prepare students, and the diploma privilege was not subject to any educational requirement other than graduation from a Wisconsin law school.<sup>229</sup> This effectively represented an attempt, contrary to the wishes of the University of Wisconsin Law School administration,<sup>230</sup> to identify and codify a “canon of substantive law to which all entry-level American lawyers must be exposed in order to be competent lawyers.”<sup>231</sup> However, rather than reflecting concerns for Wisconsin practice, the thirty-credit rule considered basic national competence.<sup>232</sup>

While Wisconsin’s diploma privilege has a rich history, it lacks a Wisconsin-centric objective. The drafters of the original diploma privilege had a legitimate and admirable objective of promoting formal legal education.<sup>233</sup> The privilege’s history demonstrates both concern for law school curricula, and a willingness on the part of Wisconsin’s legislature, supreme court, board of bar examiners, and faculties to debate and reform the privilege.<sup>234</sup> However, this history lacks any indication of reform intended to make Wisconsin trained attorneys more attuned to Wisconsin law and procedure. To the contrary, the principal educational requirement imposed on those seeking to enjoy the privilege suggests a national orientation.<sup>235</sup>

#### V. PASSING JUDGMENT “ON WISCONSIN”

Because contemporary Dormant Commerce Clause jurisprudence has endeavored to transition from dichotomous classifications to balancing

---

225. See generally Peter K. Rofes, *Mandatory Obsolescence: The Thirty Credit Rule and the Wisconsin Supreme Court*, 82 MARQ. L. REV. 787, 790–96 (1999).

226. WIS. STAT. § 256.28(1)(b) (1971). It should be noted that this statute is identical to the current statutory expression of Wisconsin’s diploma privilege. WIS. STAT. § 757.282 (1977).

227. Rofes, *supra* note 225, at 806.

228. These courses are constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates. *Id.* at 797.

229. Rofes, *supra* note 225, at 791.

230. See *id.* at 798.

231. *Id.* at 794 (emphasis added).

232. See *id.*

233. Levine, *supra* note 1.

234. See generally, Rofes *supra* note 225, at 790–96.

235. See *id.* at 794.

acts,<sup>236</sup> Dormant Commerce Clause analysis is difficult and imprecise.<sup>237</sup> A regulation's constitutionality largely depends on the magnitude of its effect on interstate commerce, insomuch as that unknown metric determines what standard of review to be employed.<sup>238</sup> Where a statute effectively discriminates against interstate commerce, strict scrutiny almost certainly sounds its death knell.<sup>239</sup> However, *Pike* balancing generally favors upholding a regulation.<sup>240</sup> The premature dismissal of Wiesmueller's claim limited the Seventh Circuit's ability to determine which standard need be employed. While one may argue that review of Wis. Sup. Ct. R. 40.03 warrants strict scrutiny, based primarily on a liberal interpretation of the Dormant Commerce Clause that actively seeks out illusory motives,<sup>241</sup> case law, and the Wisconsin Supreme Court's demonstrated interest in legal education appears to support review under the *Pike* test.<sup>242</sup> However, it is uncertain whether the privilege satisfies even that comparatively lax standard of review.

The remainder of this section will analyze and dismiss the arguments in favor of strict scrutiny review. It will then advance the position that while the privilege warrants *Pike* balancing, the purported benefits conferred to the state by the statute do not outweigh the burden placed on interstate commerce.

#### A. Strict Scrutiny is Inappropriate

The implementation of strict scrutiny review is inappropriate in the present case. While an aggrieved party would understandably claim that Wis. Sup. Ct. R. 40.03 is effectively discriminatory, thus invoking strict scrutiny, the *Pike* balancing is the appropriate standard. The historical context surrounding the diploma privilege, the Supreme Court of Wisconsin's intent, and magnitude of the privilege's effect on interstate commerce each support using the lesser of the two Dormant Commerce Clause standards. Consideration of the arguments in support of strict scrutiny is warranted, but they are all easily refuted.

Arguments in favor of invoking strict scrutiny under the Dormant Commerce Clause center on notions of protectionism. The Supreme Court has a long-standing "suspicion [of] state statutes requiring business operations to be performed in the home State that could more efficiently be

---

236. See generally *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

237. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 703 (7th Cir. 2009).

238. *Id.*

239. *Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 353 (1977).

240. *Pike v. Bruce Church*, 397 U.S. 137, 146 (1970).

241. See, e.g., *id.* at 145; *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 679–80 (1981) (Brennan, J., concurring).

242. See *A History*, *supra* note 216; *Rofes*, *supra* note 225, at 790–96.

performed elsewhere.”<sup>243</sup> Such statutes frequently “point[] to the unhappy fact of provincialism—come to us or else.”<sup>244</sup> Invokers of strict scrutiny will invariably draw comparisons to the plaintiff in *Hunt*.<sup>245</sup> However, instead of bemoaning the inability to display state inspection certificates,<sup>246</sup> diploma privilege’s critics will demand that their law degrees be recognized as entitling them to the diploma privilege. Instead of claiming that the statute is ostensibly a consumer protection measure designed to exclude apple growers,<sup>247</sup> aggrieved parties will label the privilege a protectionist measure cloaked in education’s clothing. They will petition courts to resume their continuing mission to detect and expose protectionist subterfuge.<sup>248</sup> Despite courts’ willingness to seek out “illusory motives,”<sup>249</sup> these protectionism arguments in favor of strict scrutiny are likely to fail.

Perhaps the most obvious of the protectionism argument’s shortcomings is the difficulty associated with demonstrating that the statute is effectively discriminatory. It is true that statutes that facially or effectively discriminate against interstate commerce are nearly a case of *per se* invalidity.<sup>250</sup> However, the Seventh Circuit’s latest opinion effectively dismissed the contention that Wisconsin’s diploma privilege was facially discriminatory,<sup>251</sup> and the invocation of strict scrutiny is far more difficult where facial discrimination is not present.<sup>252</sup> Accordingly, diploma privilege’s challengers face a practical hurdle to invoking strict scrutiny.

The statutory evolution of the diploma privilege continually echoes the importance of legal education, not protectionism. This presence of pedagogical concern further detracts from the calls for strict scrutiny. Wisconsin enacted the first diploma privilege statute in 1870, shortly after the institutionalization of the University of Wisconsin’s law department, as a means of promoting formal legal education.<sup>253</sup> The promotion of formal

---

243. *Pike*, 397 U.S. at 145.

244. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175, 1186 (D. Mont. 1974) (East, J., dissenting), *aff’d*, 419 U.S. 955 (1974).

245. *Hunt v. Wash. State Apple Adver. Com’n*, 432 U.S. 333 (1977) (considering a North Carolina apple grading regulation).

246. *Id.*

247. *Id.* at 353–54 (“[A]lthough the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area. Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect the problems it was designed to eliminate.”).

248. *See REDLICH ET AL.*, *supra* note 17, § 6.04, at 200. *See generally Philadelphia v. New Jersey*, 437 U.S. 617, 625–27 (1978).

249. *See Pike v. Bruce Church*, 397 U.S. 137, 146 (1970).

250. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

251. *Id.*

252. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). *See also, e.g., Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978).

253. *Levine*, *supra* note 1.

legal education does not suggest intent to protect Wisconsin lawyers or law schools. Similarly, Marquette's ascension to the privilege through the reforms of the 1930s<sup>254</sup> may be seen through an educational lens as the state recognized the value of a Marquette legal education.<sup>255</sup> Further, when the state added the thirty-credit rule in 1971, these efforts constituted an effort to codify a "canon of substantive law to which all entry-level American lawyers must be exposed in order to be competent lawyers."<sup>256</sup> Accordingly, there is a recurring emphasis on education from the privilege's original version through its current form.<sup>257</sup> Fostering education is not indicative of discriminatory protectionism.

There is no indication that the Supreme Court of Wisconsin, in its capacity as the monitor of fitness and qualifications, has ever acted with an invidious protectionist agenda. Rather, the Supreme Court of Wisconsin has acted in a proper manner in order to ensure a qualified bar. The court has actively monitored the Wisconsin bar for generations.<sup>258</sup> It is the stated belief of the court that the diploma privilege is a rigorously monitored device that succeeds in its goal of maintaining a qualified bar,<sup>259</sup> and "courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation."<sup>260</sup> Thus, the pristine record established by the Supreme Court of Wisconsin further weakens the call for strict scrutiny and lends further support to *Pike* balancing.

While a regulation's constitutionality may depend on its impact on commerce,<sup>261</sup> the Wisconsin diploma privilege's impact on interstate commerce may be insufficient to constitute effective discrimination. The majority of cases under the Dormant Commerce Clause involve the tangible articles or avenues of commerce.<sup>262</sup> While it is established law that legal services constitute interstate commerce where they have a modest connection to another state,<sup>263</sup> measuring the diploma privilege's impact on interstate commerce is more difficult than monitoring apple sales or rail traffic—although, unlike *Sestric*, one cannot say that the privilege fosters

254. *A History*, *supra* note 216.

255. Levine, *supra* note 1.

256. Rofes, *supra* note 225, at 794 (emphasis added).

257. WIS. STAT. § 757.282 (1977).

258. *See generally A History*, *supra* note 216 (providing a history of Wisconsin bar regulations).

259. Shirley S. Abrahamson, Letter to the ABA Center for Professional Responsibility (2002) available at [http://www.abanet.org/cpr/mjp/comm2\\_wsc.html](http://www.abanet.org/cpr/mjp/comm2_wsc.html).

260. *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 679–80 (1981) (Brennan, J., concurring).

261. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

262. *See, e.g., Hunt v. Wash. State Apple Adver. Com'n*, 432 U.S. 333, 333 (1977) (apples); *St. Louis & Pacific Ry. v. Illinois*, 118 U.S. 577, 577 (1886) (involving rail transportation).

263. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787–88 (1975).



the interstate mobility of attorneys.<sup>264</sup> One conceivable metric would be the means through which bar admission was achieved; at least one third of Wisconsin's bar did not enjoy the privilege.<sup>265</sup> However, the absence of a definitive metric through which the diploma privilege's economic impact may be measured lends further support to the less rigorous *Pike* test.

#### B. Unconstitutionality Under *Pike*

Wisconsin's diploma privilege, as presently written, fails to demonstrate a discernible benefit and should subsequently fail the balancing test required under *Pike*. *Pike* says that where a legitimate local purpose exists, the question becomes one of degree, and such a regulation should be upheld unless the burden imposed on commerce is clearly excessive to its local benefits.<sup>266</sup> Yet some sort of benefit must justify the burden imposed on interstate commerce,<sup>267</sup> and the state must make more than a speculative showing that the regulation contributes to an otherwise legitimate purpose.<sup>268</sup> The diploma privilege sought to encourage formal legal education and ensure that Wisconsin-trained lawyers were competent to practice law in the state.<sup>269</sup> Moreover, advocates of the privilege believe that "as a qualification for practice in the state the study of law in a Wisconsin law school is a reasonable substitute for passing the bar exam."<sup>270</sup> Those advocates believe that such study within Wisconsin promotes familiarity with Wisconsin law more than legal study outside of Wisconsin. However, Wis. Sup. Ct. R. 40.03 fails to provide any evidence for this last belief. To the contrary, its language and history support the proposition of a nationalist, rather than Wisconsin-centric, orientation. This nationalist orientation does not support a finding of any benefit, independent of the fact that the schools are located within the state of Wisconsin, which would justify the burden placed on interstate commerce (the interstate mobility of new attorneys).

Textual analysis of Wisconsin's diploma privilege fails to provide any indication of a Wisconsin-centered orientation. Wis. Sup. Ct. R. 40.03's entirety provides:

**SCR 40.03. Legal competence requirement: Diploma privilege.** An applicant who has been awarded a first professional degree in law from a law school in this state that is

---

264. *Sestric v. Clark*, 765 F.2d 655, 655 (7th Cir. 1985).

265. *Wiesmueller*, 571 F.3d at 701; *See also* *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 456 (1981)(discussing the implications of in-state losers on Dormant Commerce Clause review).

266. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

267. *Wiesmueller*, 571 F.3d at 705.

268. *Raymond Motor Transp., Inc., v. Rice*, 434 U.S. 429, 447 (1978).

269. Levine, *supra* note 1; *A History*, *supra* note 216.

270. *Wiesmueller*, 571 F.3d at 701.

fully, not provisionally, approved by the American bar association shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

(1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.

(2) Satisfactory completion of study in mandatory and elective subject matter areas. The law school shall certify to the board satisfactory completion of not less than 60 semester credits in the mandatory and elective subject matter areas as provided in (a) and (b). All semester credits so certified shall have been earned in regular law school courses having as their primary and direct purpose the study of rules and principles of substantive and procedural law as they may arise in the courts and administrative agencies of the United States and this state.

(a) Elective subject matter areas; 60-credit rule.

Not less than 60 semester credits shall have been earned in regular law school courses in the subject matter areas generally known as: Administrative law, appellate practice and procedure, commercial transactions, conflict of laws, constitutional law, contracts, corporations, creditors' rights, criminal law and procedure, damages, domestic relations, equity, evidence, future interests, insurance, jurisdiction of courts, legislation, labor law, ethics and legal responsibilities of the profession, partnership, personal property, pleading and practice, public utilities, quasi-contracts, real property, taxation, torts, trade regulation, trusts, and wills and estates. The 60-credit subject matter requirement may be satisfied by combinations of the curricular offerings in each approved law school in this state.

(b) Mandatory subject matter areas; 30-credit rule.

Not less than 30 of the 60 semester credits shall have been earned in regular law school courses in each of the following subject matter areas: constitutional law, contracts, criminal law and procedure, evidence, jurisdiction of courts, ethics and legal responsibilities of the legal profession, pleading and practice, real property, torts, and wills and estates.

(c) Law school certification of subject matter content of

curricular offerings.

Upon the request of the supreme court, the dean of each such law school shall file with the clerk a certified statement setting forth the courses taught in the law school which satisfy the requirements for a first professional degree in law, together with a statement of the percentage of time devoted in each course to the subject matter of the areas of law specified in this rule.<sup>271</sup>

Indeed, the diploma privilege's text contains "no reference to Wisconsin law, and none of the listed course names has "Wisconsin" or any cognate in it."<sup>272</sup> While it is true that the word "state" appears twice in the statute, its presence is easily dismissed. "State," or more precisely, "in this state,"<sup>273</sup> first appears as a qualifier for the words "law school"; this qualification was the very subject of the *Wiesmueller* litigation. Second, the word "state," or more precisely, "United States and this state,"<sup>274</sup> appears alongside the United States as a recognition of general legal practice. Thus, there is no explicit reference to Wisconsin law or practice within the regulation.

To the contrary, the privilege's text, coupled with consideration of the privilege's history, suggests a national orientation to the legal education that the privilege's drafters desired. First, the only "academic qualifications" required under Wis. Sup. Ct. R. 40.03 are the thirty-credit rule and its companion sixty-credit rule.<sup>275</sup> Noticeably absent from these lists of courses is any reference to Wisconsin law, practice, or procedure. In fact, these lists resemble a course offering that could be found at any other law school, and "so far as appears, [any graduate of an ABA accredited law school] could establish that his other law school studies conformed to the requirements set forth in this rule except that the law school was in another state."<sup>276</sup> Moreover, the 1971 amendment's imposition of the thirty-credit rule identified and codified a "canon of substantive law to which all entry-level American lawyers must be exposed in order to be competent lawyers."<sup>277</sup> Accordingly, subsections (2)(a) and (2)(b) fail to provide any basis from which a discernible contribution to education in Wisconsin law may be drawn.

Second, the inclusion of the phrase "approved by the American bar

---

271. Wis. S.Ct. R. 40.03 (2009) (emphasis added).

272. *Wiesmueller*, 571 F.3d at 702.

273. Wis. S.Ct. R. 40.03 (2009).

274. Wis. S.Ct. R. 40.03(2) (2009).

275. Wis. S.Ct. R. 40.03(2)(a)–(b) (2009).

276. Rofes, *supra* note 225, at 794.

277. *Id.* (emphasis added); *See also Wiesmueller*, 571 F.3d at 706 ("The fact that the Wisconsin bar exam includes both the Multistate Professional Responsibility Examination and the Multistate Essay examination is a further indication that the state supreme court does not believe that saturation in Wisconsin law is a prerequisite for members of its bar . . .").

association”<sup>278</sup> reflects a national orientation to legal education. Wisconsin’s first diploma privilege statute went on the books in 1870,<sup>279</sup> eight years before the founding of the ABA. Subsequent versions of the privilege impose the requirement that bar applicants graduate from an ABA-approved law school.<sup>280</sup> The ABA enjoys something of a despotic role in determining law-school accreditation and educational requirements,<sup>281</sup> and the inclusion of the ABA accreditation requirement suggests that the state sought to adopt the ABA’s nationally de facto required standards.<sup>282</sup> While the inclusion of the ABA requirement indicates a need for national conformity, it provides no basis through which a Wisconsin-centric requirement may be drawn.

The ABA’s accreditation process is listed in its “Standards and Rules of Procedure for Approval of Law Schools.”<sup>283</sup> Its fundamental statement regarding ABA approval states, “A law school approved by the Association or seeking approval by the association shall demonstrate that its program is consistent with sound legal education principles. It does so by establishing that it is being operated in compliance with the Standards.”<sup>284</sup> It follows that an ABA-accredited law school’s education program is, in the judgment of the ABA, legally sound. Regarding education, the Standards’ provisions elaborate on: objectives, curriculum, academic standards and achievements, course of study and academic calendar, study outside the classroom, distance education, participation in studies or activities in a foreign country, and degree programs in addition to J.D.<sup>285</sup> Yet nowhere in this laundry list of educational concerns is any reference to conformity with a particular state’s practice, let alone Wisconsin.

Wisconsin’s inclusion of the ABA-approval provision suggests concern that Wisconsin’s law schools conform to national educational standards. Moreover, the state’s proffered interpretation of Wis. Sup. Ct. R. 40.03 seeks to secure ABA accreditations, and accreditation’s benefits, for its law schools while excluding others who have conformed with educational standards prescribed by ABA’s standards and explicit Wisconsin law. As

278. WISCR 40.03 (2009).

279. WIS. STAT. § 70 (1870).

280. *See, e.g.*, WIS. STAT. § 757.282 (1977).

281. *See generally*, *Mass. Sch. of Law v. United States*, 118 F.3d 776, 783–84 (1st Cir. 1995) (discussing a law school’s failed attempt to bring an antitrust claim against the ABA and noting the ABA’s response to a governmental investigation).

282. The motive behind this adoption is not entirely clear. It is plausible that the language’s inclusion is merely recognition of an additional standard, but it is equally plausible that the adoption also served to protect Wisconsin attorneys’ practice in light of the ABA’s de facto regulation of legal practice.

283. American Bar Association, *2010–11 Standards and Rules of Procedure for Approval of Law Schools*, Standard 101, available at <http://www.abanet.org/legaled/standards/standards.html>.

284. *Id.*

285. *Id.* at Standard 301–08.

Judge East noted:

It is indeed a delicate and ticklish posture for one to compare the relative merits and qualities of academic accomplishments held by the graduate of one ABA approved law school over those of another. . . . I cannot agree that the comparison of the curriculum of one ABA approved law school's catalogue with another's is a reasonable rationality upon which to waive the requirement of taking a bar examination in favor of the graduates of one such approved law school and in turn demand and require such an examination by graduates of all of all other such approved law schools.<sup>286</sup>

Moreover, Judge Posner's opinion acknowledged that the privilege could create an "arbitrary distinction between graduates of other accredited law schools."<sup>287</sup> Although the statute's language strives for conformity in national legal education standards, the proffered interpretation places extra-jurisdictionally trained attorneys at a disadvantage.

As to the privilege's purported benefits, advocates of the present privilege are mistaken if they believe that the rule of the Wisconsin Supreme Court requires that the curriculum include Wisconsin law.<sup>288</sup> The most obvious of this argument's shortcomings is that it "cannot be inferred from the language of the rule or from the list of mandatory and elective courses"<sup>289</sup> that the rule requires any Wisconsin law. However, the dissent among legal educators within the state also suggests that the present privilege does not require the inclusion of Wisconsin law. For example, one former law professor at Marquette, analyzing the latest *Wiesmueller* opinion, wrote:

[Judge] Posner seems to want more facts on exactly how Wisconsin-y the curricula at Wisconsin and Marquette are. Gordon [Smith, a former University of Wisconsin Law Professor,] has argued that his curriculum was Wisconsin-y, but I didn't see a lot of this at Marquette. No one ever gave me any parameters as to what to teach in my courses beyond a slim course description, which I don't remember mentioning Wisconsin. Of course, I may be jaded because . . . I am no fan of the privilege. I think it skews the incentives of graduates to stay in the Milwaukee area, limiting their own opportunities and saturating the market. It may also incentivize applicants with low

---

286. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175, 1185 (D. Mont. 1974) (East, J., dissenting) *aff'd*, 419 U.S. 955 (1974).

287. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

288. Even if this is the case, this raises the interesting question as to what would happen if the law schools in Minnesota, a state that already enjoys tuition reciprocity with Wisconsin, were to modify their curricula as to offer the "Wisconsin law" required by WISCR 40.03.

289. *Wiesmueller*, 571 F.3d at 705.

success indicators to borrow large amounts of money to go to law school because, if accepted, they are almost guaranteed a law license at the end of three years.<sup>290</sup>

Conversely, one of the directors of the Wisconsin Board of Bar Examiners defended the privilege, arguing that “not every state has adopted the most recent accretions to the [Uniform Commercial Code], nor have they accepted the wisdom that informs Wisconsin’s criminal law, marital property law, tort law, or real estate law.”<sup>291</sup> While the veracity and conviction of each of these individuals cannot be questioned, their discord highlights the lack of educational guidance provided by current Wisconsin law. Moreover, this disagreement reinforces the *Huffman* dissent’s concerns that a judiciary and a statute cannot control “the faculty, course of study or the end product” of law schools.<sup>292</sup> When facing *Pike* balancing, the state is required to show more than speculative benefits.<sup>293</sup> The present statute does not provide any assurance that Wisconsin students are better versed in Wisconsin law than their out-of-state colleagues.

Further, while the present diploma privilege’s supporters attempt to justify the regulation by virtue of the Wisconsin Supreme Court’s supervisory role, this justification is flawed. A state supreme court’s ability to regulate a bar is not at issue here,<sup>294</sup> but this argument misses the point. An ascertainable benefit must still be shown.<sup>295</sup> There is evidence that the Supreme Court of Wisconsin plays a supervisory role over academics and bar regulations,<sup>296</sup> but there is no evidence that they played a role in ensuring that Wisconsin law is a central component of the law schools’ curricula. In fact, during the Supreme Court of Wisconsin’s most notable intervention into the law schools’ educational requirements (the thirty-credit rule), the court acted to ensure that the curricula conformed to national educational standards.<sup>297</sup> However, even if the court plays such a role, the lack of language within the privilege indicating an orientation towards Wisconsin law is still problematic.

Admittedly, the “market participant” exemption may prove to be a

290. Christine Hurt, *The Diploma Privilege Suffers Seventh Circuit Setback*, THE CONGLOMERATE: BUS., L., ECON., SOC’Y (July 9, 2009), <http://www.theconglomerate.org/2009/07/the-wisconsin-diploma-privilege-suffers-seventh-circuit-setback.html>.

291. Gene R. Rankin, *Other States Should Catch Up to Wisconsin*, WIS. LAW., Vol. 75, No. 12 (Dec. 2002), [http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin\\_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118](http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=22118).

292. *Huffman v. Montana State Supreme Court*, 372 F. Supp 1175, 1185 (D. Mont. 1974) (East, J., dissenting) *aff’d*, 419 U.S. 955 (1974).

293. *Raymond Motor Transp., Inc., v. Rice*, 434 U.S. 429, 447 (1978).

294. *Sestic v. Clark*, 765 F.2d 655, 655 (7th Cir. 1985).

295. *Raymond*, 434 U.S. at 447.

296. See generally Rofes, *supra* note 225.

297. *Id.* at 794.

viable defense.<sup>298</sup> However, should this be the case, it is probable that Marquette's status as a private school will preclude its use of the privilege. While the amendments of the 1930s may be seen as honoring Marquette academics,<sup>299</sup> the continued use of the privilege, after implementing the market participant defense, would likely dishonor Marquette by creating a seemingly arbitrary distinction between graduates of the two law schools.<sup>300</sup>

There is a need to address a specific phrase that is circulating among the circles examining this case—the Wisconsin legal community, Wisconsin law schools, the ABA, and various colleges and universities. The phrase “Why diploma privilege works in Wisconsin,” or a phrase substantially similar, appears repeatedly among pieces dealing with this topic.<sup>301</sup> Some of the stated reasons for why the privilege “works” include: 1) Wisconsin is a small state with a relatively small bar, 2) a close relationship between the judiciary, bar, legislature, and law schools, 3) the public's esteem for the state's law schools, 4) the Supreme Court of Wisconsin's geographic proximity to the University of Wisconsin Law School, and 5) the supervisory role the Board of Examiners play.<sup>302</sup> While the first three of these points may be considered criteria for a model jurisdiction in which a diploma privilege regulation with a textually discernible benefit would thrive, they do not in and of themselves confer any form of educational benefit to the state or its bar that could satisfy *Pike*. If the fourth proposition, geographic proximity, were to be taken seriously, anyone who studied law at a hypothetical Northern Illinois University satellite campus in South Beloit, Illinois would be more qualified to practice in Wisconsin than an individual from Milwaukee by virtue of the town's proximity (South Beloit is twenty-three miles closer to Madison than is Milwaukee).<sup>303</sup> Finally, this note has gone at great length to demonstrate that there is no evidence that the Wisconsin law confers a discernible benefit on the state, let alone one that would outweigh the burden placed on interstate commerce. Where there is no established metric by which the Board of Examiners can determine that a Wisconsin-provided legal education makes a Wisconsin-trained attorney more versed in Wisconsin law than an extra-jurisdictionally trained attorney, no benefit

---

298. *Wiesmueller v. Kosobucki*, 571 F.3d 699, 706 (7th Cir. 2009). While it is well beyond the scope of this note to discuss the nuances of the market participant exemption, the market participant exemption describes a situation in which a state is acting as a producer or supplier of a marketable good or service in which otherwise constitutionally offensive behavior by the state is allowed. *See generally* *Reeves, Inc. v. Stakke*, 447 U.S. 429, 438–39 (1980).

299. *See generally* *Levine*, *supra* note 1.

300. *See* *Wiesmueller*, 571 F.3d at 707.

301. *See, e.g.*, *Moran*, *supra* note 4, at 654–55; *Rankin*, *supra* note 291.

302. *Id.*

303. Coincidentally, Milwaukee is a mere twenty-four miles closer to Madison than Northern Illinois University.

is discernible.

The present regulation provides insufficient guidance to demonstrate any discernible educational benefit. Both the text and history of Wisconsin's diploma privilege suggest reforms aimed toward conformity with national educational standards. Even though Wiesmueller has elected not to continue to pursue this claim, the issue is still very much alive.<sup>304</sup> However, Justice Brennan issued a warning on this very topic.<sup>305</sup> He warned that determining the constitutionality of a state regulation by the factual record created by a state's lawyers in trial would be in error, "for it would make the constitutionality of state laws and regulations depend on the vagaries of litigation rather than the judgments made by the State's lawmakers."<sup>306</sup> While the state may list various ancillary and post-hoc "perks" resulting from the statute, the fact remains that the present statute fails to provide a discernible educational benefit. Such incidental consequences of a regulatory scheme could perhaps be tolerated if they were on par with a compelling state interest such as health or safety, but here the incidental rewards do not further the state's interest and are certainly less than a state's interest in securing employment for its people.<sup>307</sup> Although the diploma privilege is intended to ensure a qualified bar through education, no discernible educational benefit exists in Wis. Sup. Ct. R. 40.03's present form.

### C. Potential Reforms

A reformed diploma privilege statute could conceivably pass review under the Dormant Commerce Clause. In fact, it may even be desirable in a state such as Wisconsin where 1) the state has a relatively small bar, 2) a close relationship exists between the judiciary, bar, legislature, and law schools, and 3) the public has high regard for the state's law schools.<sup>308</sup> Potential reforms are discussed below.

A court might uphold an extension of the diploma privilege that covered graduates of all ABA accredited law schools, the remedy initially sought by Mr. Wiesmueller. As in *Sestric*, this would actually encourage the interstate mobility of lawyers.<sup>309</sup>

However, Wisconsin would likely refrain from implementing this reform. This course of action might flood the Wisconsin legal market with

---

304. It is likely that Judge Crabb's concerns over adequate representation would be alleviated if an experienced class action litigator, perhaps a university attorney or a law professor, were to represent the same individuals in this case.

305. *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 680 (1981).

306. *Id.*

307. *Pike v. Bruce Church*, 397 U.S. 137, 146 (1970).

308. Moran, *supra* note 4, at 654–55 (conversely, the diploma privilege would not be ideal in a state such as California where there is a large population and several law schools).

309. *Sestric v. Clark*, 765 F.2d 655, 655 (7th Cir. 1985).



graduates from all accredited schools. Further, it is unlikely that this solution would be politically tenable as Wisconsin, and its bar, would find a horde of Illinoisans, Iowans, Minnesotans, and “UPers” crossing the state’s borders to practice law.

Alternatively, the state could amend the language by setting a “bar” at which the diploma privilege would be cut off. This could be achieved through some sort of ranking metric (such as the U.S. News and World Report). For example, Wis. Sup. Ct. R. 40.03 could be modified to read, “An applicant who has been awarded a first professional degree in law from a school that is fully, not provisionally, approved by the American Bar Association and ranked above number ‘x’ by survey ‘y.’”

However, this reform is equally unlikely. Law school rankings are somewhat fluid, arbitrary, and subject to manipulation by educational institutions.<sup>310</sup> Not only would this “solution” allow recent graduates and schools with no connection to Wisconsin to enjoy the privilege’s benefits, but it has the potential to offer a remedy that would escape Marquette and University of Wisconsin law graduates.

Alternatively, and most likely, Wisconsin could amend the statute to include the words “in Wisconsin law,” or some cognate of it to the courses listed in the thirty-credit rule. This could be achieved by Wisconsin requiring an explicitly “Wisconsin-oriented class” in the privilege’s list of mandatory courses. For example, Wis. Sup. Ct. R. 40.03(b) could become the “thirty-three-credit rule” and require an applicant to earn three credits in “Wisconsin Law 101.”

However, while providing a discernible Wisconsin-oriented education would provide a benefit that might pass *Pike* balancing, the addition of this curricular requirement may pose unforeseen problems. Should a college or university such as the University of Minnesota, a school that already engages in a tuition reciprocity program, elect to offer the same mandated education in Wisconsin law, it too would have a claim that Wisconsin imposed a seemingly arbitrary burden on interstate commerce. Another law school could conceivably conduct a cost-benefit analysis and determine that offering such Wisconsin-oriented classes required by a reformed version of the Wisconsin diploma privilege is in the school’s best interest. Admittedly, this is far more likely in “border schools” such as those in the Chicago area, or in the Minneapolis-St. Paul metropolitan area where it is more likely that the institutions’ students intend to practice in the state of Wisconsin. Indeed, such institutions may prove to be better, or more sympathetic, Dormant Commerce Clause challengers than Wiesmueller, a novice Oklahoma-trained attorney.

Despite the Wisconsin diploma privilege’s faults, it is far from doomed. If Wisconsin adopted either of the later two reforms, the regulation would

---

310. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 8, 2011, at BU1, available at <http://www.nytimes.com/2011/01/09/business/09law.html>.

demonstrate a discernible benefit that would justify the otherwise arbitrary consideration.<sup>311</sup> These reforms would not be without their own issues, but Wisconsin could amend the law to save the privilege its law school graduates enjoy.

## VI. CONCLUSION

In an era of renewed debate over the utility of bar examinations,<sup>312</sup> the diploma privilege may serve as an innovative means of bar regulation. However, Wisconsin's present privilege is unconstitutional because the regulation provides no basis through which a discernible benefit may contribute to its intended purpose—ensuring a qualified bar through legal education. Undoubtedly, studying in Madison or Milwaukee provides one with unique experiences. A student at a Wisconsin school may get to “Jump Around” during a football game at Camp Randall, or they may even end up marrying the person who dresses up as the Golden Eagle at Marquette basketball games. However, these unique experiences, taken at face value, do not make an individual more qualified to be an attorney. In fact, they have nothing to do with legal education. Rather, the language of a viable diploma privilege statute must provide a discernible educational benefit that differentiates a Wisconsin law school provided education from other schools.

While lobbying for the privilege's abolition may be unpopular, Wisconsin should seriously consider abolishing the diploma privilege rather than reforming it. Consider all of the potential reforms discussed in the previous section. Do any of them provide a constitutional means through which a more qualified Wisconsin bar may be achieved without jeopardizing the Wisconsin law schools, Marquette and University of Wisconsin law students, or attorneys already admitted to the Wisconsin bar? There does not appear to be a reform that would not harm one of these constituencies.

Thus, while Wisconsin's diploma privilege may be trapped with the best of intentions—promoting a more qualified bar through legal education<sup>313</sup>—one simply cannot ignore an inherent political reality. Various constituencies benefit greatly from the present diploma privilege. Wisconsin's diploma privilege confers benefits to in-state constituencies, while making it effectively impossible for non-Wisconsin law schools and law students, who chose not to study in America's Dairyland, to comply with the regulation and enjoy its benefits. Admittedly, there is nothing conceptually unconstitutional with a diploma privilege *per se*. However,

---

311. *Raymond Motor Transp., Inc., v. Rice*, 434 U.S. 429, 447 (1978).

312. See, e.g., Linda Jellum & Emmeline Paulette Reeves, *Cool Data on a Hot Issue: Empirical Evidence That A Law School Bar Support Program Enhances Bar Performance*, 5 NEV. L.J. 646, 647 (Spring 2005) (acknowledging the debate over bar examinations' merit).

313. Levine, *supra* note 1.

some form of change is required. Does the State of Wisconsin really want to open its doors to the detriment of its law schools, law students, and attorneys?



