PRECEDENTIAL DEFILADE: A REPLY TO DEAN CHASE

All the business of war, and indeed all the business of life, is to endeavor to find out what you don't know by what you do; that's what I called 'guessing what was at the other side of the hill.' The Duke of Wellington.[1]

Prof. Donald H. Berman*

Dean Chase, like the skilled leader of a well disciplined army, has marshalled his precedents to defend a straightforward syllogism. He starts by implicitly assuming that State A can not restrict the flow of goods to and from State B on the condition that State B give State A's citizens free access to B's markets.[2] He discusses several established precedents, such as *Great Atlantic & Pacific Tea Co., Inc. v. Cottrell*[3] and *Sporhase v. Nebraska ex rel. Douglas*,[4] which supports his argument. He notes numerous statutes that grant lawyers and other professionals from State B the right to practice in State A on the condition that State B provides similar privileges to professionals from State A.[5] Since the practice of these professions constitutes commerce,[6] he concludes that these statutes are unconstitutional.[7]

Like the well prepared general, Dean Chase considers precedents to the contrary, recognizing that a court sympathetic to a particular reciprocity arrangement could cite authorities sustaining the constitutionality of such arrangements in the area of state taxation[8] and automobile registration.[9] And Dean Chase notes a criti-

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1. 3 CROKER PAPERS 276 (1885).

* Richardson Professor of Law, Northeastern University School of Law.

2. Chase, *Does Professional Licensing Conditioned Upon Mutual Reciprocity Violate the Commerce Clause?* 10 VT. L. REV. 223, *passim* (1985) [hereinafter cited as Chase]. I say "implicitly" because at no point does Dean Chase systematically set forth the relevant constitutional principles and the accompanying standards of review in commerce clause cases.

3. 424 U.S. 366 (1976).

4. 458 U.S. 941 (1982).

5. Chase, *supra* note 2, at 223 & nn. 2-3.

6. *Id.* at 224 n. 4.

7. *Id.* at 224.

8. *Id.* at 230 n. 38 (citing Bode v. Barrett, 344 U.S. 583 (1953)).

9. Chase, *supra* note 2, at 230 n. 38 (citing Kane v. New Jersey, 242 U.S. 160, 167-68 (1916)). For reasons that I cannot fathom, Dean Chase expends considerable effort attempting to reconcile the Court's recent decision in Metropolitan Life Ins. Co. v. Ward, 105 S.Ct.

cal distinction between *Cottrell* and the lawyer reciprocity cases: In *Cottrell*, Mississippi prohibited all milk processed in Louisiana while, in the lawyer reciprocity cases, professionals from State B can still practice in State A, even if B does not grant reciprocity, by merely seeking admission *pro hac vice* or by taking an examination.[10]

Rather than commenting on the entire spectrum of professional undertakings this reply will focus solely on the reciprocal licensing statutes that limit the rights of lawyers. From the standpoint of a traditional common law attorney confronted by Dean Chase's analysis, the question is whether this Supreme Court will treat a partial barrier to the practice of law the same way that the Court treats a total bar to the importation of milk or the total ban on the exportation of underground water. The outcome of that ju-

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1676 (1985), with his argument. Chase, *supra* note 2, at 235-44. In *Metropolitan Life*, the Court struck down under the equal protection clause an Alabama tax that discriminated against out-of-state insurance companies. Presumably, Dean Chase deals with *Metropolitan Life* because there the Court reaffirmed an earlier decision wherein the Court, in sanctioning California's use of a retaliatory tax, used language that ostensibly undercuts Dean Chase's argument. *See Metropolitan Life*, 105 S.Ct. at 1680-83 (approving Western & Southern Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648 (1981)). Rather than proffering the untenable argument that "*Metropolitan Life* [stands] for the principle that the commerce clause precludes Congress from authorizing, and states from enacting, legislation which necessarily impedes interstate commerce as a means to realize otherwise permissible objectives," Chase, *supra* note 2, at 239, Dean Chase could merely have distinguished *Western & Southern* on the grounds that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982), which grants the states great latitude in regulating the insurance industry, has been interpreted as a Congressional authorization for such retaliatory taxing measures. *Metropolitan Life*, 105 S.Ct. at 1683.

I do share Dean Chase's belief that *Metropolitan Life* unwisely invokes the equal protection clause to invalidate economic protectionism and agree with him that this judicial maneuver was engendered by extant doctrine that exempts out-of-state insurance companies from the protections of the dormant commerce clause. Chase, *supra* note 2, at 238 n. 94. But an article seeking to invalidate reciprocity in professional licensing appears to be a most inappropriate place for Dean Chase to question the structural basis of commerce clause jurisprudence after Professor Eule's forceful argument that the dormant commerce clause doctrine, upon which Dean Chase relies for his argument, should be totally abandoned in favor of exclusive reliance on the privileges and immunities clause. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982). Only by recasting Dean Chase's paradoxically far-fetched notion that Congress is proscribed from legislating about interstate commerce under the commerce clause to read "the 14th amendment, enacted long after the commerce clause, precludes Congress from authorizing the states which necessarily impedes interstate commerce . . ." does his argument attain a modicum of plausibility.

10. Chase, *supra* note 2, at 238. To present a fully balanced picture Dean Chase should have mentioned that in *Sporhase* the state of Nebraska prohibited all exportation of water to Colorado, 458 U.S. at 958, and mentioned that the Court in *Cottrell* left open the question of whether states may require re-inspection for retaliatory purposes. 424 U.S. at 377 n. 10.

dicial battle appears more problematic than Dean Chase suggests.

In many respects the Court does treat the practice of law in a manner similar to many other commercial undertakings. The Court, in *Hishon v. King & Spalding*,[11] held that Title VII prohibits law firms from discriminating on the basis of sex in choosing partners; in *Goldfarb v. Va. State Bar*[12] the Court ruled that lawyers cannot conspire to fix fees; in *Bates v. State Bar of Arizona*[13] the Court struck down blanket prohibitions against lawyers' advertising; and recently, in *Supreme Court of New Hampshire v. Piper*,[14] the Court, in denying the states the right to require residency as a condition for admission to the bar, used language strongly supportive of Dean Chase's conclusion: "[L]ike the occupations considered in our earlier cases, the *practice* of law is important to the national economy. As the Court noted in *Goldfarb*, the 'activities of lawyers play an important part in the commercial intercourse.' "[15]

After *Piper* I do not fault Dean Chase for believing that this Court sees little difference between the practice of law and the processing of milk or the exportation of underground water. And if Dean Chase is correct in assuming that the Court will apply *Sporhase*'s close scrutiny test when it measures the "fit between the means used, the requirement of mutual reciprocity, and the ends sought to be served,"[16] then bar admission reciprocity requirements will fall because the Court's opinion in *Piper*, rejecting several justifications for a residency requirement, demonstrates that a state, in resisting a privileges and immunities clause challenge to residency requirements for bar admission, will have to do more than recite a series of make weight justifications for its exclusionary practices.

I have three objections to Dean Chase's analysis. First, this Court has not uniformly applied the same standards of review to both commerce clause and privileges and immunities clause cases. In *White v. Massachusetts Council of Construction Employers, Inc.*,[17] the Court rejected a commerce clause challenge to a munici-

11. 102 S.Ct. 2229 (1984).
12. 421 U.S. 773 (1975).
13. 433 U.S. 350 (1970).
14. 105 S.Ct. 1272 (1985).
15. *Id.* at 1277 (emphasis added).
16. Chase, *supra* note 2, at 234.
17. 460 U.S. 204 (1983).

pal executive order which required that local workers be hired for construction projects funded in whole or in part by city funds. The following term, on almost identical facts, the court in *United Bldg & Construction Trades Council v. Camden*[18] held that such a provision might run afoul of the privileges and immunities clause.[19]

Secondly, most cases in which the Supreme Court invalidated a state statute as violative of the dormant commerce clause have involved situations where the state regulation has imposed a rather significant burden on commerce. For example, *Cottrell* involved a "devastating effect upon the free flow of milk,"[20] while *Sporhase* involved the total ban on the exportation of water needed for irrigation.[21] But regulations that condition bar admission on reciprocity pose no such burdens. First, out-of-state attorneys can appear in an individual case *pro hac vice*. Secondly, states, since the Court's decision in *Piper*, can no longer bar from practice the nonresident who is willing to take a bar examination.

Thirdly, the states which lost dormant commerce clause cases like *Cottrell* and *Sporhase* did not proffer plausible, non-protectionist purposes that were well served by the reciprocity provision. Mississippi could not sustain its claim to a legitimate health interest given her willingness to admit milk of a lower quality from states that entered into the reciprocity agreements.[22] Similarly, Nebraska could not justify its reciprocity requirement on conservation grounds because Nebraska permitted the exportation of water in a time of shortage to any state granting reciprocity while totally banning exportation to a state that refused to grant reciprocity even in times of abundance.[23]

Unlike Mississippi and Nebraska, however, the defenders of reciprocity for bar admission can advance a plausible, though not necessarily a perfectly tailored, justification for reciprocity that does not smack of blatant economic protectionism. Since many clients who engage counsel in State A would find it both cumbersome

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18. 104 S.Ct. 1020 (1984).

19. *But cf.* Sestric v. Clark, 765 F.2d 655 (7th Cir. 1985). Though Judge Posner did not believe that any meaningful distinction exists between the standards of review under the two clauses, he nonetheless shares my view that absent a total barrier to practice, a state's reciprocity requirements would survive a constitutional challenge under the commerce clause. *Id.* at 664.

20. 424 U.S. at 375.

21. 458 U.S. at 944-45.

22. 424 U.S. at 375.

23. 458 U.S. at 957-58.

and costly to engage local counsel in State B for handling matters that could easily be managed by their State A counsel, State A has a legitimate interest in using its reciprocity requirement for the licensing of attorneys to facilitate the representation of clients who have interstate business. Similar problems confront clients who employ attorneys in State B who have legal matters requiring the presence of lawyers in State A.

Unlike Mississippi, which sought to "force its own judgments as to an adequate level of milk sanitation on Louisiana,"[24] State A does not seek to force its standards of admissions to practice on State B. Nor, by encouraging reciprocity, does State A seek only to open markets for its legal profession. Rather, State A is attempting to make it easier for clients who engage the services of lawyers licensed in either State A or State B to maintain a continuity of representation when legal matters require the conduct of business in both states.

The reciprocity requirement is reasonably well tailored to achieving this non-protectionist goal. State B does have an incentive to open its doors to practitioners from State A and the element of coercion is quite limited since State B's attorneys and their clients, in the event State A chooses not to grant reciprocity, still have other avenues available for handling matters that require admission to practice in State A.[25]

Beginning with its initial attempt to federalize the profession of law, the Supreme Court has repeatedly acknowledged the unique characteristics of the legal profession:

> We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." . . . The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the

24. *Cottrell*, 424 U.S. at 380.

25. *See supra* text accompanying notes 21-22.

> courts." . . . In holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority to regulate its professions.[26]

Subsequent cases reveal similar concerns. In 1976, the Court, by a 7-1 vote, struck down state laws prohibiting pharmacists from advertising the prices of prescription drugs.[27] But during the following term a bitterly divided Court in a 5-4 decision struck down regulations limiting the ability of lawyers to advertise their services.[28] While sanctioning advertising, the majority recognized the singularity of legal practice: "[B]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."[29]

The following term, the Court, in permitting the states to prohibit attorneys from soliciting personal injury victims, reaffirmed this distinction between the practice of law and other callings.[30] And the Court's recent decision in *Piper* continues the litany:

> The lawyer's role in the national economy is not the only reason that the opportunity to *practice* law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the *practice* of law fails within the ambit of the Privileges and Immunities Clause.[31]

To date, the Court has only struck down state regulations of the legal profession in three areas. First, the Court has invalidated actions of the state which contravene federal policies articulated by acts of Congress.[32] Second, the Court has struck down actions of the state which contravene an expanded first amendment protection.[33] And finally, the Court has invalidated actions of the state which infringe upon the rights of individuals secured by the privi-

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26. *Goldfarb*, 421 U.S. at 792-93 (citations omitted).

27. Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

28. Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

29. *Id.* at 383.

30. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 460-66 (1978).

31. 105 S.Ct. at 1277.

32. *See* cases cited *supra* notes 11-12.

33. *See supra* text accompanying note 13.

leges and immunities clause.[34] To apply mechanically the standards of the dormant commerce clause as set forth in *Cottrell* and *Sporhase* to the practice of law would eliminate many more distinctions between the practice of law and other commercial undertakings without furthering any compelling interest served by a dormant commerce clause jurisprudence that seeks to "[protect the] interstate movement of goods against local burdens and repressions."[35]

All too soon, given the spate of recent cases,[36] we will learn what lies "at the other side of the hill."

34. *See supra* text accompanying note 14.
35. H.P. Hood & Sons v. Dumond, 336 U.S. 525, 538 (1949).
36. *See* Chase, *supra* note 2, at 224 n. 4 for a partial listing of these cases.