

Bar Admission Rules and Foreign Lawyers: U.S. State Barriers Challenged in a Global Economy

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Introduction

The global economy has underscored the need for transnational legal services. If the United States seeks to become an example of free trade and trade liberalization, U.S. State Supreme Courts need to reexamine their traditional sub-national antagonism toward foreign attorneys and foreign law graduates with respect to providing these constituents with an equal opportunity to enter the legal profession in the United States by removing *non-rational* barriers. Non-rational barriers have no *necessary* relation to the competency and educational quality that foreign attorneys possess, yet State Supreme Courts continue to exclude foreign attorneys and graduates solely because they lack an American Bar Association ("ABA") accredited law degree.

This paper seeks to highlight the need for global legal services and examine how the traditional framework used by most State Supreme Court rules falls short of this global, national and state public interest. An assessment of the current exclusions against foreign lawyers and law graduates by most U.S. states will be examined under the equal protection and due process clauses of the Fourteenth Amendment together with a look at the role of the Supremacy Clause under Article VI given the recent ratification of North American Trade Agreement (NAFTA) between U.S., Mexico, and Canada.

Globalization of Legal Services

There is little doubt that the integration and growth of world trade has created a demand for international legal services.¹ Between 1986 and 1993, for example, U.S. *exports* of legal services increased from \$97 to \$1453 million. U.S. *imports* of legal services over the same period increased from \$40 to \$326 million.² The growth in legal services globally, however, has been either thwarted or restricted by both local and national bar associations, including those in the United States.³

While global trade has certainly highlighted the need for attorney admission beyond their home jurisdictions, local and national barriers that bar foreign attorneys and foreign law graduates, in particular by the U.S., have resulted in higher legal costs for global clients and inefficiencies in legal services. "The most visible effect of governmental regulation of legal services is that it typically results in the establishment of a cartel in the domestic legal services market—complete with high barriers to entry, restrictive practices, and monopoly pricing."⁴ In short, U.S. State Supreme Courts, for the most part, have continued to maintain barriers not only against foreign attorneys, but also against foreign law graduates who seek to take their bar examinations. "In fact, the United States has been among the most protectionist in this area, for many years refusing to allow even the existence of foreign legal consultants."⁵ Justice Shirely S. Abrahamson, in a dissenting opinion of the Supreme Court of Wisconsin's ruling in *In the Matter of the Bar Admission of: Yotvat Adi Altshuler*, 171 Wis. 2d 1 (1992), expressed not only her disapproval of the standard of review used by the court to dismiss a foreign law applicant's appeal against the Wisconsin Board of Bar Examiners, but also her concern with the ABA's Section on Legal Education and Bar Admission, a committee she was a member for some ten years. Her opinion states:

[h]aving been a member of the council of the Section for approximately 10 years, I have a high regard for its work and for its members. I believe, however, that its rules keeping foreign-trained individuals from access to state bar examinations are too narrow and rigid; they are not suited to the global economy in which we now live.⁶

Prior to 1973, citizenship was required by every state before anyone could be admitted to the bar of any state's jurisdiction.⁷ Although citizenship requirements were dismantled in the U.S. Supreme Court's decision *In re Griffiths*, 413 U.S. 717 (1973), foreign attorneys and foreign law graduates in many states are still required to complete three years of law school in the U.S.—usually at an ABA approved law school in addition to having to pass the bar examination before being permitted to fully practice law in such state.

While these requirements appear to impose unreasonable or even draconian hurdles in front of foreign bar applicants to many U.S. State jurisdictions, constitutionally, all U.S. states have *retained* the right to regulate admission to their state bars. Historically, the states that preceded the formation of the Union under the Constitution had already established their own legal professions with courts and lawyers—though at a primitive level. As the states were still ahead of the new Union with respect to regulatory controls, it is perhaps by default that the Constitution did not intrude upon a state's power to regulate its own legal profession.

Other sources have agreed that the constitutional foundation of state authority over the legal profession is a simple result of our nation's history.

The states pre-existed the union formed by the Constitution in 1787. The states all had courts and they all had legal professions, even if the bar at that early time was embryonic compared with its modern configuration. The early federal government had problems enough establishing its authority in foreign affairs and policy toward the western territories and in the relationship between the federal judiciary and the state court systems. Regulation of the legal profession, such as it was, remained with the states as a matter of tradition and by default. It remains there.⁸

Under the Tenth Amendment of the U.S. Constitution, "[t]he powers not delegated to the United States by the Constitution, are reserved to the States respectively, or to the people."⁹ In other words, the federal government does not have the constitutional power to intrude upon state rights in the area of attorney certification and admission. At best, the federal government can only use its influence to "encourage" states to liberalize their rules with respect to their legal profession.¹⁰ In *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957), U.S. Supreme Court Justice Frankfurter stated:

From the thirteenth century to this day, in England the profession itself has determined who should enter it. In the United States the courts exercise ultimate control. But while we have nothing comparable to the Inns of Court, with us too the profession itself, through appropriate committees, has long had a vital interest, as a sifting agency, in determining the fitness, and above all the moral fitness, of those who are certified to be entrusted with the fate of the courts . . . [a]dmission to practice in a State and before its courts necessarily belongs to the State."¹¹

The state's power to regulate entry into its legal profession is however subject to judicial review should a state adopt arbitrary and indiscriminate practices against otherwise qualified individuals. In *Schwartz*, the U.S. Supreme Court ruled that there must be a "rational connection" between an individual's

capacity to practice law and the regulations. That is, to indiscriminately bar an individual who is otherwise qualified and morally fit to practice law would run counter to the Court's ruling violating an individual's *due process* or *equal protection* under the Fourteenth Amendment.¹²

Due Process

The U.S. Supreme Court's ruling in *Schware* is significant authority in establishing that states are subject to judicial review when their bar admission rules or practices violate the due process or equal protection clause of the Fourteenth Amendment. As the Court plainly held in that case "[a] state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."¹³ Although foreign lawyers or graduates are not citizens of the United States, their application to take a state's bar examination falls under the jurisdiction of a given state, and it could be argued that they are "persons" for purposes of due process and equal protection under the Fourteenth Amendment. This argument receives even greater weight when placed alongside the Supreme Court's decision in *In Re Griffiths*, where the Court overruled a state's attempt to use citizenship as a requirement for admission to that state's bar.¹⁴

In *Dent v. West Virginia*, 129 U.S. 114 (1889), the Supreme Court stated "[i]t is sufficient, for the purposes of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates. . . ."¹⁵ Although it *seems* that those states who apply the ABA law-degree rule to their bar examinations present such rules to all candidates, the rule presupposes that *only* an ABA law degree can promote a state's interest. In this context, the rule excludes candidates with substantially equal legal education, and as such, a state that applies this rule does not apply its legislation generally. Under the *Dent* test, therefore, it is argued that due process rights are violated when a state excludes—under a per se standard—those candidates who have either foreign or domestic legal degrees that are substantially equal to an ABA law degree.

Under the due process clause, when a state policy deprives a person of life, liberty or property, that person is entitled to a fair process to determine the basis for or legality connected to such a state policy. In *Schware*, the Court held that "[a] state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."¹⁶ States which exclusively use the ABA law degree to determine eligibility have de facto created an apparent rational connection between the ABA law degree and their state policy; namely, to promote ethical and competent lawyers within their jurisdictions. Of course, this apparent rational connection is defined too narrowly when juxtaposed against many foreign lawyers and law graduates who can evidence substantially equivalent legal training relative to ABA-approved JD graduates. As such, a state policy relying *exclusively* on the ABA-approved law degree to promote state policy places non-rational burdens upon foreign trained lawyers; therefore, running counter to the due process protections under the Fourteenth Amendment of the U.S. Constitution.

If a foreign lawyer or law graduate can prove that their fitness and capacity to take a state's bar examination is substantially equal to an ABA law graduate, then it is argued, that they would have grounds under the due process parameters outlined in *Schware*, to take any state's U.S. bar examination assuming all other requirements were met. This conclusion relies on the essential element in *Schware*: namely, establishing a "rational connection" between a state policy and an applicant's fitness to promote a state policy. As such, any state with a bar requirement that will only permit ABA law school graduates to enter a given bar examination bears a heavy burden to demonstrate that the ABA route to the bar examination is the only possible way to advance a state's interest, namely, to protect the public from unethical or incompetent lawyers.

It seems difficult to justify a state's exclusion of foreign lawyers or graduates on the grounds that they hold non-ABA law degrees when many states such as California, and many U.S. ABA-approved law schools utilize the services of private organizations or agencies to evaluate foreign legal credentials either for admission to a bar examination or to enter a U.S. law school. World Education Services ("WES") in New York City, for example, is called upon by countless foreign lawyers and graduates to evaluate their foreign legal education for states like California, New York, and others. WES is also recommended by countless U.S. ABA law schools for evaluation services. ABA law schools for example, use WES to assist them in reaching a determination for admission of foreign-educated applicants. Given the persuasiveness of establishing the equivalency of foreign legal credentials by State Bar Associations and U.S. ABA law schools, it appears untenable for some states like New Jersey and Georgia among others, to expressly require all candidates for admission to their bar examination to hold an ABA law degree first. State Supreme courts like Massachusetts have made it clear that they have and will use their judicial powers to review *do novo* an applicant's request to take a bar examination rather than delegate final authority either to state statute or board decision.¹⁷ This is particularly the case with respect to foreign attorneys and law graduates. In one such case, the court noted that "[w]e observed that, because the ABA does not evaluate foreign law schools for accreditation, 'it is reasonable to provide an alternative approval system for foreign law school graduates.'"¹⁸

Because foreign lawyers and graduates have proven that they can meet a state's educational standard—which is substantially equivalent to an ABA JD—restricting or excluding foreign applicants *per se* on the grounds that they lack an ABA law degree first would appear to violate the due process clause of the Fourteenth Amendment.

Equal Protection

Foreign lawyers and foreign law graduates may have standing to seek potential remedies under the equal protection clause of the Fourteenth Amendment on grounds that stipulate that no state can make any law "nor deny to any person within its jurisdiction the equal protection of the laws."¹⁹ *Unlike* the Privileges and Immunities Clause of Article IV, where Article IV, Sec. 2 states "[t]he citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States," the Fourteenth Amendment places its emphasis on "any person," rather than "citizen."

Under the U.S. Supreme Court's ruling in *In Re Griffiths*, the Court restated its decision from *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)²⁰ that held "a lawfully admitted resident alien is a 'person' within the meaning of the Fourteenth Amendment's directive that a State must not deny to any person within its jurisdiction the equal protection of the laws."²¹ It could be argued that foreign lawyers and law graduates may fall within the meaning of a "person" given that their application to enter a given state's bar falls under the jurisdiction of that state's Supreme Court.

Those states that base their educational requirement to take their bar examination exclusively upon obtaining an ABA law degree first *de facto* create a *classification* of ABA and non-ABA law graduates. Non-ABA graduates include both U.S. law schools and *foreign* law schools. By creating such a classification, these states bear the heavy burden of proving that a necessary and unique link exists between the classification and some overriding state or governmental interest. *In Re Griffiths*, the Court held "a State which adopts a suspect classification bears a heavy burden of justification . . . a burden which, though variously formulated, requires the State to meet certain standards of proof."²²

When a state policy effectively creates a classification between ABA and non-ABA bar candidates, when the latter group is also inherently based on national origin, then a "suspect classification," arises. The Court has held that "[c]lassifications based on race or national origin have been held to be "suspect," that is, the "justices will use 'strict scrutiny' to determine whether the law is invidious."²³

Foreign lawyers and graduates have obtained their legal training in a foreign jurisdiction. In the U.S., most states rely exclusively on the acquisition of an ABA law degree first in order to meet the educational standard to enter a bar examination. Consequently, a foreign lawyer is *per se* barred from the benefits afforded to the ABA law graduate. This bar is not based upon an applicant's capacity or ability to promote the state's interest but solely on whether the applicant holds an ABA law degree. Since the ABA only accredits U.S. law schools, the ABA excludes all foreign law graduates. In effect, national origin is part and parcel of a state's policy for bar admission.

When a "suspect classification," is evident, the Supreme Court will provide equal protection guarantees under a "strict scrutiny" or "compelling interest" test.²⁴ What is at issue here is whether advancing a state's interest to protect the public from unqualified or incompetent legal representation can *only* be achieved by obtaining an ABA law degree. It is argued that there exist, at the very minimum, common law countries which can produce both practicing lawyers and law graduates that present substantially equivalent legal training, education and experience that meet the qualitative legal education of a newly minted ABA-approved JD educated graduate. The Supreme Court has stated that "[e]ven in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory."²⁵ Thus, when a foreign applicant who seeks to take a state's bar examination can demonstrate substantial equivalency relative to an ABA JD, a state will have a very difficult task meeting its burden that *only* ABA JD's can support the state interest it seeks to advance.

International Treaties: NAFTA & The Supremacy Clause

Recent international treaties such as NAFTA highlight the growing pressure on states to liberalize entry into their legal professions. Chapter twelve of the NAFTA treaty obligates the U.S., Mexico, and Canada to formulate a structure for future negotiations to liberalize their legal professional barriers against foreign lawyers and foreign law graduates within NAFTA.²⁶ Constitutionally, however, NAFTA raises legal issues with respect to international treaties and traditional state powers.

Under Article VI, Sec. 2, the Supremacy Clause of the U.S. Constitution, states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and that Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding."²⁷ The U.S. Supreme Court made it very clear in *Hauestein v. Lynham*, 100 U.S. 483 (1879) that international treaties between the United States and other countries preempted any state power to the contrary. "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a State legislature can stand in its way."²⁸ If there was any doubt about whether international treaties between the U.S. and other countries preempted state powers, *Hauestein* firmly established that treaties, like the Constitution, were the supreme law of the land.²⁹

While *Hauestein* established that treaties between the US and other nations override any contrary state power or legislation, the Supreme Court has identified two types of treaties; namely, executory and self-executory.³⁰ Executory treaties require "implementing legislation" before they can take effect. Conversely, self-executory treaties are already ratified by Congress and take effect immediately upon all states. NAFTA seems to fall within a gray area. On the one hand, Congress ratified NAFTA, and in many areas, especially with respect to tariffs on goods, the treaty does take effect upon ratification. On the other hand, the more recent *trade in service* category, was not incorporated into NAFTA with any precise legislation from Congress other than that the U.S. agreed with Canada and Mexico to pursue a timetable to merely create a structure for further negotiations for liberalizing transnational legal services between the NAFTA signatories. As such, NAFTA has not created any imposing or supreme legislation upon the states to liberalize their bar-entry requirements. The trade in services element of NAFTA without any further Congressional legislation, would lack the teeth necessary to force any nationwide changes in bar entry rules. This state of affairs was addressed as early as 1929 by the U.S. Supreme Court in *Foster v. Neilson*, 27 U.S. 253 (1829), where the Court held that:

[o]ur constitution declares a treaty to be a law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses

itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.³¹

NAFTA merely requires the U.S. to pursue negotiations with Mexico and Canada to establish a structure for future negotiations. In its current form, NAFTA is unquestionably leaving the liberalizing of the legal profession, at least at this time, to the professional bodies (e.g., State Supreme Courts, Provinces and in Mexico, the government), to merely structure a framework for negotiations.³² However, it could be argued that if the U.S. had expressly agreed to reform its legal profession within the body of the treaty, then the U.S. states, under the Supremacy Clause, would have to follow NAFTA—not to structure future negotiations within the legal profession, but instead focus on the actual *implementation* of reform. Under *Foster*, where a treaty is silent on any act or requirement upon the states, Congress must pass legislation imposing the will of the treaty upon the states.

Commerce Clause

Interestingly, the U.S. Constitution's commerce clause³³ does give the federal government the authority to prevent states from discriminating unreasonably against interstate and foreign commerce.³⁴ But in recent years, the commerce clause powers have been blurred by non-tariff issues relating to *trade in services* (such as legal services) rather than goods.

While there is no federal legislation relating to bar admission since this is a state power, the commerce clause may assume a more direct role upon states if it can be shown that the cost of regulating, or as some would argue, protecting, local state bars creates more harm than good on an interstate level.³⁵ Simply, by harm we mean higher costs and less choice for the public in terms of legal services, especially as it applies to companies doing business nationally and internationally. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the Court held that:

[i]n thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.³⁶

Undoubtedly states have retained their power to regulate admission to their bar. Notwithstanding this power, however, if a reasonable non-discriminatory policy is available, then exclusive reliance upon the ABA law degree first to protect a state's interest would violate the commerce clause. States do have an alternative policy to assess the legal training and education of foreign lawyers, namely, foreign evaluation services throughout the U.S. As discussed previously, this alternative accreditation option is pervasive throughout the U.S. legal community. Thus, it is not unreasonable for states to integrate an

alternative policy to avoid undermining interstate commerce between those states that have established policies to review foreign applicants and those states which rely exclusively on the ABA accreditation coverage.

In the pre-World War II era, given the undeveloped technology, and undeveloped global economy, each state could rationally claim that protecting its public interest was local enough to avoid the majority's concern in *Dean Milk* of interfering with interstate commerce; however, the explosion in technology and the surge in national and global trade have created clients with state, national, and international needs. Thus, a state's exclusion of foreign lawyers and graduates when pursued in a discriminatory fashion would highlight the inconsistency outlined in *Dean Milk*. That is, instances of local state bar rules hurting clients both in state and out of state by increasing the cost of legal services, and forcing clients to employ different layers of lawyers to meet different layers of state bar admission rules. This concern was expressed in the majority opinion in *Dean Milk*, "[t]o permit Madison to adopt a regulation not essential for the protection of local health interests and placing a discriminatory burden on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."³⁷

Justice Black, who presented the dissent in *Dean Milk*, presents a view that would suggest that the commerce clause has no jurisdiction on purely local matters that states traditionally have controlled. "Since the days of Chief Justice Marshall, federal courts have left states and municipalities free to pass bona fide health regulations subject only 'to the paramount authority of Congress if it decides to assume control. . . ." ³⁸ Unless Congress were to pass legislation creating a national bar, or some other reform mitigating a state's power to regulate its bar admission laws, it is submitted that the U.S. Supreme Court would be reluctant to preempt state powers where both constitutional history and Congressional silence have laid the foundation for state control—notwithstanding any adverse effects on interstate commerce.

The emergence of the service sector economy within the context of the global economy has increased the significance of this component of gross national product resulting in more difficult trade negotiations on the international level. This is primarily because some of the service economy is regulated on the sub-national level beyond the traditional scope and powers of the U.S. Commerce Clause. "These non-tariff and new area topics of negotiation are matters in which sub-federal governments are active regulators. Constraining sub-federal actors in the U.S., Canada, and other economically powerful federations may be more important to world welfare than constraining central government action in smaller nations."³⁹

While State Supreme Courts currently retain the power to regulate entry into their legal profession, what these state actors must acknowledge is that the federal government's attempt to negotiate International Treaties will place direct pressure on this traditional autonomy. "For our purposes the point is that one day it may dawn on the state courts that significant decisions driven by treaty and economics have reshaped access to the practice of law."⁴⁰

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End Notes

¹ Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 Minn. J. Global Trade 159, (Winter 1993).

² Michael J. Chapman, Paul J. Tauber, *Liberalizing International Trade In Legal Services: A Proposal For An Annex On Legal Services Under The General Agreement On Trade In Services*, 16 Mich. J. Int'l L. 941, 946 (Spring 1995).

³ Flores, *supra* note 1, at 159.

⁴ Tauber, *supra* note 2, at 954.

⁵ Julie Barker, *The North American Free Trade Agreement and The Complete Integration of the Legal Profession: Dismantling The Barriers to Providing Cross Border Legal Services*, 19 Hous. J. Int'l. L. 95, 99 (Fall 1996).

⁶ *In re Yotvat Adi Altshuler*, 171 Wis. 2d 1, 25 (1992).

⁷ Barker, *supra* note 3, at 125.

⁸ *Symposium: The Future of State Supreme Courts As Institutions In The Law: Commentary: State Supreme Courts as Regulators Of The Profession*, 72 Notre Dame L. Rev. 1155, 1177 (May 1997).

⁹ U.S. CONST. amend. X.

¹⁰ Barker, *supra* note 3, at 142.

¹¹ *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 248 (1957).

¹² *Id.* at 238-239.

¹³ *Id.* at 238.

¹⁴ *In re Griffiths*, 413 U.S. 717 (1973).

¹⁵ *Dent v. West Virginia*, 129 U.S. 114, 124 (1888).

¹⁶ See *Board of Bar Examiners of New Mexico*, 353 U.S. at 239.

¹⁷ Wei Jia v. Board of Bar Examiners, 427 Mass. 777, 782 (1998).

¹⁸ *Id.* at 783.

¹⁹ U.S. CONST. amend. XIV, §1.

²⁰ Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

²¹ *In Re Griffiths*, 413 U.S. at 719.

²² *Id.* at 721.

²³ Nowak & Rotunda, *supra* note at 16, §14.5.

²⁴ *Supra* at 637.

²⁵ See *Board of Bar Examiners of New Mexico*, 353 U.S. at 239.

²⁶ Barker, *supra* note 5, at 101.

²⁷ U.S. CONST. art. VI, §2.

²⁸ Hauestein v. Lynham, 100 U.S. 483, 488 (1879).

²⁹ *d.* at 489.

³⁰ Nowak & Rotunda, *supra* note 16, at §6.7.

³¹ Foster v. Neilson, 27 U.S. 253, 314 (1829).

³² Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, 5 Minn. J. Global Trade 159, 188 (Winter 1996).

³³ U.S. CONST. arts. 1 & 8, cl. 3.

³⁴ Matt Schaefer, Symposium - *Institutions For International Economic Integration: Are Private Remedies In Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?*, 17 J. Int'l. L. Bus., 615, 609 (Winter 1996).

³⁵ Nowak & Rotunda, *Supra* note 16, at §8.2.

³⁶ *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353 (1951).

³⁷ *Id.* at 356.

³⁸ *Id.* at 358.

³⁹ Schafer, *supra* note 18, at 614.

⁴⁰ See *Supra* note 8, at 1173.