

# The Burger Court Opinion Writing Database

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

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



b

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

February 14, 1985

Re: No. 83-1466 - Supreme Court of New Hampshire v.  
Kathryn A. Piper

Dear Lewis:

I join, albeit reluctantly, as I did at Conference.

Regards,

*W. J. B.*

Justice Powell

Copies to the Conference

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

December 26, 1984

No. 83-1466

Supreme Court of New Hampshire  
v. Piper

Dear Lewis,

I agree.

Sincerely,



Justice Powell

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.84 DEC 26 11 33

002  
003

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To: The Chief Justice  
Justice Brennan  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: **Justice White**

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1466

**SUPREME COURT OF NEW HAMPSHIRE v.  
KATHRYN A. PIPER**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

[January —, 1985]

JUSTICE WHITE, concurring in the result.

Respondent Piper lives only 400 yards from the New Hampshire border. She has passed the New Hampshire bar and intends to practice law in New Hampshire. Indeed, insofar as this record reveals, the only law office she will maintain is in New Hampshire. But because she will commute from Vermont rather than reside in New Hampshire, she will not be allowed to practice in the latter state.

I have no doubt that the New Hampshire residency requirement is invalid as applied to respondent Piper. Except for the fact that she will commute from Vermont, she would be indistinguishable from other New Hampshire lawyers. There is every reason to believe that she will be as able as other New Hampshire lawyers to maintain professional competence, to stay abreast of local rules and procedures, to be available for sudden hearings, and to satisfy any requirements of a member of the New Hampshire bar to perform pro bono and volunteer work. It does not appear that her non-residency presents a special threat to any of the state's interests that is not shared by lawyers living in New Hampshire. Hence, I conclude that the Privileges and Immunities Clause forbids her exclusion from the New Hampshire bar.

The foregoing is enough to dispose of this case. I do not, and the Court itself need not, reach out to decide the facial validity of the New Hampshire residency requirement. I

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

January 3, 1985

Re: No. 83-1466-Supreme Court of New Hampshire v.  
Kathryn A. Piper

Dear Lewis:

Please join me.

Sincerely,

*T.M.*  
T.M.

Justice Powell

cc: The Conference

W  
Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

December 28, 1984

Re: No. 83-1466, Supreme Court of New Hampshire v. Piper

Dear Lewis:

Please join me.

Sincerely,

*Harry*

Justice Powell

cc: The Conference

SECTION 83-1466-146

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12/19

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

From: Justice Powell

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1466

SUPREME COURT OF NEW HAMPSHIRE,  
APPELLANT *v.* KATHRYN A. PIPER

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

[December —, 1984]

JUSTICE POWELL delivered the opinion of the Court.

The Rules of the Supreme Court of New Hampshire limit bar admission to state residents. We here consider whether this restriction violates the Privileges and Immunities Clause of the United States Constitution, Art. IV, § 2.

I

A

Kathryn Piper lives in Lower Waterford, Vermont, about 400 yards from the New Hampshire border. In 1979, she applied to take the February 1980 New Hampshire bar examination. Piper submitted with her application a statement of intent to become a New Hampshire resident. Following an investigation, the Board of Bar Examiners found that Piper was of good moral character and met the other requirements for admission. She was allowed to take, and passed, the examination. Piper was informed by the Board that she would have to establish a home address in New Hampshire prior to being sworn in.

On May 7, 1980, Piper requested from the Clerk of the New Hampshire Supreme Court a dispensation from the residency requirement. Although she had a "possible job" with a lawyer in Littleton, New Hampshire, Piper stated that becoming a resident of New Hampshire would be inconvenient. Her house in Vermont was secured by a mortgage with a

12/20  
Join  
~~12/20~~

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To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

Old footnotes 10 and 22 deleted

pp. 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12

~~LFT  
Please join me  
JW~~

From: Justice Powell

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DEC 28 1984

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2nd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1466

**SUPREME COURT OF NEW HAMPSHIRE,  
APPELLANT v. KATHRYN A. PIPER**

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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*Law*

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02/15

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall ✓  
Justice Blackmun  
Justice Rehnquist  
Justice Stevens  
Justice O'Connor

*New footnotes 8, 12, and 23  
pp. 2, 4, 5, 6, 7, 8, 9, 10, 13  
Stylistic Changes Throughout*

From: **Justice Powell**

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3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1466

**SUPREME COURT OF NEW HAMPSHIRE,  
APPELLANT *v.* KATHRYN A. PIPER**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

[February —, 1985]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

January 2, 1985

Re: No. 83-1466 Supreme Court of New Hampshire v. Piper

Dear Lewis,

I am going to prepare a dissent in this case.

Sincerely,

*Wm*

Justice Powell

cc: The Conference

.81 17-5 b3 23

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

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1st DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1466

**SUPREME COURT OF NEW HAMPSHIRE,  
APPELLANT v. KATHRYN A. PIPER**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

[January —, 1985]

JUSTICE REHNQUIST, dissenting.

Today the Court holds that New Hampshire cannot decide that a New Hampshire lawyer should live in New Hampshire. This may not be surprising to those who view law as just another form of business frequently practiced across state lines by interchangeable actors; the Privileges and Immunities Clause of Art. IV, § 2 has long been held to apply to States' attempts to discriminate against non-residents who seek to ply their trade interstate. The decision will be surprising to many, however, because it so clearly disregards the fact that the practice of law is—almost by definition—fundamentally different from those other occupations that are practiced across state lines without significant deviation from State to State. The fact that each State is free, in a large number of areas, to establish *independently* of the other States its own laws for the governance of its citizens, is a fundamental precept of our Constitution that, I submit, is of equal stature with the need for the States to form a cohesive union. What is at issue here is New Hampshire's right to decide that those people who in many ways will intimately deal with New Hampshire's self-governance should reside within that State.

The Court's opinion states that the Privileges and Immunities Clause of Art. IV "was intended to 'help fuse into one nation a collection of independent, sovereign states.'" *Ante*,

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STYLISTIC CHANGES THROUGHOUT

Also P.6

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

Circulated: \_\_\_\_\_

Recirculated: 1/28/85

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1466

SUPREME COURT OF NEW HAMPSHIRE,  
APPELLANT *v.* KATHRYN A. PIPER

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

[January —, 1985]

JUSTICE REHNQUIST, dissenting.

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STYLISTIC CHANGES THROUGHOUT

ALSO pg 2, 4, 5

To: The Chief Justice  
Justice Brennan  
Justice White  
Justice Marshall  
Justice Blackmun  
Justice Powell  
Justice Stevens  
Justice O'Connor

From: Justice Rehnquist

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Recirculated: FEB 28 1985 ✓

3rd DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 83-1466

**SUPREME COURT OF NEW HAMPSHIRE,  
APPELLANT *v.* KATHRYN A. PIPER**

**ON APPEAL FROM THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

[March —, 1985]

JUSTICE REHNQUIST, dissenting.

Today the Court holds that New Hampshire cannot decide that a New Hampshire lawyer should live in New Hampshire. This may not be surprising to those who view law as just another form of business frequently practiced across state lines by interchangeable actors; the Privileges and Immunities Clause of Art. IV, § 2 has long been held to apply to States' attempts to discriminate against nonresidents who seek to ply their trade interstate. The decision will be surprising to many, however, because it so clearly disregards the fact that the practice of law is—almost by definition—fundamentally different from those other occupations that are practiced across state lines without significant deviation from State to State. The fact that each State is free, in a large number of areas, to establish *independently* of the other States its own laws for the governance of its citizens, is a fundamental precept of our Constitution that, I submit, is of equal stature with the need for the States to form a cohesive union. What is at issue here is New Hampshire's right to decide that those people who in many ways will intimately deal with New Hampshire's self-governance should reside within that State.

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

January 2, 1985

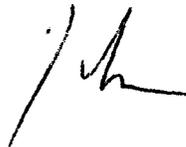
Re: 83-1466 - Supreme Court of New  
Hampshire v. Piper

Dear Lewis:

On page 5, in the text and in footnote 7, you suggest that the Commerce Clause had its origins in the fourth Article of Confederation. I have a little difficulty with that suggestion because the earlier provision just deals with the individual right to engage in business whereas the later provision deals with the power of Congress to regulate business. In my view (which I know you do not entirely share) the principle defect in the Articles of Confederation was its omission of any provision that even remotely resembled the Commerce Clause. I wonder, therefore, if you would consider omitting the suggestion that the Commerce Clause was derived from the Articles of Confederation.

Apart from this point, I think your opinion is excellent.

Respectfully,



Justice Powell

4

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

AM: 29 8-VAL 48

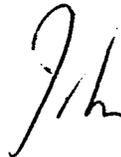
January 8, 1985

Re: 83-1466 - Supreme Court of New  
Hampshire v. Piper

Dear Lewis:

Please join me.

Respectfully,



Justice Powell

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

December 21, 1984

No. 83-1466 Supreme Court of New Hampshire v. Piper

Dear Lewis,

I anticipate joining your excellent opinion in this case. I have several concerns with the present draft, however, and I list them in hopes you might consider some minor modifications.

1. I would prefer that the last sentence of footnote 5 be deleted. I think it is quite possible that one state--Alaska, for example--might have a substantial reason for a residency requirement for some state benefit even if other states do not. Federalism inherently involves diversity, and I would prefer to avoid even the suggestion that privileges and immunities clause analysis turns on the practices of other states. OK

2. The last sentence on page 7 might jar the sensibilities of shrimp fishermen and pipeline workers among others. Could you substitute the words "no less" for the word "more" in this sentence so as to avoid suggesting that lawyers are more important than people who provide our food or furnish our utilities? OK

3. I would hope you would consider changing footnote 10. While it is true that Bradwell involved the privileges and immunities clause of the Fourteenth Amendment rather than Article IV, it is inconceivable to me that the practice of law could be a privilege of state citizenship but not a privilege of national citizenship. I would prefer that the last sentence of the footnote be replaced with something along the following lines: "The Fourteenth Amendment, of course, protects only privileges and immunities of national citizenship, see Slaughterhouse Cases, 16 Wall. 36, 74 (1873); Twining v. New Jersey, 211 U.S. 78, 96 (1908), and Bradwell can be distinguished on that basis. Nevertheless, it would be disingenuous to ignore the analytical inconsistency arising from Bradwell's holding that the practice of law is not a privilege of national citizenship and today's holding that the practice of law is a privilege of state citizenship. To the extent the reasoning in Bradwell is inconsistent with this opinion, we reject it."

Lee -  
Can't  
we  
simply  
say  
that  
Bradwell  
involved  
the 14<sup>th</sup>

without saying  
anything about  
national citizenship?

4. On page 12 the opinion asserts that the state's substantial interest in having lawyers available for court proceedings can be promoted by a less restrictive means: "The trial court, by rule or as an exercise of discretion, may require any lawyer who resides at a great distance to associate local counsel." This statement raises some ambiguity in what the term "associate" means. New Hampshire now requires that out-of-state attorneys who are admitted pro hac vice must "associate" a New Hampshire attorney who must accompany the out-of-state attorney to trial and argument. See footnote 2. Do you mean to suggest that New Hampshire courts can require non-resident New Hampshire bar members to bring a resident New Hampshire attorney to each trial and argument?

SO'C  
has a  
point.  
Try  
rephrasing  
the  
sentence.

Sincerely,

Sandra

Justice Powell

See -  
one  
possibility

In situations where the non-resident member of the bar cannot be available on

In situations where the non-resident <sup>but</sup> out-of-state member of the ~~bar~~ <sup>of the</sup> involvement of the court in the conduct of a case, the court has discretion to require the association of local counsel.

17

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE SANDRA DAY O'CONNOR

January 2, 1985

Re: 83-1466 Supreme Court of New Hampshire v. Piper

Dear Lewis,

Please join me in your opinion.

Sincerely,

*Sandra*

Justice Powell

Copies to the Conference

.84 101-5 613-23

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