
RAISING THE BAR: HOW THE SEVENTH CIRCUIT NEARLY STRUCK DOWN THE DIPLOMA PRIVILEGE UNDER THE DORMANT COMMERCE CLAUSE

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INTRODUCTION

The dormant Commerce Clause and state bar admission rules are in conflict. On the one hand, the dormant Commerce Clause prohibits states from engaging in economic protectionism.¹ On the other hand, states design bar admission rules in large part to promote the economic interests of in-state lawyers.² Courts have nonetheless deferred to state licensing restrictions on the practice of law.³ One common licensing restriction is the bar examination—a form of economic protectionism.⁴ Most states require prospective lawyers to take and pass their bar examination.⁵ Wisconsin, however, allows certain law school

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¹ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

² Andrew M. Perlman, *A Bar Against Competition: The Unconstitutionality of Admission Rules For Out-of-State Lawyers*, 18 GEO. J. LEGAL ETHICS 135, 146–50 (2004).

³ *See Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam).

⁴ Michael J. Thomas, *The American Lawyer's Next Hurdle: The State-Based Bar Examination System*, 24 J. LEGAL PROF. 235, 249 (2000).

⁵ *See* NATIONAL CONFERENCE OF BAR EXAMINERS & AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2009,

graduates admission to the Wisconsin bar by virtue of the diploma privilege.⁶

Put simply, the Wisconsin diploma privilege grants graduates of both the University of Wisconsin Law School and Marquette University Law School admission to the Wisconsin bar without examination.⁷ Not only do recipients of the diploma privilege avoid the bar examination, but they also incur fewer expenses compared to bar exam applicants who prudently enroll in a bar review course. Unlike graduates of the two Wisconsin law schools, graduates of other ABA-accredited law schools who desire to practice in Wisconsin must take and pass the Wisconsin bar examination.⁸ In *Wiesmueller v. Kosobucki*, a law student at a non-Wisconsin law school challenged the Wisconsin diploma privilege under the Commerce Clause of the United States Constitution.⁹ Because the activities of lawyers play an important part in commercial intercourse,¹⁰ the diploma privilege must comply with the constraints of the Commerce Clause.¹¹

This comment considers whether the Wisconsin diploma privilege impermissibly constrains the mobility of lawyers in violation of the Commerce Clause.¹² Part I sketches the contextual background of both the diploma privilege and the dormant Commerce Clause. Part II reviews the facts, procedural history, and reasoning of the Seventh

http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/CompGuide_2009.pdf.

⁶ See WIS. SUP. CT. R. 40.03.

⁷ See WIS. SUP. CT. R. 40.03.

⁸ See WIS. SUP. CT. R. 40.04.

⁹ 571 F.3d 699, 701 (7th Cir. 2009).

¹⁰ Supreme Court of N.H. v. Piper, 470 U.S. 274, 281 (1985) (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 788 (1975)).

¹¹ See Scariano v. Justices of Supreme Court of State of Ind., 38 F.3d 920, 923 (7th Cir. 1994).

¹² Recent law graduates can gain admission to the Wisconsin bar by virtue of the diploma privilege or through the Wisconsin bar examination. WIS. SUP. CT. R. 40.03–04. Also, licensed attorneys who satisfy the proof of practice elsewhere requirement can gain admission to the Wisconsin bar without examination. WIS. SUP. CT. R. 40.05. This comment focuses on the admission procedures available to recent law graduates.

Circuit's opinion in *Wiesmueller v. Kosobucki*. Part III discusses the effects of the diploma privilege on Wisconsin and argues that the state does not arbitrarily discriminate between beneficiaries and non-beneficiaries of the diploma privilege. Finally, Part III subjects the diploma privilege to the *Pike* balancing test and argues that adversely affected in-state interests guarantee that the diploma privilege is no more burdensome than is necessary to achieve its intended purpose.

I. GENERAL CONTEXT: THE DIPLOMA PRIVILEGE AND THE DORMANT COMMERCE CLAUSE

A. *The Diploma Privilege*

In 1842, Virginia enacted the first diploma privilege statute that allowed graduates of two Virginia law schools—William and Mary College and the University of Virginia—admission to the Virginia bar without examination.¹³ Initially, many law schools favored the diploma privilege as a means to entice prospective students to obtain a formal legal education.¹⁴ Since 1842, thirty-two states and the District of Columbia have granted one of three variations of the diploma privilege: a universal diploma privilege, in which the state admits graduates from any United States law school; a state university diploma privilege, in which the state admits only graduates of the state's law school; or a statewide diploma privilege, in which the state admits graduates of any law school within the state.¹⁵

In 1870, shortly after the University of Wisconsin established a law school, the Wisconsin state legislature enacted a provision conferring the diploma privilege on graduates of the state university.¹⁶ Two different theories have been advanced for this enactment. One

¹³ Thomas W. Goldman, *Use of the Diploma Privilege in the United States*, 10 TULSA L.J. 36, 39 (1974) [hereinafter Thomas Goldman].

¹⁴ *Id.*

¹⁵ Beverly Moran, *The Wisconsin Diploma Privilege: Try It, You'll Like It*, 2000 WIS. L. REV. 645, 646 (2000).

¹⁶ Richard A. Stack, Jr., *Commentary, Admission upon Diploma to the Wisconsin Bar*, 58 MARQ. L. REV. 109, 118 (1975).

theory proposes that Wisconsin sought to attract students to the University of Wisconsin who were flocking to Michigan.¹⁷ Another plausible explanation rests on Wisconsin's preference for formal training over the minimal amount required to satisfy the in-court oral examination then in existence.¹⁸

In 1897, the Wisconsin state legislature abandoned the state university diploma privilege and enacted a universal diploma privilege.¹⁹ This provision was short-lived and, in 1903, the Wisconsin state legislature returned to a state university privilege.²⁰ Following the repeal of a nationwide privilege, law school graduates could gain admission to the Wisconsin bar in one of three ways: (1) by virtue of a diploma from the law school at the University of Wisconsin; (2) through the state bar examination; or (3) by proof of practice elsewhere for five of the prior eight years in another jurisdiction.²¹ In 1933, despite opposition from the faculty at Marquette University Law School,²² the Wisconsin state legislature extended the diploma privilege to Marquette graduates.²³

As bar associations mobilized in the early and mid-1900s, state interest in the diploma privilege steadily declined.²⁴ In 1921, the American Bar Association formally denounced the diploma privilege, stating: “[t]he American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an

¹⁷ John McDill Fox, *Preface to Carl Zollman, Diploma Privilege in Wisconsin*, 11 MARQ. L. REV. 73, 73 (1927).

¹⁸ See Moran, *supra* note 15, at 646; Stack, *supra* note 16, at 118 n.28.

¹⁹ Stack, *supra* note 16, at 119.

²⁰ *Id.*

²¹ In re Admission of Certain Persons to the Bar, 247 N.W. 877, 877 (Wis. 1933) (per curiam).

²² Carl Zollman, *Diploma Privilege in Wisconsin*, 11 MARQ. L. REV. 73, 78 (1927).

²³ Stack, *supra* note 16, at 118 n.28.

²⁴ In 1917, twenty-two schools honored the diploma privilege. Thomas Goldman, *supra* note 13, at 41. By 1948, only thirteen schools honored the diploma privilege. *Id.* at 42.

examination by public authority to determine his fitness.”²⁵ Presumably, many states ceased honoring the diploma privilege out of a fear of losing ABA-accreditation.²⁶ Despite opposition from the American Bar Association, the Wisconsin Supreme Court maintained confidence in the state’s two law schools and retained the diploma privilege.²⁷ In 1954, the Legal Education and Bar Admissions Committee of the Wisconsin Bar Association conducted a thorough study to determine whether the Wisconsin diploma privilege was detrimental to the training and education of lawyers at the two Wisconsin law schools.²⁸ The committee voted in favor of retaining the diploma privilege.²⁹ Most notably, the committee determined that law school faculty were in a better position to test and evaluate an applicant’s qualifications for the practice of law than an examining board; that a change in the diploma privilege would lower present teaching standards by requiring an undue emphasis on bar examination preparation; and that education in Wisconsin ranked high nationally, both in terms of legal education and professional competency.³⁰

Like other states, regulating admission to the practice of law in Wisconsin vests exclusively in the state supreme court.³¹ Wisconsin’s diploma privilege remained virtually unchanged until the Wisconsin Supreme Court proposed stricter graduation requirements for the two Wisconsin law schools in 1971.³² Before the proposal, graduates of the two Wisconsin law schools gained admission to the Wisconsin bar

²⁵ *Id.* at 41. The American Bar Association and the National Conference of Bar Examiners reaffirmed this position in 1971. Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191, 1201 (1995).

²⁶ See *In re Yanni*, 697 N.W.2d 394, 400 n.7 (S.D. 2005).

²⁷ Stack, *supra* note 16, at 123.

²⁸ *Id.* at 123–24.

²⁹ *Id.* at 124.

³⁰ *Id.* at 124–125.

³¹ State ex rel. State Bar of Wis. v. Keller, 114 N.W.2d 796, 801 (Wis. 1962), *vacated*, 374 U.S. 102 (1963); see also WIS. CONST. art. VII, § 3.

³² Moran, *supra* note 15, at 649.

simply by earning a diploma.³³ In 1971, the Wisconsin Supreme Court repealed and recreated the diploma privilege rule.³⁴ After additions to the rule by the Wisconsin Supreme Court in 1973,³⁵ applicants seeking admission to the Wisconsin bar by virtue of the diploma privilege were now required to complete the thirty-credit and sixty-credit rules,³⁶ for a minimum of eighty-four credits.³⁷

The thirty-credit and sixty-credit rules ensure that students seeking admission to the practice of law in Wisconsin by virtue of the diploma privilege take certain courses that prepare them to be competent attorneys.³⁸ Under the sixty-credit rule, applicants must complete a minimum of sixty semester credits in an enumerated list of about thirty subjects.³⁹ Further, applicants must satisfy the thirty-credit rule, which requires completion of at least thirty of the sixty semester credits in ten subject matter areas.⁴⁰ Diploma privilege applicants must complete the mandatory and elective credits in “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

³³ See WIS. STAT. § 256.28 (1969) (repealed 1971).

³⁴ See WIS. STAT. § 256.28 (1971).

³⁵ Peter K. Rofes, *Mandatory Obsolescence: The Thirty Credit Rule and the Wisconsin Supreme Court*, 82 MARQ. L. REV. 787, 806 n.57 (1999).

³⁶ See WIS. SUP. CT. R. 40.03.

³⁷ See WIS. SUP. CT. R. 40.03(1).

³⁸ Lorenzo A. Trujillo, *The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69, 95 (2007).

³⁹ WIS. SUP. CT. R. 40.03(2)(a). The subjects are 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. *Id.*

⁴⁰ WIS. SUP. CT. R. 40.03(2)(b). The subjects 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.*

courts and administrative agencies of the United States and this state.”⁴¹

The thirty-credit and sixty-credit rules represented a major shift in the diploma privilege. In 1971, three other states—Mississippi, Montana, and West Virginia—honored the diploma privilege.⁴² Admission to the practice of law in these states by virtue of the diploma privilege merely required the production of a diploma.⁴³ By contrast, the Wisconsin Supreme Court imposed mandatory and elective curriculum requirements on diploma privilege applicants.⁴⁴ Quite simply, “Wisconsin has the most restrictive diploma privilege [rule] ever written.”⁴⁵

Today, Wisconsin remains the only state to honor the diploma privilege.⁴⁶ Wisconsin also grants licensure to applicants who demonstrate legal competency through the bar examination or proof of practice elsewhere.⁴⁷ The proof of practice elsewhere rule requires applicants to have practiced law for three of the prior five years in another jurisdiction which has reciprocity with Wisconsin.⁴⁸ Applicants seeking admission to the Wisconsin bar through the state bar examination or proof of practice elsewhere are not subject to the thirty-credit and sixty credit rules.⁴⁹

⁴¹ WIS. SUP. CT. R. 40.03(2).

⁴² Thomas Goldman, *supra* note 13, at 42.

⁴³ *Id.*

⁴⁴ *See* WIS. SUP. CT. R. 40.03.

⁴⁵ Thomas Goldman, *supra* note 13, at 42.

⁴⁶ Trujillo, *supra* note 38, at 94. In 2006, Franklin Pierce Law Center in New Hampshire implemented an alternative licensure program similar to the Wisconsin diploma privilege. *Id.* Students who complete this program may gain admission to the practice of law in New Hampshire without taking the full bar examination. *Id.*

⁴⁷ *See* WIS. SUP. CT. R. 40.04–05.

⁴⁸ WIS. SUP. CT. R. 40.05.

⁴⁹ *See* WIS. SUP. CT. R. 40.04–05.

B. The Dormant Commerce Clause

The Commerce Clause of the United States Constitution empowers Congress “[t]o regulate Commerce . . . among the several States.”⁵⁰ By its terms, the Commerce Clause is a grant of authority to Congress, not an explicit limitation on the power of the States.⁵¹ However, the United States Supreme Court has recognized that the Commerce Clause also contains an implied limitation on the power of the States to interfere with or impose burdens on interstate commerce.⁵² This negative implication is known as the dormant Commerce Clause.⁵³ Despite the lack of explicit textual justification for the dormant Commerce Clause in the Constitution, the decisions of the United States Supreme Court on this point reflect “a course of adjudication unbroken though the Nation’s history.”⁵⁴

The fundamental objective of the dormant Commerce Clause is to preserve a national market for competition undisturbed by state regulatory measures that benefit in-state economic interests by burdening out-of-state competitors.⁵⁵ In short, the dormant Commerce Clause prohibits economic protectionism.⁵⁶ Justice Jackson’s famous words illustrate the central importance of federal control over interstate and foreign commerce:

Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his

⁵⁰ U.S. CONST. art. I, § 8, cl. 3.

⁵¹ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

⁵² *See, e.g., Welton v. State of Mo.*, 91 U.S. 275, 280–82 (1875); *Cooley v. Board of Wardens*, 53 U.S. 299, 318–19 (1851).

⁵³ *United Haulers Ass’n, Inc.*, 550 U.S. at 338.

⁵⁴ *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

⁵⁵ *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

⁵⁶ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988).

exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.⁵⁷

Still, the dormant Commerce Clause does not invalidate all state restrictions on commerce relating to the health, life, and safety of their citizens, even though the legislation might incidentally affect national commerce.⁵⁸

Consistent with these principles, the United States Supreme Court has adopted a two-tiered approach to analyzing state economic regulation under the dormant Commerce Clause.⁵⁹ When a state statute directly regulates or discriminates⁶⁰ against interstate commerce, or when the statute's effect favors in-state economic interests over out-of-state interests, the Court generally strikes down the statute under a virtual *per se* rule of invalidity.⁶¹ The burden to show discrimination⁶² rests on the party challenging the validity of the statute.⁶³ Once this burden is met, the state must demonstrate that a

⁵⁷ *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 537, 539 (1949).

⁵⁸ *Gen. Motors Corp.*, 519 U.S. at 306.

⁵⁹ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986).

⁶⁰ The term “discrimination” means “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

⁶¹ *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 338 (1979); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978). *But see Maine v. Taylor*, 477 U.S. 131, 151–52 (1986) (upholding Maine’s ban on the importation of live baitfish because the regulation, despite discriminating on its face against interstate trade, served legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives).

⁶² A state statute can constitute economic protectionism on proof of either discriminatory effect or discriminatory purpose. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981).

⁶³ *Hughes*, 441 U.S. at 336.

legitimate local purpose cannot be adequately served by reasonable nondiscriminatory means.⁶⁴ In effect, the Court applies strict scrutiny.⁶⁵

In contrast, the Court applies less scrutiny when a state advances legitimate objectives for a nondiscriminatory regulation.⁶⁶ The Court in *Pike v. Bruce Church, Inc.* articulated the general contours of the nondiscrimination standard:

Where the statute regulates even-handedly 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. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.⁶⁷

For purposes of constitutional inquiry, courts treat judiciary-approved bar admission rules as legislation.⁶⁸ The bifurcated approach to analyzing bar admission rules under the dormant Commerce Clause poses significant challenges to the judiciary because no clear line

⁶⁴ *Id.*

⁶⁵ See *Or. Waste Sys., Inc.*, 511 U.S. at 101 (describing the first tier standard as the “strictest scrutiny”); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994) (describing the first tier standard as “rigorous scrutiny”); *Taylor*, 477 U.S. at 144 (describing the first tier standard as “the strictest scrutiny”).

⁶⁶ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 583 n.16 (1997) (referring to the *Pike* test as a more deferential standard); *City of Philadelphia*, 437 U.S. at 624 (referring to the *Pike* test as a much more flexible approach); Catherine Gage O’Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, 34 SAN DIEGO L. REV. 571, 574 (1997) (describing the *Pike* test as a relaxed standard).

⁶⁷ 397 U.S. 137, 142 (1970) (citation omitted).

⁶⁸ *Scariano v. Justices of Supreme Court of State of Ind.*, 38 F.3d 920, 923 (7th Cir. 1994).

separates the category subject to the virtual *per se* invalid test and the category subject to the *Pike* balancing test.⁶⁹ Applying the appropriate test ultimately requires consideration of the overall effect of the rule on both local and interstate activity.⁷⁰

II. WIESMUELLER V. KOSOBUCKI

Christopher Wiesmueller attended Oklahoma City University School of Law, an ABA-accredited law school in Oklahoma City, Oklahoma.⁷¹ Unlike graduates of the two Wisconsin law schools, graduates of Oklahoma City University School of Law who desire to practice in Wisconsin must take and pass the Wisconsin bar examination.⁷² Prior to graduation, Wiesmueller commenced a civil action against the Director of the Wisconsin Board of Bar Examiners, John Kosobucki.⁷³ He alleged that the Wisconsin diploma privilege, available to graduates of Wisconsin's ABA-accredited law schools but not to graduates of other ABA-accredited law schools, deprived him of his rights secured under the Commerce Clause.⁷⁴

A. *The First District Court Opinion*

In the district court, Wiesmueller filed a motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, claiming that the diploma privilege discriminated against interstate commerce.⁷⁵ Judge Shabaz of the United States District Court for the Western District of Wisconsin first analyzed whether Wisconsin's diploma

⁶⁹ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

⁷⁰ *Id.*

⁷¹ *Wiesmueller v. Kosubucki* [sic], 492 F. Supp. 2d 1036, 1037 (W.D. Wis. 2007).

⁷² *Id.* at 1038.

⁷³ *Id.* Wiesmueller also named as defendants members of both the Wisconsin Board of Bar Examiners and the Wisconsin Supreme Court. *Id.* at 1037–38.

⁷⁴ *Id.* at 1037.

⁷⁵ *Id.*

privilege discriminated against interstate commerce or regulated evenhandedly with only incidental effects on interstate commerce.⁷⁶ He reasoned that the rule treated residents and non-residents alike and did not discriminate against interstate commerce.⁷⁷

Having found an even-handed regulation, Judge Shabaz then considered whether the burden imposed on interstate commerce was clearly excessive in relation to the putative local benefits.⁷⁸ He reasoned that requiring graduates of law schools not in Wisconsin to show their familiarity with Wisconsin law was reasonable in light of Wisconsin's interest in regulating the legal profession.⁷⁹ Further, without any discussion, Judge Shabaz concluded that, based on the reasoning in *Sestric v. Clark*⁸⁰ and *Scariano v. Justices of Supreme Court of State of Indiana*,⁸¹ requiring graduates of all law schools to take the state bar examination except graduates of the two Wisconsin law schools did not violate the Commerce Clause.⁸² The district court denied Wiesmueller's motion for summary judgment.⁸³

About one week later, Judge Shabaz entertained the defendants' motion to dismiss Wiesmueller's complaint on the pleadings.⁸⁴ Having found that the Wisconsin bar admission rules did not violate the Commerce Clause, Judge Shabaz determined that the defendants were entitled to judgment as a matter of law and granted their motion to dismiss.⁸⁵ Additionally, Judge Shabaz denied as moot Wiesmueller's

⁷⁶ *Id.* at 1038.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1039 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

⁷⁹ *Id.*

⁸⁰ 765 F.2d 655 (7th Cir. 1985).

⁸¹ 38 F.3d 920 (7th Cir. 1994).

⁸² *Wiesmueller*, 492 F. Supp. 2d at 1039.

⁸³ *Id.*

⁸⁴ *Weismueller [sic] v. Kosubucki [sic]*, No. 07-C-211-S, 2007 WL 4882649, at *1 (W.D. Wis. June 28, 2007).

⁸⁵ *Id.*

pending motion to certify a class action.⁸⁶ Wiesmueller appealed the district court's judgment.⁸⁷

B. The First Seventh Circuit Opinion

Shortly after filing his notice of appeal, Wiesmueller passed the Wisconsin bar examination; consequently, the Seventh Circuit dismissed his claims as moot because the object of his suit—licensure in Wisconsin—was now attained.⁸⁸ Nonetheless, the Seventh Circuit held that Wiesmueller could appeal the district court's denial of class certification, which was not moot because "if a class is certified, its members (unless they opt out of the class), and not just the named plaintiff, are bound by the judgment."⁸⁹

The Seventh Circuit determined that the district court failed to consider whether the proposed class met the criteria set forth in Federal Rule of Civil Procedure 23.⁹⁰ According to the Seventh Circuit, the district court never ruled on the merits of the motion for class certification because it erroneously assumed that ruling on the merits of the suit rendered the motion moot.⁹¹ The Seventh Circuit reversed the district court's denial of class certification and remanded the case for further proceedings.⁹²

C. The Second District Court Opinion

Following the first decision in the Seventh Circuit, Corrine Wiesmueller and Heather Devan, two Wisconsin residents who recently graduated from Oklahoma City University School of Law,

⁸⁶ *Id.*

⁸⁷ *Wiesmueller v. Kosobucki*, 513 F.3d 784, 785 (7th Cir. 2008).

⁸⁸ *Id.*

⁸⁹ *Id.* at 786.

⁹⁰ *Id.* at 787. Federal Rule of Civil Procedure 23 governs class action law suits. *See* FED. R. CIV. P. 23.

⁹¹ *Wiesmueller*, 513 F.3d at 787.

⁹² *Id.*

intervened as plaintiffs.⁹³ Christopher Wiesmueller withdrew as a plaintiff and appeared as attorney for the newly substituted plaintiffs.⁹⁴ On remand, Judge Crabb of the United States District Court for the Western District of Wisconsin confined the court's review to whether a class should be certified for purposes of pursuing an appeal of the prior district court's order dismissing the plaintiffs' claims.⁹⁵ She determined that the plaintiffs satisfied the requirements for class certification under Federal Rule of Civil Procedure 23; thus, Judge Crabb certified the plaintiffs' proposed class.⁹⁶ Judge Crabb also dismissed the plaintiffs' Commerce Clause challenge on the basis of the first district court's opinion.⁹⁷ The plaintiffs appealed.⁹⁸

D. The Second Seventh Circuit Opinion

Writing for the panel, Judge Posner first considered whether the plaintiffs lacked standing to sue.⁹⁹ The defendants argued that the plaintiffs lacked standing to sue because any judicial relief would not make them better off.¹⁰⁰ According to the defendants, the plaintiffs would still be subject to the Wisconsin bar examination because they had not completed sufficient credit hours in the specified types of courses in law school classes that included Wisconsin law.¹⁰¹ The

⁹³ Wiesmueller v. Kosubucki [sic], 251 F.R.D. 365, 367 (W.D. Wis. 2008).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 367–68. The certified class consisted of all 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. *Id.* at 368.

⁹⁷ *Id.* at 367.

⁹⁸ Wiesmueller v. Kosobucki, 571 F.3d 699, 701 (7th Cir. 2009).

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ Brief of Defendants-Appellees at 21–22, Wiesmueller v. Kosobucki, 571 F.3d 699 (7th Cir. 2009) (No. 08-2527).

Seventh Circuit rejected the defendants' argument, noting that unequal treatment can be eliminated without conferring any benefit on those challenging the rule.¹⁰² The Seventh Circuit further determined that, if the court invalidated the diploma privilege, Wisconsin might instead require all applicants to take a continuing legal education course in lieu of a bar examination, which would give the plaintiffs most of the relief they seek.¹⁰³

Finding the redressability requirement met, the Seventh Circuit next addressed the merits.¹⁰⁴ According to Judge Posner, "[g]raduates of accredited law schools in states other than Wisconsin who would like to practice law in that state are at a disadvantage vis-à-vis graduates of Wisconsin's two law schools."¹⁰⁵ Unlike graduates of Wisconsin's two law schools, graduates of other ABA-accredited law schools seeking admission to the Wisconsin bar must either have practiced law for five years in another state or have passed the Wisconsin bar examination.¹⁰⁶ For applicants seeking admission through the bar examination, the amount of preparation time and costs were significant.¹⁰⁷ Judge Posner concluded that the diploma privilege rule implicated the dormant Commerce Clause since it influenced an aspiring lawyer's decision where to attend law school.¹⁰⁸

The Seventh Circuit discussed the Supreme Court's two-tiered approach to analyzing state economic regulation under the dormant Commerce Clause and suggested that the diploma privilege rule implicated the *Pike* balancing test.¹⁰⁹ According to Judge Posner, the diploma privilege favored the economic interests of the Wisconsin law schools; nonetheless, the diploma privilege only indirectly affected interstate commerce and regulated evenhandedly because both the

¹⁰² *Wiesmueller*, 571 F.3d at 702.

¹⁰³ *Id.* at 702–03.

¹⁰⁴ *Id.* at 703.

¹⁰⁵ *Id.* at 701.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 705.

¹⁰⁹ *Id.* at 703.

diploma privilege and admission to Wisconsin law schools were not limited to state residents.¹¹⁰

But, the court found itself in an “evidentiary vacuum created by the early termination of the case by the grant of a motion to dismiss.”¹¹¹ If Wisconsin law was no greater part of the curriculum of the two Wisconsin law schools than other ABA-accredited law schools, then the diploma privilege “create[d] an arbitrary distinction between graduates of the two Wisconsin law schools and graduates of other accredited law schools.”¹¹² This distinction, according to Judge Posner, burdened interstate commerce.¹¹³ Because the plaintiffs had no opportunity to justify this distinction, the Seventh Circuit remanded the case to allow the plaintiffs to build an evidentiary record.¹¹⁴

Despite the court’s reluctance to issue a ruling, Judge Posner suggested that Wisconsin law did not occupy a larger place in the curriculum at the two Wisconsin law schools than at other ABA-accredited law schools.¹¹⁵ He noted that Wisconsin law schools used the same casebooks and other teaching materials as other ABA-accredited law schools.¹¹⁶ Moreover, because no graduates of the Wisconsin law schools took the state bar examination, Judge Posner concluded that the faculty had less incentive to test them on Wisconsin law.¹¹⁷ Citing portions of the diploma privilege rule, the defendants argued that the rule expressly mandated that the curriculum of the Wisconsin law schools include Wisconsin law.¹¹⁸ The Seventh Circuit rejected this assertion, finding no provisions in the rule to support a curriculum saturated in Wisconsin law.¹¹⁹ Judge Posner reasoned that

¹¹⁰ *Id.* at 703–04.

¹¹¹ *Id.* at 704.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 707.

¹¹⁵ *Id.* at 704.

¹¹⁶ *Id.* at 705.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

this interpretation of the rule was consistent with Wisconsin's proof of practice elsewhere procedure, which did not require any knowledge of Wisconsin law, and the Wisconsin bar examination, which included the Multistate Professional Responsibility Examination and the Multistate Essay Examination.¹²⁰

Judge Posner also rejected the defendants' argument that the diploma privilege rule gave the Wisconsin Supreme Court a supervisory role so that it could assure a curriculum oriented toward Wisconsin law.¹²¹ Judge Posner found no evidence in the record or the diploma privilege rule to support this role.¹²² He also refuted the argument that the Wisconsin Supreme Court, by virtue of creating the diploma privilege, entrusted only the two local law schools to prepare its students for the practice of law in Wisconsin.¹²³

Finally, the court rejected the defendants' argument that the market participant doctrine exempted the Wisconsin bar admission rules from Commerce Clause scrutiny.¹²⁴ The market participant doctrine allows states to engage in otherwise discriminatory practices so long as the state acts as a market participant rather than a market regulator.¹²⁵ A state acting as a market participant is not subject to the restraints of the Commerce Clause.¹²⁶ The Seventh Circuit rejected the defendants' argument because the diploma privilege applied equally to Marquette University Law School, a private institution.¹²⁷ In short, even in the face of Judge Posner's skepticism, the Seventh Circuit remanded the case to allow the plaintiffs the opportunity to show that

¹²⁰ *Id.* at 706.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984).

¹²⁶ *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983).

¹²⁷ *Wiesmueller*, 571 F.3d at 707.

Wisconsin law made up a greater part of the curriculum at the two Wisconsin law schools than at other ABA-accredited law schools.¹²⁸

III. ANALYSIS

The Seventh Circuit's analysis in *Wiesmueller v. Kosobucki* is important in many respects. Most significantly, Judge Posner suggested that the diploma privilege burdened interstate commerce in violation of the dormant Commerce Clause.¹²⁹ Subjecting the diploma privilege to the appropriate level of review under the dormant Commerce Clause doctrine reveals that it survives constitutional scrutiny. Part A of this section justifies the diploma privilege. Part B of this section subjects the diploma privilege to the Supreme Court's two-tiered test and argues that adversely affected in-state interests result in a permissible burden under the *Pike* balancing test.

A. *The Diploma Privilege and Its Putative Local Benefits*

The American legal profession considers competency as one of its core values.¹³⁰ Each state has a compelling interest in guaranteeing that lawyers practicing within their borders possess a minimum level of competence.¹³¹ States can ensure a minimum level of competence by subjecting prospective lawyers to high standards so long as the standards comply with certain constitutional mandates.¹³² By guaranteeing a minimum level of competence, states can protect its citizens from subpar legal representation, as many citizens may be unable to adequately assess the competence of lawyers on their

¹²⁸ *Id.*

¹²⁹ *Id.* at 704.

¹³⁰ Sara J. Lewis, Note, *Charting the "Middle" Way: Liberalizing Multijurisdictional Practice Rules for Lawyers Representing Sophisticated Clients*, 22 GEO. J. LEGAL ETHICS 631, 646 (2009).

¹³¹ *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975).

¹³² *Schwabe v. Bd. of Bar Exam'rs*, 353 U.S. 232, 239 (1957).

own.¹³³ The power to prescribe qualifications for admission to the practice of law has traditionally been left exclusively to the states.¹³⁴ In Wisconsin, the power to regulate the practice of law vests exclusively in the Wisconsin Supreme Court.¹³⁵ The diploma privilege is an exercise of this judicial ruling-making authority.¹³⁶

The Wisconsin Supreme Court did not expressly address the benefits of the diploma privilege when proposing and implementing it. One commentator argues that the absence of an express purpose behind the diploma privilege's creation contributes to the rule's shortcomings.¹³⁷ Others, however, believe the diploma privilege furthers Wisconsin's interest in licensing lawyers—that is, guaranteeing that only competent lawyers practice within its border.¹³⁸ Defendants in *Wiesmueller* argued that the diploma privilege was designed to ensure competency in the practice of law, including familiarity in Wisconsin's rules and statutes.¹³⁹ This view is consistent with the undisputed fact that only Wisconsin law schools systematically instruct in Wisconsin law.

Even though the University of Wisconsin and Marquette University are law schools of national stature,¹⁴⁰ the curriculum at both schools includes Wisconsin law, not simply the rules and principles of substantive and procedural law common across American states.¹⁴¹ Indeed, the thirty-credit and sixty-credit rules mandate a

¹³³ Lewis, *supra* note 130, at 647; *see also* *In re Griffiths*, 413 U.S. 717, 731 (1973) (Burger, C.J., dissenting) (lawyers enjoy a “broad monopoly . . . to do things other citizens may not lawfully do”).

¹³⁴ *See* *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam).

¹³⁵ *In re Bar Admission of Anderson*, 715 N.W.2d 586, 587 (Wis. 2006) (per curiam); *see also* WIS. CONST. art. VII, § 3–4.

¹³⁶ *See* WIS. SUP. CT. R. 40.03.

¹³⁷ Rofes, *supra* note 35, at 807–12.

¹³⁸ *See* Trujillo, *supra* note 38, at 95–97; Moran, *supra* note 15, at 649–51; Stack, *supra* note 16, at 21.

¹³⁹ Brief of Defendants-Appellees, *supra* note 101, at 36.

¹⁴⁰ *See* *Wiesmueller v. Kosobucki*, 571 F.3d 699, 705 (7th Cir. 2009).

¹⁴¹ Gene R. Rankin, *No. Other States Should Catch up to Wisconsin*, WISCONSIN LAWYER, Dec. 2002, available at

curriculum oriented in both national and Wisconsin law.¹⁴² In addition to doctrinal courses, students at the two Wisconsin law schools take clinical and other skills training courses that incorporate Wisconsin law.¹⁴³ The diploma privilege also encourages knowledge in a wide range of legal subjects under the thirty-credit and sixty-credit rules rather than the limited number of courses traditionally tested on the bar examination.¹⁴⁴ Significantly, the Wisconsin Supreme Court deems these subject matter areas fundamental to practicing law.¹⁴⁵

http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_Lawyer&template=/CM/ContentDisplay.cfm&CONTENTID=48646#con (arguing that certain areas of the law are unique to Wisconsin, which both in-state law schools emphasize); Eric Goldman, *Wisconsin Diploma Privilege Ruling Comments—Wiesmueller v. Kosobucki*, GOLDMAN'S OBSERVATIONS, July 29, 2009, http://blog.ericgoldman.org/personal/archives/2009/07/wisconsin_diplo.html [hereinafter Eric Goldman] (noting that Wisconsin's law schools emphasize both national and Wisconsin law).

¹⁴² WIS. SUP. CT. R. 40.03(2) (“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*.” (emphasis added)).

¹⁴³ See MARQUETTE UNIVERSITY LAW SCHOOL, COURSE DESCRIPTIONS 2007–2008, <http://law.marquette.edu/s3/site/images/current/courseDescriptions06.pdf>; University of Wisconsin Law School, *Clinical Education & Skills Training*, <http://www.law.wisc.edu/academics/clinics/clinicaleducationskillstraining.html> (last visited Nov. 15, 2009).

¹⁴⁴ Moran, *supra* note 15, at 652.

¹⁴⁵ One member of the Wisconsin Supreme Court noted:

The diploma privilege makes good sense for Wisconsin. The Wisconsin Supreme Court (in charge of attorney admissions) is very familiar with the two excellent A.B.A. accredited schools in Wisconsin. . . . Both schools have high standards for admission and graduation. To qualify for the diploma privilege, students must take certain courses (determined by our court as being fundamental) and achieve a certain average score for those courses. In short, we have confidence in the quality of graduates from these two schools. . . . Wisconsin should not be viewed as the last to retain the diploma privilege; I like to think of Wisconsin as the leader on this issue, not the holdout.

Judge Posner's narrow view of the curriculum at the two Wisconsin law schools derived in part from the admission without examination procedure. According to Judge Posner, the faculty has less incentive to teach Wisconsin law since no graduates of these law schools take the bar examination.¹⁴⁶ However, legal educators prepare students to not only pass a bar examination but also practice law.¹⁴⁷ Because graduates of the two Wisconsin law schools often practice in Wisconsin, the faculty has an incentive to prepare students for actual practice in the state and teach them Wisconsin law.¹⁴⁸ Also, a number of faculty members at the University of Wisconsin Law School and Marquette University Law School formerly practiced or currently practice in Wisconsin, and these faculty members likely emphasize local statutes and rules applicable to the subject matter covered.¹⁴⁹

Beyond producing competent graduates knowledgeable in both national and local law, the diploma privilege also indirectly benefits Wisconsin. For example, the diploma privilege increases contact between the Wisconsin Supreme Court and the two Wisconsin law schools, thereby promoting relationships between the judiciary and law school graduates.¹⁵⁰ These relationships allow the Wisconsin Supreme Court to determine whether the breadth of legal education at the two Wisconsin law schools measures up to the court's expectations and whether graduates in fact possess the requisite competency and

Howard Bashman, *20 Questions for Chief Justice Shirley S. Abrahamson of the Supreme Court of Wisconsin*, HOW APPEALING, Sept. 13, 2004, http://howappealing.law.com/20q/2004_09_01_20q-appellateblog_archive.html.

¹⁴⁶ *Wiesmueller v. Kosobucki*, 571 F.3d 699, 705 (7th Cir. 2009).

¹⁴⁷ Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 271 (2007).

¹⁴⁸ See Moran, *supra* note 15, at 651; Eric Goldman, *supra* note 141.

¹⁴⁹ See Marquette University Law School, *Faculty & Staff*, <http://law.marquette.edu/cgi-bin/site.pl?10927> (last visited Nov. 15, 2009); University of Wisconsin Law School, *Faculty & Staff*, <http://www.law.wisc.edu/faculty/> (last visited Nov. 15, 2009); see also *Shenfield v. Prather*, 387 F. Supp. 676, 687 (N.D. Miss. 1974) (three-judge panel).

¹⁵⁰ Moran, *supra* note 15, at 654.

moral character to practice law.¹⁵¹ Moreover, the diploma privilege benefits consumers by increasing the number of practicing attorneys in Wisconsin.¹⁵² Increasing the number of lawyers in Wisconsin lowers prices for legal services and provides consumers the freedom to choose their own lawyer.¹⁵³

B. The Diploma Privilege and a Deferential Standard of Review

In addition to determining the putative local benefits of a challenged rule, the dormant Commerce Clause doctrine instructs a reviewing court to apply the appropriate standard of review.¹⁵⁴ A heightened level of review applies when a rule directly regulates or discriminates against interstate commerce.¹⁵⁵ This level of review is known as the virtual *per se* rule of invalidity test.¹⁵⁶ In contrast, when a rule regulates even-handedly, a relaxed standard, commonly referred to as the *Pike* balancing test, applies.¹⁵⁷ Applying the appropriate level of review is critical since these two tests produce disparate results.¹⁵⁸ The *Pike* balancing test is the appropriate level of review when assessing the constitutionality of the diploma privilege under the dormant Commerce Clause.

¹⁵¹ See *id.*; Bashman, *supra* note 145.

¹⁵² See Moran, *supra* note 15, at 655 (noting that Wisconsin has a relatively small practicing bar); Eric Goldman, *supra* note 141 (arguing that the diploma privilege encourages graduates of the two Wisconsin law schools to practice in Wisconsin).

¹⁵³ Lewis, *supra* note 130, at 649–50; see *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (“lawyers are essential to the primary governmental function of administering justice”).

¹⁵⁴ See *Scariano v. Justices of Supreme Court of State of Ind.*, 38 F.3d 920, 926 (7th Cir. 1994).

¹⁵⁵ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986).

¹⁵⁶ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

¹⁵⁷ *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970).

¹⁵⁸ See *Scariano*, 38 F.3d at 926.

1. The Diploma Privilege Lacks a Discriminatory Purpose or Effect

Underlying the virtual *per se* rule of invalidity test is the assumption that the challenged regulation has a discriminatory purpose or effect.¹⁵⁹ Of course, the notion of “discrimination” under the dormant Commerce Clause rests on a comparison of in-state benefits and burdens with out-of-state benefits and burdens.¹⁶⁰ The diploma privilege neither facially nor effectually discriminates against commerce because the purported burden and corresponding benefit under the rule—requiring graduates of other ABA-accredited law schools to sit for the Wisconsin bar examination while exempting graduates of the two Wisconsin law schools from it—applies to both residents and nonresidents alike.¹⁶¹ As the Seventh Circuit recognized in *Wiesmueller*,¹⁶² nonresidents may attend one of the Wisconsin law schools and receive admission to the Wisconsin bar by virtue of the diploma privilege.¹⁶³ Conversely, residents of Wisconsin who attend an out-of-state law school and desire admission to the Wisconsin bar must take and pass the Wisconsin bar examination.¹⁶⁴ In short, the diploma privilege affords no preference to in-state interests over out-of-state interests.

More significantly, the diploma privilege lacks any differential treatment between similarly situated persons.¹⁶⁵ Prior to *Wiesmueller*, no litigant has ever challenged the diploma privilege under the Commerce Clause. Instead, litigants relied on the Equal Protection Clause and argued that the diploma privilege created an arbitrary distinction between eligible and ineligible recipients of the diploma

¹⁵⁹ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981).

¹⁶⁰ O’Grady, *supra* note 66, at 583.

¹⁶¹ *See Tolchin v. Supreme Court of the State of N.J.*, 111 F.3d 1099, 1107–08 (3d Cir. 1997) (holding that New Jersey’s bar admission rules were not subject to the heightened level of dormant Commerce Clause review because the rules affected both residents and nonresidents equally).

¹⁶² 571 F.3d 699, 703–04 (7th Cir. 2009).

¹⁶³ *See* WIS. SUP. CT. R. 40.03.

¹⁶⁴ *See* WIS. SUP. CT. R. 40.04.

¹⁶⁵ *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

privilege by excusing only the former from the bar examination.¹⁶⁶ Like prior challenges to the diploma privilege, the plaintiffs in *Wiesmueller* appeared to complain not about the burdens of having to take the bar examination, but about a purported unfair advantage that graduates of the two Wisconsin law schools had over graduates of other ABA-accredited law schools.¹⁶⁷ Consistent with the plaintiffs' contention, Judge Posner suggested that the diploma privilege created an arbitrary distinction between graduates of the two Wisconsin law schools and graduates of other ABA-accredited law schools.¹⁶⁸

Generally, this claim is most naturally assessed under the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁹ Nonetheless, similar to the Equal Protection doctrine,¹⁷⁰ any notion of discrimination under the dormant Commerce Clause assumes a comparison of substantially similar entities.¹⁷¹ This central assumption has often remained ignored in the Commerce Clause jurisprudence of the Supreme Court.¹⁷² Under Wisconsin's diploma privilege rule, graduates of the two Wisconsin law schools and graduates of other ABA-accredited law schools are unequally situated.

¹⁶⁶ See, e.g., *Shenfield v. Prather*, 387 F. Supp. 676, 679 (N.D. Miss. 1974) (three-judge panel); *Huffman v. Mont. Supreme Court*, 372 F. Supp. 1175, 1176 (D. Mont. 1974) (three-judge panel), *aff'd mem.*, 419 U.S. 955 (1974); *Goetz v. Harrison*, 462 P.2d 891, 893 (Mont. 1969).

¹⁶⁷ See Brief of Plaintiff-Appellants at 10, *Wiesmueller v. Kosobucki*, 571 F.3d 699 (7th Cir. 2009) (No. 08-2527).

¹⁶⁸ *Wiesmueller v. Kosobucki*, 571 F.3d 699, 704 (7th Cir. 2009).

¹⁶⁹ See *Sestric v. Clark*, 765 F.2d 655, 661 (7th Cir. 1985) (explaining that the plaintiff's real objection to the Illinois bar admission rule is "that it creates an arbitrary distinction between experienced new residents and equally experienced nonresidents by excusing the former from the bar exam required of the latter," which "is a claim most naturally assessed under the Equal Protection Clause of the Fourteenth Amendment").

¹⁷⁰ *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) (quoting *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (noting that the Equal Protection Clause of the Fourteenth Amendment means that all persons similarly situated should be treated alike)).

¹⁷¹ *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997).

¹⁷² *Gen. Motors Corp.*, 519 U.S. at 298-99.

Underlying the arbitrary distinction theory advanced by Judge Posner is the assumption that graduates of the two Wisconsin law schools and graduates of other ABA-accredited law schools receive an equal legal education. However, unlike the Wisconsin Supreme Court, which imposes the thirty-credit and sixty-credit rules on diploma privilege applicants,¹⁷³ the American Bar Association does not dictate curriculum requirements for purposes of accreditation.¹⁷⁴ Instead, the American Bar Association merely requires substantial instruction in:

- (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
- (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
- (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
- (4) other professional skills generally regarded as necessary for effective responsible participation in the legal profession; and
- (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.¹⁷⁵

The differences in curriculum requirements renders graduates of the two Wisconsin law schools and graduates of other ABA-accredited law schools unequally situated for purposes of the dormant Commerce Clause.¹⁷⁶ Absent a comparison of similarly-situated objects, the

¹⁷³ See WIS. SUP. CT. R. 40.03.

¹⁷⁴ See Stack, *supra* note 16, at 128.

¹⁷⁵ AMERICAN BAR ASSOCIATION, 2009–2010 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS, <http://www.abanet.org/legaled/standards/2009-2010%20StandardsWebContent/Chapter3.pdf>.

¹⁷⁶ See *Gen. Motors Corp.*, 519 U.S. at 310 (rejecting the claim that the state's differential treatment between sales of gas by domestic utilities and sales of gas by other entities violated the Commerce Clause because the enterprises were not similarly situated); *Shenfield v. Prather*, 387 F. Supp. 676, 686–87 (N.D. Miss. 1974) (three-judge panel) (holding that differences in curriculum requirements and content at the University of Mississippi School of Law and other law schools

heightened level of review under the dormant Commerce Clause doctrine does not apply.¹⁷⁷

While Wisconsin limits the diploma privilege to graduates of Wisconsin's two law schools,¹⁷⁸ an out-of-state law school could conceivably comply with the requirements of the thirty-credit and sixty-credit rules and incorporate Wisconsin law into its curriculum.¹⁷⁹ Under these circumstances, graduates of the out-of-state law school and graduates of Wisconsin's two law schools would appear similarly situated. Still, Wisconsin could deny the out-of-state graduate admission to the Wisconsin bar by virtue of the diploma privilege without discriminating against interstate commerce.¹⁸⁰ Courts have continuously upheld state licensing restrictions limiting admission to the state bar to graduates of ABA-accredited law schools.¹⁸¹ The basis of these decisions rests on administrative efficiency.¹⁸² Similarly, the

provided a rational basis to exempt only graduates of the former from the Mississippi bar examination).

¹⁷⁷ See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting) ("Disparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated.").

¹⁷⁸ See WIS. SUP. CT. R. 40.03.

¹⁷⁹ See Stack, *supra* note 16, at 128 n.63.

¹⁸⁰ See *id.*

¹⁸¹ See, e.g., *Hackin v. Lockwood*, 361 F.2d 499, 504 (9th Cir. 1966) (holding that the Arizona bar admission rule restricting bar admission to graduates of an accredited law school was not arbitrary, capricious, or unreasonable); *Nordgren v. Hafter*, 616 F. Supp. 742, 755 (S.D. Miss. 1985) (holding that the unequal treatment or classification between graduates of ABA-accredited law schools and graduates of non-ABA-accredited law schools is justified under the rational basis test since it serves the interest of the state in arriving at an objective measure of the quality of legal training of its prospective lawyers).

¹⁸² Seeking uniform and measurable admission standards, the Florida Supreme Court discussed the rationale underlying the ABA-accreditation requirement:

We were persuaded to follow the American Bar Association standards relating to accreditation of law schools because we sought to provide an objective method of determining the quality of the educational environment of prospective attorneys. This was deemed especially

Wisconsin Supreme Court cannot ensure that the curricula at other ABA-accredited law schools meet the requirements of Wisconsin Supreme Court Rule 40.03.¹⁸³ The inability of the Wisconsin Supreme Court to determine whether out-of-state law schools comply with the thirty-credit and sixty-credit rules and incorporate Wisconsin law into their curricula would provide a constitutionally sufficient basis for limiting the diploma privilege to graduates of Wisconsin's law schools,¹⁸⁴ especially in light of Wisconsin's compelling interest in regulating its bar.¹⁸⁵

2. Under the *Pike* Balancing Test, Adverse Effects upon Wisconsin Residents Mean a Permissible Burden on Commerce

Since the diploma privilege does not purposefully or effectually discriminate against interstate commerce, the appropriate level of review under the dormant Commerce Clause doctrine is the *Pike* balancing test.¹⁸⁶ The *Pike* balancing test has become the proverbial constitutional rule for nondiscriminatory analysis, despite criticism in approach and uncertainty in application.¹⁸⁷ Both Justice Scalia and Justice Thomas describe the *Pike* balancing inquiry as a policy-laden,

necessary because of the rapid growth in the number of educational institutions awarding law degrees. We wished to be certain that each of these many law schools provided applicants with a quality legal education, but we were unequipped to make such a determination ourselves because of financial limitations and the press of judicial business.

LaBossiere v. Fla. Bd. of Bar Exam'rs, 279 So. 2d 288, 289 (Fla. 1973).

¹⁸³ See Rankin, *supra* note 141 (extending the diploma privilege to other law schools "may sound easy on the surface, but operationally the process would be terribly difficult").

¹⁸⁴ See Stack, *supra* note 16, at 128 n.63.

¹⁸⁵ See Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975).

¹⁸⁶ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁸⁷ David S. Day, *Revisiting Pike: The Origins of the Nondiscrimination Tier of the Dormant Commerce Clause Doctrine*, 27 *HAMLIN L. REV.* 45, 60 (2004).

legislative function, which the courts are ill-suited to perform.¹⁸⁸ In essence, the ad hoc balancing approach requires courts to act as “super-legislatures.”¹⁸⁹ The Supreme Court in *Department of Revenue of Kentucky v. Davis* declined to apply the *Pike* inquiry altogether, noting that the judiciary is institutionally unsuited to draw reliable conclusions necessary for the *Pike* standard.¹⁹⁰ Likewise, some lower courts echo a similar reluctance to apply the *Pike* balancing test.¹⁹¹ Judge Posner in *Wiesmueller* noted 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.”¹⁹² *Pike* nonetheless identified three different components of the nondiscrimination standard: (1) the burden imposed on interstate commerce; (2) the putative local benefits; and (3) and available nondiscriminatory alternatives.¹⁹³

The purported burden under the diploma privilege rule is the bar examination.¹⁹⁴ Unlike diploma privilege recipients, graduates of non-Wisconsin law schools who desire to practice law in Wisconsin must

¹⁸⁸ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348–49 (2007) (Scalia, J., concurring in part); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 619 (1997) (Thomas, J., dissenting).

¹⁸⁹ Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 441–42 (1981).

¹⁹⁰ 128 S. Ct. 1801, 1818 (2008); *see also* *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 308–10 (1997) (recognizing that “the Court is institutionally unsuited to gather facts upon which economic predictions can be made, and professionally untrained to make them”); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 92 (1987) (declining to second-guess the empirical judgments of lawmakers concerning the utility of the challenged legislation).

¹⁹¹ *See, e.g., Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1016 (9th Cir. 1994); *N.Y. State Trawlers Ass’n v. Jorling*, 16 F.3d 1303, 1308 (2d Cir. 1994).

¹⁹² 571 F.3d 699, 704 (7th Cir. 2009) (citing *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 505 (7th Cir. 1989)).

¹⁹³ 397 U.S. 137, 142 (1970).

¹⁹⁴ *See* Supreme Court of Va. v. Friedman, 487 U.S. 59, 68 (1988) (taking judicial notice that the bar exam “is not a casual or lighthearted exercise”).

take and pass the Wisconsin bar examination.¹⁹⁵ In addition to preparing for the bar examination,¹⁹⁶ bar exam applicants incur greater costs, especially for those who prudently enroll in a bar review course.¹⁹⁷ But, does the Wisconsin bar examination actually restrict the mobility of lawyers?¹⁹⁸ Put differently, does the diploma privilege influence an aspiring lawyer's decision where to attend law school?¹⁹⁹ The Seventh Circuit previously answered these questions in the negative.²⁰⁰ Whether prospective lawyers would attend one of the two Wisconsin law schools simply because of the diploma privilege is pure speculation.²⁰¹ Likewise, whether the requirement of taking and passing the Wisconsin bar examination would actually exclude many out-of-state graduates having a serious desire to practice in Wisconsin is a matter of conjecture.²⁰²

¹⁹⁵ See WIS. SUP. CT. R. 40.04.

¹⁹⁶ See Riebe, *supra* note 147, at 307 (noting that “[m]ost students study six days a week, eight to ten hours a day, for at least ten weeks—a total of approximately six hundred hours”).

¹⁹⁷ See Association of American Law Schools, *Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 448 (2002) (noting that bar review courses may cost as much as \$3,000).

¹⁹⁸ See *Sestric v. Clark*, 765 F.2d 655, 661 (7th Cir. 1985) (“[a]s we cannot say that [the Illinois bar admission rule] is more likely to impede than to increase the interstate mobility of lawyers, it is apparent that Illinois has not violated the commerce clause”).

¹⁹⁹ See *Wiesmueller v. Kosobucki*, 571 F.3d 699, 705 (7th Cir. 2009) (“[i]t is enough that an aspiring lawyer's decision about where to study, and therefore about where to live as a student, can be influenced by the diploma privilege to bring this case within at least the outer bounds of the commerce clause”). In essence, the burden in *Wiesmueller* was the adverse constraint on a law applicant's decision-making, not simply the increased costs and delays of the bar examination. See *id.*

²⁰⁰ See *Scariano v. Justices of Supreme Court of State of Ind.*, 38 F.3d 920, 927 (7th Cir. 1994).

²⁰¹ See *id.*

²⁰² See *id.*; *Scariano v. Justices of Supreme Court of State of Ind.*, 47 F.3d 173, 174 (7th Cir. 1995) (Posner, J., dissenting from denial of rehearing en banc) (noting that the burden imposed by the bar examination is small).

The second component of the *Pike* balancing test is the putative local benefits of the diploma privilege.²⁰³ As discussed, the Wisconsin Supreme Court presumably designed the diploma privilege rule to ensure competency in the practice of law, including familiarity in Wisconsin law.²⁰⁴ The Seventh Circuit has identified these interests as legitimate.²⁰⁵ Despite the deference generally afforded to states in regulating their bars,²⁰⁶ Judge Posner effectively placed the burden on Wisconsin to substantiate the putative local benefits, noting that “there may be nothing at all to justify [the diploma privilege].”²⁰⁷ Only when the burdens of a particular bar admission rule fall predominantly on out-of-state interests should the court place the burden of persuasion on the state.²⁰⁸

²⁰³ 397 U.S. 137, 142 (1970).

²⁰⁴ See *supra* Part III.A.

²⁰⁵ See *Scariano*, 38 F.3d at 924.

²⁰⁶ See *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam); *Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 569 (4th Cir. 2005) (when assessing whether a statute has “a legitimate local purpose” and “putative local benefits” under *Pike*, a court must proceed with deference to the state legislature).

²⁰⁷ *Wiesmueller v. Kosobucki*, 571 F.3d 699, 705 (7th Cir. 2009).

²⁰⁸ Compare *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 472–73 (1981) (implying that the state legislature considered the national interest in the free flow of commerce in determining the appropriate extent of the statutory restrictions at issue since the restrictions directly affected some in-state retailers and producers), and *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 187 (1938) (upholding state restrictions on trucks since “[t]he fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse”), with *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 353 (1977) (requiring the state to justify the regulation at issue 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 since the regulation had the effect of burdening out-of-state interests while leaving in-state interests unaffected), and *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 446–47 (1978) (finding state regulation governing the length and configuration of trucks unconstitutional under the dormant commerce clause in part because the regulatory scheme provided for a number of exceptions, primarily for the benefit of in-state interests, and thus undermined the assumption that the State’s own political process will act as a check on local regulations that unduly burden interstate commerce).

The United States Supreme Court often justifies judicial review under the dormant Commerce Clause, even in the absence of textual support,²⁰⁹ on grounds that it compensates for a defect in the political process.²¹⁰ Under the inner political process theory, when a legislative body enacts legislation with corresponding burdens falling solely or predominantly on a group represented in the legislature, a presumption arises that the enactment is rationally based, efficacious, and no more burdensome than is necessary to achieve its proffered purpose.²¹¹ However, when a legislative body enacts legislation with corresponding burdens falling predominantly on nonresidents unrepresented in the legislative body, the presumption of validity ceases to exist and the need for judicial intervention is greater to protect unrepresented interests from protectionist statutes.²¹²

The political process theory not only solidifies the putative local benefits of the diploma privilege, but also guarantees a procedure no more burdensome than is necessary to achieve them. As discussed, the diploma privilege affords no preference to in-state residents over out-of-state residents.²¹³ Thus, represented and unrepresented interests equally share any burden under the diploma privilege rule.²¹⁴ Represented interests—those who graduate from non-Wisconsin law schools and desire to practice law in Wisconsin—serve as a check

²⁰⁹ Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 617 (1987) (“[t]he dormant commerce clause lacks a foundation or justification in either the Constitution’s text or history”).

²¹⁰ Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 164–65 (1979).

²¹¹ Eule, *supra* note 189, at 445; see *Clover Leaf Creamery Co.*, 449 U.S. at 473 n.17 (“[t]he existence of major in-state interests adversely affected by the [legislation] is a powerful safeguard against legislative abuse”).

²¹² Eule, *supra* note 189, at 445; see *S.C. State Highway Dep’t*, 303 U.S. at 185 n.2 (“when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state”).

²¹³ See *supra* Part III.B.1.

²¹⁴ See WIS. SUP. CT. R. 40.03.

against protectionist impulses and assure that Wisconsin sufficiently realizes the benefits of the diploma privilege rule, namely, competent attorneys in both national and local law.²¹⁵ Though not a legislative enactment, the political process theory also applies to the diploma privilege. Enactors of the diploma privilege—members of the Wisconsin Supreme Court—are elected officials; consequently, they are responsive to Wisconsin residents.²¹⁶ In short, adversely affected in-state interests under the diploma privilege rule avoids a distortion in the political process, and judicial intervention on grounds of an unreasonable burden is unnecessary.²¹⁷

The final component of the *Pike* test is a “means” prong analysis.²¹⁸ This analysis requires courts to consider whether the stated legitimate purpose could be promoted as well with a lesser impact on interstate commerce.²¹⁹ When assessing the constitutionality of a statute, some courts have searched for nondiscriminatory alternatives.²²⁰ In the context of bar admission rules, however, courts have been reluctant to invoke a “means” analysis in light of state interest in regulating admission standards.²²¹ Significantly, courts cannot readily identify an alternative less restrictive than the bar examination.²²² Wisconsin could, for example, require all applicants seeking admission to the Wisconsin bar to take a continuing legal education course in Wisconsin law in lieu of a bar examination.²²³ But

²¹⁵ See *Eule*, *supra* note 189, at 445–46.

²¹⁶ See WIS. CONST. art. VII, § 4; *Sestric v. Clark*, 765 F.2d 655, 659 (7th Cir. 1985) (recognizing that the bar admission rule burdened residents and nonresidents equally, which provided some assurance that the burden was a moderate and reasonable, rather than arbitrary and prohibitive, burden)

²¹⁷ See *Tushnet*, *supra* note 210, at 140.

²¹⁸ 397 U.S. 137, 142 (1970).

²¹⁹ *Id.*

²²⁰ See, e.g., *Hunt v. Wash. State Apple Adver. Comm’ n*, 432 U.S. 333, 355 (1977); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354–55 (1951).

²²¹ See *Goldfarb v. Supreme Court of Va.*, 766 F.2d 859, 863 (4th Cir. 1985).

²²² *Sestric v. Clark*, 765 F.2d 655, 663 (7th Cir. 1985).

²²³ Judge Posner raised this alternative in *Wiesmueller*. See 571 F.3d 699, 702–03 (7th Cir. 2009).

as the Seventh Circuit recognized in *Sestric v. Clark*, this alternative could easily be more burdensome and exclusionary than the bar examination.²²⁴ Constant judicial intervention would be necessary not only to weigh the relative impact of all available nondiscriminatory alternatives of the diploma privilege,²²⁵ but also to ensure that they were less restrictive.²²⁶ The fact that Wisconsin remains the only state to honor the diploma privilege does not render its admission procedure unconstitutional.²²⁷ Wisconsin is free to exercise its own judgment and is not bound by the decisions of other states.²²⁸

CONCLUSION

In *Wiesmueller v. Kosobucki*, the Seventh Circuit suggested that the diploma privilege restricted the mobility of lawyers in violation of the dormant Commerce Clause.²²⁹ In guaranteeing that only competent lawyers practice within its borders, Wisconsin could require all lawyers to take and pass the Wisconsin bar examination. Wisconsin elected to provide the diploma privilege in lieu of the bar examination for those lawyers—residents and non-residents alike—who satisfy the thirty-credit and sixty-credit rules. This approach may not gain any support from economists. But, a bar admission rule “can be both economic folly and constitutional.”²³⁰

²²⁴ See 765 F.2d at 663; see also Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. ST. L.J. 429, 449 (2001) (noting that continuing legal education programs hardly guarantee any level of competence).

²²⁵ See *Goldfarb*, 766 F.2d at 863.

²²⁶ See *Sestric*, 765 F.2d at 664.

²²⁷ See *S.C. State Highway Dep’t v. Barnwell Bros.*, 303 U.S. 177, 195–96 (1938).

²²⁸ See *id.*

²²⁹ 571 F.3d 699, 704 (7th Cir. 2009).

²³⁰ *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 96–97 (1987) (Scalia, J., concurring).