

# LEIS v. FLYNT—YET ANOTHER PERSPECTIVE\*

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## INTRODUCTION

Prior to 1963, it was commonly accepted that each state had plenary power to promulgate its own qualifying rules for the admission to and the conduct of law practice.<sup>1</sup> However, in 1963 the United States Supreme Court, in *NAACP v. Button*,<sup>2</sup> held unconstitutional a state decree which banned the practice of the NAACP requiring persons assisted by that organization to retain NAACP attorneys. A year later the Court held, *inter alia*, in *Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar*,<sup>3</sup> that a state's power to regulate the practice of law is not without constitutional limitations. "Substantive due process, for example, requires a rational connection between any requirement for admission to the bar and an applicant's fitness or capacity to practice law."<sup>4</sup> A state's plenary power over the practice of law, however, has been retained in at least one significant area: a state may restrict trial appearances by non-resident attorneys.<sup>5</sup> While states usually permit an attorney licensed in another jurisdiction to appear in individual cases in their courts, such appearances are often subject to the discretion of state trial courts. Because the rules governing these *pro hac vice*<sup>6</sup> appearances and the discretion accorded the trial courts vary from case to

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1. *Martin v. Walton*, 368 U.S. 25 (1961) applied the allowable range of state action test to the fourteenth amendment, *but cf.* *NAACP v. Button*, 371 U.S. 415 (1963) (*Button* modified that power with regard to local rules that disqualify attorneys employed by organizations for the benefit of their members in civil rights matters). See Katz, *Admission of Non-Resident Attorneys Pro Hac Vice No. 5*, AMERICAN BAR FOUNDATION 1968 [hereinafter cited as *Admission, Pro Hac Vice*].

2. 371 U.S. at 415 (federal courts cite *Button* for the proposition that "a state may not under the guise of regulating the legal profession ignore constitutional rights," *Louis v. Supreme Court of Nevada*, 490 F. Supp. 1174, 1183 (1980). *Cf.* *People v. Holder*, 103 Ill. App. 3d 353, 315 N.W.2d 204 (1981) (Invalidating an overly broad statute which suppressed first amendment rights notwithstanding conduct of the defendant). See also *Saxton v. Arkansas Gazette Co.*, 264 Ark. 133, 140, 569 S.W.2d 115, 119 (1978) (Where the court upheld a grant of summary judgment in a libel action for appellees *Arkansas Gazette* and *Griffiee*. "It is my view that the privilege to criticize public officials' conduct, despite the possible harm that might develop, is unconditional and absolute.") (Howard, J., concurring).

3. 377 U.S. 1 (1964) (The court held that an injunction which restrained a labor union group from recommending specific lawyers to injured workers violated the member's first and fourteenth amendment rights of free speech, petition and assembly).

4. *Schware v. Board of Examiners*, 353 U.S. 232 (1957), see also Comment, *Due Process and Pro Hac Vice Appearances by Attorneys: Does Any Protection Remain?*, 29 BUFFALO L. REV. 133 (1981) [hereinafter cited as *Pro Hac Vice Appearances*].

5. *Norfolk and Western R.R. Co. v. Beatty*, 423 U.S. 1009 (1975), *summarily aff'd*, 400 F. Supp. 234 (S.D. Ill. 1975); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'd*, 359 F. Supp. 549 (E.D. Va. 1973). "This court . . . has sustained state bar rules that excluded out-of-state counsel from practice altogether. . . ." *Leis v. Flynt*, 439 U.S. 438, 443 (1979).

6. "*Pro hac vice*" means literally, "for this turn; for this one particular occasion." BLACK'S LAW DICTIONARY 1091 (rev. 5th ed. 1979).

case and state to state, there is no common standard applicable to such appearances.<sup>7</sup>

In *Leis v. Flynt*,<sup>8</sup> the United States Supreme Court considered the scope of the *pro hac vice* "right" while upholding an Ohio state judge's refusal to allow two New York attorneys to defend Larry Flynt and Hustler Magazine, Inc., in a criminal action, without granting the out-of-state attorneys a hearing on the issue. In a per curiam opinion, the Court reasoned that the attorneys had not been deprived of any interest protected by the fourteenth amendment's guarantee of procedural due process.

This article will (a) examine the due process standards that *Leis* holds applicable to *pro hac vice* appearances, (b) discuss the applicability of the "*Leis* rule" to comity rules in Arkansas and adjacent states, and (c) explore several important issues which were not raised but should have been discussed in *Leis*.

### LEIS V. FLYNT

On February 8, 1977 Larry Flynt and Hustler Magazine were indicted for violation of the Ohio obscenity statute.<sup>9</sup> Counsel-of-record forms were filed designating Herald Price Fahringer as counsel for Flynt and Paul J. Cambria as counsel for Hustler Magazine. Both were New York lawyers and neither was admitted to practice law in Ohio.<sup>10</sup> Judge Rupert Doan approved these entry forms and ordered that they be entered in the record.<sup>11</sup> Later the criminal case against Flynt and his magazine was transferred to Judge William J. Morrissey who, without explanation or hearing, informed Flynt and the corporate defendant that their New York counsel would not be allowed to represent them.<sup>12</sup> After unsuccessfully filing a mandamus action in the Ohio Supreme Court, Fahringer and Cambria filed suit in United States district court to enjoin further prosecution of the criminal case until the question of their status as attorneys for the named defendants was resolved.<sup>13</sup> The district court held that the lawyers had a constitutionally protected property interest and enjoined any further proceedings in the state court until a hearing could be held to determine whether the attorneys would be permitted to represent Flynt and Hustler.<sup>14</sup> Affirming the district

7. *Pro Hac Vice Appearances*, *supra* note 4, at 133.

8. 439 U.S. 438 (1979).

9. OHIO REV. CODE ANN. § 2907.31 (Baldwin 1979) is entitled, Disseminating Matter Harmful to Juveniles. It provides: "(A) No person, with knowledge of its character, shall recklessly furnish or present to a juvenile any material or performance which is obscene or harmful to juveniles. . . ."

10. *Leis*, 439 U.S. at 439.

11. The issue of whether Judge Doan's approval of this designation of counsel conferred admissions *pro hac vice* status to Fahringer and Cambria, was of central concern in the court's opinion. See *infra* notes 58-59 and accompanying text.

12. 574 F.2d 874, 876 (6th Cir. 1978). On March 9, 1977, Judge Morrissey advised Attorney Dennison that Fahringer and Cambria would be stricken as counsel of record in the case. Though given early notice of Morrissey's contemplated action, neither lawyer argued his position until April 8, 1979. The trial court and the Supreme Court did not consider this issue important.

13. *Flynt v. Leis*, 434 F. Supp. 481 (1977). The Court assumed jurisdiction in accordance with 42 U.S.C. §§ 1982, 1983, and 1343(3) for alleged violations of the sixth and fourteenth amendment rights of the United States Constitution.

14. *Id.* at 486. The Court felt that Fahringer and Cambria's property interest had been violated by the state court's failure to grant them a hearing.

court's decision, the Sixth Circuit held, *inter alia*, that *pro hac vice* practice could not be denied without a meaningful hearing.<sup>15</sup>

The Supreme Court of the United States, after granting certiorari, reversed and remanded in a per curiam opinion.<sup>16</sup> The Court sharply rejected the lower courts' conclusion that attorneys Cambria and Fahringer were entitled to procedural due process because they had been denied property rights<sup>17</sup> or significant constitutional interests.<sup>18</sup> The Court found that neither lower federal court had shown the source of two attorneys' "claims" or entitlement under state law,<sup>19</sup> and even if the attorneys had "reasonable expectations of professional service, the expectation was not based on the 'requisite *mutual* understanding.'"<sup>20</sup> The Court concluded that the attorneys must establish that they have been deprived of a liberty or property interest before procedural due process is required.<sup>21</sup>

## I. THE SUPREME COURT'S ANALYSIS

### A. *The Cornerstone Cases*

The Court's conclusion that the "right" of a non-resident lawyer to appear *pro hac vice* is not protected by the Due Process Clause of the fourteenth amendment<sup>22</sup> was based on a line of cases<sup>23</sup> that purportedly establishes that the Clause protected only those interests created by state or federal law. The cornerstone of this line of cases is *Board of Regents v. Roth*.<sup>24</sup> Roth, a state university assistant professor in good standing, was summarily denied renewal of his one year appointment as permitted under university rules. He sued the university claiming a denial of procedural due process for failure to grant him a hearing. The Court held that Roth was not entitled to procedural due process because he had not shown an interest within the fourteenth amendment's protection of liberty and property.<sup>25</sup> There was no state statute or rule vesting in him an existing, "albeit defeasible," future interest in that renewal.

The *Roth* decision was not without its critics. As one commentator ar-

15. *Flynt*, 574 F.2d 874.

16. *Leis*, 439 U.S. at 438.

17. *Id.* at 441.

18. *Id.*

19. "A claim of entitlement under state law, to be unenforceable, must be derived from statute or legal rule or through a mutually explicit understanding. . . . The record here is devoid of any indication that an out-of-state lawyer may claim such an entitlement in Ohio, where the rules of the Ohio Supreme Court expressly consign the authority to approve *pro hac vice* appearance to the discretion of the trial court."

*Id.* at 442-43 (citation omitted).

20. The attorneys had not "shown the requisite *mutual* understanding that they would be permitted to represent their clients in any particular case in the Ohio courts." (emphasis in original). *Id.* at 443.

21. *Id.* at 441.

22. *Id.* at 443, *see infra* notes 24-51 and accompanying text.

23. A majority of federal and state jurisdictions have adopted this principle. *See, e.g.*, *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *aff'd*, 434 U.S. 1052 (1978); *Consolidated Aluminum Corp. v. TVA*, 462 F. Supp. 464 (M.D. Tenn. 1978); *United States v. Sutton*, 607 F.2d 220 (8th Cir. 1979).

24. 408 U.S. 564 (1972).

25. *Id.* at 569-71 (emphasis in original) (footnotes omitted) (citations omitted).

gued, Roth may have had no property in the old property sense,<sup>26</sup> but he did appear to have a property interest of the new property-variety<sup>27</sup> that was recognized in *Goldberg v. Kelley*.<sup>28</sup> *Goldberg* established that the Due Process Clause requires a welfare recipient to be afforded an evidentiary hearing before the termination of his or her benefits,<sup>29</sup> thus explicitly recognizing a "statutory entitlement" to welfare benefits as a protectable property interest.

Justice Stewart, writing for the *Roth* Court, thought the *Goldberg* principle inapplicable to *Roth*. The government in *Roth* did not "rupture . . . a subsisting relationship without notice and hearing to establish adequate cause. Rather, [it only failed] to establish a new relationship identical to the previous one, which had already expired."<sup>30</sup> The board merely refused, without a hearing, to extend to Roth a new one-year teaching contract. Hence, even under the new property concept introduced by *Goldberg*, where the source of the entitlement also specifies the conditions for its termination, due process protection is not required when the entitlement is extinguished according to the requirements of the state statute or rule. There is no "legal entitlement" to the "non-renewal" of a contract.

In *Arnett v. Kennedy*,<sup>31</sup> the Court took a similar but more restrictive view of "entitlements". The Court in *Arnett* upheld the dismissal of a federal civil service "non-probationary" employee without a hearing because he had allegedly made false and defamatory statements about his director. There were three opinions in the *Arnett* decision. Justice Rehnquist, speaking for one trio of Justices, concluded that due process required no pre-dismissal hearing, since the governing statute provided for employee removal to "promote the efficiency of the service"<sup>32</sup> and the employee's property interest was conditioned by this statutory provision. The remaining six Justices found a property interest unlimited by the statutory source, but disagreed as to whether a *Goldberg*-type pre-dismissal hearing was warranted.<sup>33</sup> Thus the majority of Justices rejected the Rehnquist view that a person could be deprived of a statutorily created property interest at any time without notice or a hearing. Yet, *Arnett* did recognize that even a statutorily created right may be deprived pursuant to less "due process" than that required in *Goldberg*.

Two years after the *Arnett* decision, however, the Rehnquist view prevailed in *Bishop v. Wood*.<sup>34</sup> In *Bishop*, a city policeman, who had attained

26. Van Alstyne, *Cracks in The New Property: Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977) [hereinafter cited as *Adjudicative Due Process*].

27. *Id.* at 458, *See also* Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter cited as Reich].

28. 397 U.S. 254 (1970).

29. *Id.* at 260.

30. *Adjudicative Due Process*, *supra* note 26 at 458.

31. 416 U.S. 134 (1974).

32. *Id.* at 161-64.

33. Justices Powell and Blackmun agreed that *Arnett's* interest was sufficient to bring due process into play, but agreed that in this case a provision for post-dismissal hearing was sufficient to protect *Arnett's* constitutional right to due process. *Id.* at 164-71. Justices Marshall, Brennan, and Douglas dissented, arguing that a full evidentiary hearing under *Goldberg v. Kelley* was necessary. *Id.* at 206-231. Justice White concurred and dissented. He felt that there should have been an impartial hearing officer.

34. 426 U.S. 341 (1976).

the status of "permanent employee" pursuant to an applicable city ordinance,<sup>35</sup> was dismissed without a hearing.<sup>36</sup> Although this ordinance "appeared to vest in him (Bishop) a continuing entitlement to that station (permanent employee) subject only to certain conditions subsequent,"<sup>37</sup> the Supreme Court adopted the lower court's contrary interpretation of the ordinance and held that Bishop had no property interest in this "permanent" job status.<sup>38</sup> Therefore, he could be fired at-will. *Bishop* is generally understood to mean that determinations of a property interest in employment must be made by reference to state law<sup>39</sup> and that the Due Process Clause of the fourteenth amendment is not a guarantee against incorrect or ill-advised personnel decisions.<sup>40</sup>

Interestingly, the Court in *Bishop* considered the federal district court's interpretation controlling on the issue of whether the local ordinance made Bishop a tenured or an at-will employee, even though the local ordinance permitted the state trial court to decide whether Bishop had been deprived of due process protection. The *Leis* Court, however, rejected the law expressed by the federal district court and the court of appeals which held the two lawyers' interest in representing the defendants was constitutionally protected.<sup>41</sup> In diversity cases, federal courts have held that great weight should be given to the interpretation of state law by a federal district court sitting in that state if there is no controlling state court decision.<sup>42</sup> Moreover, even under the *Erie* doctrine<sup>43</sup> state law may apply under the Rules of Decision Act even in "federal question" litigation insofar as particular issues involved are not governed by federal law, and unreported decisions of county courts of common pleas need not be followed because of their lack of precedential effect in state courts.<sup>44</sup> On a question of constitutional law, the federal district court and the court of appeals decisions should command considerable more weight than an opinion by a court of common pleas. This obvious inconsistency in the Court's approach offers it too much "flexibility" (and

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35. *Id.* at 364 n.5.

Dismissal. A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the city manager. Any discharged employee shall be given written notice of his discharge, setting forth the effective date and reasons for his discharge if he shall request such a notice.

36. *Id.* at 346.

37. *Adjudicative Due Process*, *supra* note 26, at 467.

38. *Id.* at 341.

39. *See, e.g.*, *Jacobs v. Kunes*, 541 F.2d 222 (9th Cir. 1976); *Williams v. Day*, 553 F.2d 1160 (8th Cir. 1977); *Rosenthal v. Riggs*, 555 F.2d 390 (3rd Cir. 1977); *see also Stebbins v. Weaver*, 537 F.2d 939 (7th Cir. 1976); *Prince v. Bridges*, 537 F.2d 1269 (4th Cir. 1976).

40. *Bishop*, 426 U.S. at 347; *see Doe v. Hampton*, 566 F.2d 265, 271 n.15 (1977). (It is still not completely clear what the appropriate formula should be, if any, for judicial review of the evidence supporting agency findings in adverse personnel actions. Earlier cases almost always characterized the scope of review as limited to assuring procedural compliance and applying the so-called arbitrary or capricious test).

41. *Leis*, 439 U.S. at 441.

42. *E.g.*, *American Timber & Trade Co. v. First Nat'l Bank of Oregon*, 511 F.2d 980 (9th Cir. 1973).

43. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

44. *King v. Order of United Commercial Travelers*, 333 U.S. 153 (1948).

litigants too little guidance) in changing its approach depending on the label of the case.

In *Leis*, where there was no state statute vesting either a substantive right or procedural guaranties in a *pro hac vice* applicant, it is apparent that the attorneys failed not only the *Bishop* test but the threshold "source in state law" test of *Roth* as well. In essence, the *Leis* majority required Fahringer and Cambria to overcome the insurmountable burden of the *Roth-Bishop* challenge to show that they were vested with a substantive property interest under state law that was greater than that circumscribed by the procedural restriction laid upon it.<sup>45</sup> The denial of their "request" to appear *pro hac vice* did not violate procedural due process because they failed the "vested right" test; procedural due process is required only where there is an invasion of a "vested right." There are other interests, however, which are protected not by virtue of their recognition by the law of a particular state but because they are guaranteed in one of the provisions of the Bill of Rights that has been "incorporated" into the fourteenth amendment or created by federal law. Section 1983,<sup>46</sup> for instance, makes deprivation of such rights actionable independent of state law. The difficulty for Fahringer and Cambria was that they could not identify the source of their "entitlement" to the satisfaction of the *Leis* Court<sup>47</sup> under either state or federal law.

The cases of *Roth* and *Bishop* presented a barrier to the arguments made by the two New York lawyers. In the absence of a state or federal entitlement, their "right" to appear *pro hac vice* was dependent upon state law.<sup>48</sup> And the state rule permitted the judge unlimited discretion to deny *pro hac vice* applications without notice or a hearing.<sup>49</sup> Such an interpretation is consistent with *Roth* and *Bishop*.<sup>50</sup> Nevertheless, there are constitutional theories that the *Leis* majority did not consider which reveal that the *Roth-Bishop* line is less<sup>51</sup> of a limitation on the fourteenth amendment's Due Process Clause than the *Leis* Court concluded.

45. *Leis*, 439 U.S. at 441.

46. 42 U.S.C. § 1983.

47. *Leis*, 439 U.S. at 441.

48. *Id.* at 441, *cf.* *District of Columbia v. Jones*, 442 A.2d 512, 516-17 (D.C. 1982) ("The statutory right due District police officers to administrative sick leave in case of injury or illness incurred in the performance of duty creates for police officers more than a mere 'unilateral expectation' and is . . . a 'legitimate claim of entitlement.'" (citation omitted))

49. OHIO REV. CODE ANN. § 4705.1. Admission without examination notes in part:

(c) An applicant under this section shall not engage in the practice of law in the state prior to the filing of his application. To do so constitutes the unauthorized application. This paragraph (c) does not apply to participation of a non-resident of Ohio in a cause being litigated in this state when such participation is with leave of the judge hearing such cause.

50. *Adjudicative Due Process*, *supra* note 26 at 488. "[A] substantive property interest [is] bound . . . exactly by the aggregate of procedural protections of that property. . . ." Hence the right does not vest unless the judge grants it, and if the judge denies it, there is no due process violation because the procedure which binds the right provides that it is within the judge's discretion to deny or admit without reason.

51. See generally, Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). It is arguable, however, that Fahringer and Cambria received due process. They received "notice" of Judge Morrissey's intent not to allow them to represent the defendants via the local attorney on March 9th. Surely an argument by brief or memorandum could have been filed prior to April 8th by either lawyer. The facts in *Leis* then may not represent cogent support for a persuasive attack on what process was due the lawyers for Flynt and Hustler Magazine.

## B. *The Remaining Segments of the Court's Opinion*

The remainder of the Court's opinion is divisible into three segments: (1) the Constitution does not create property rights and the prevalence of a *pro hac vice* appearance procedure is not enough to require due process application; (2) a claim of entitlement under state law must be derived from a statute or legal rule or through a mutually explicit understanding; and (3) the interest in appearing *pro hac vice* does not have a source in federal law.

### (1) *Due Process Extended to Particular Interests*

The Court's initial observation that the Constitution only extends procedural safeguards to interests "that stem from an independent source such as state law" is unremarkable when the *Roth-Bishop* line of cases is considered.<sup>52</sup> Since the lower courts failed to cite any Ohio authority for the proposition that these out-of-state lawyers' interest in appearing *pro hac vice* stemmed from an independent source such as state law,<sup>53</sup> the Court had to consider whether the attorneys' claimed interest stemmed from another source such as federal law. The Court acknowledged the "prevalence of *pro hac vice* practice in American courts and instances in our history where counsel appearing *pro hac vice* had rendered distinguished service."<sup>54</sup> The Court hastened to caution that this acknowledgement was not the issue. The issue, as the Court saw it, was whether the prevalence of the practice established it as a "right" in the United States generally or in Ohio particularly. The Court answered its own query in the negative.<sup>55</sup>

### (2) *Mutually Explicit Understanding*

The Court next determined that the two New York lawyers could not show under the *Leis* facts that they had "reasonable expectations of professional service" under Ohio law because the record disclosed no statute, legal rule, or requisite mutual understanding that granted them a right to represent their clients in the Ohio courts. The flagship case supporting a "mutual understanding" under state law as a source of state law rights is *Perry v. Sindermann*,<sup>56</sup> which held that a non-tenured teacher who alleged tenure under a *de facto* tenure policy had set out a sufficient "claim of entitlement" to be entitled to procedural due process. The lesson of *Perry* is that even in the absence of specific state rules, a state's "policies and practices" may create a mutually explicit understanding sufficient to constitute a property interest for due process purposes. The *Leis* Court's application of this doctrine seems erroneous.<sup>57</sup> Although the record in *Leis* reveals that the district court

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52. See *supra*, notes 24-47 and accompanying text.

53. See *supra*, notes 17-18 and accompanying text. The Sixth Circuit Court of Appeals, although admitting that it could not "define with certainty the status of the lawyers at the moment they were dismissed, concluded that . . . [t]heir interest had developed to a point where the court's action in removing them . . . should have been preceded by procedural due process." *Flynt v. Leis*, 574 F.2d 874, 878 (6th Cir. 1978).

54. *Leis*, 439 U.S. at 441.

55. "But it is not a right granted either by statute or the Constitution." *Id.* at 442.

56. 408 U.S. 593 (1972).

57. See *supra* notes 16-17 and accompanying text. The district court found that Fahringer and Cambria had appeared on behalf of Flynt and Hustler magazine in other criminal proceedings

made no finding that the New York lawyers had made an official or *de facto pro hac vice* appearance in the case, the record of this case does show that a "mutual understanding" between the New York lawyers and the court of common pleas existed within the meaning of *Perry*.<sup>58</sup> First, the lawyers had previously represented Flynt and Hustler in the Ohio court of common pleas without being denied permission to appear. Second, local counsel, who appeared as the named associate to the New York lawyers at all the proceedings, informed the Court that the two lawyers represented the defendants.<sup>59</sup>

*Pro hac vice* applications, prior and subsequent to *Leis*, have been granted as a matter of course in all the jurisdictions of this country including Ohio. It is only in rare or exceptional instances that an application is denied. In a recent mail survey,<sup>60</sup> of the fifty state bar associations, forty-three

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before the Hamilton County Court of Common Pleas, apparently without being required to do more than they did here (citation omitted). This prior experience might explain why the local lawyer did not alert the court that Fahringer and Cambria were not admitted to practice in Ohio, but it does not indicate that the first judge's endorsement of the entry form, without more, constituted leave for a *pro hac vice* appearance. Although the district court found that the manner in which Fahringer and Cambria sought leave for an appearance comported with the customary procedures of the Court, *id.*, it made no finding that these lawyers justifiably relied on any official explanation of these procedures or had any other ground for believing they actually had received leave of the Court to appear. *Leis*, 439 U.S. n.3. *But cf. Pro Hac Vice Appearances*, *supra* note 4, at 142-43 (The author fails to consider, however, the impact of *Bishop*—how much a *pro hac vice* rule as Ohio's could be read to mean you get less than what you see).

58. Fahringer and Cambria made no application for admission *pro hac vice* to him (Morrissey) or any other judge. More significantly, local counsel had appeared before Judge Morrissey on other occasions. Hence, the judge had no apparent "understanding" of the New York lawyers' interest in the case. Indeed, the judge was not made clear of that understanding until a hearing on the motion almost a month after he advised local counsel that neither Fahringer or Cambria would be allowed to represent Flynt or Hustler Magazine. *Leis*, 439 U.S. at 440.

It has been advanced that "the smooth operation of a state judicial system requires that attorneys neither removed (citation omitted) nor permitted to withdraw (citation omitted) from a trial except for compelling reasons. These policies should be sufficient to create a right to continued admission of which an attorney cannot be deprived without procedural due process." *Pro Hac Vice Appearances*, *supra* note 4, at 142.

This position misses the point. Fahringer and Cambria had not been admitted *pro hac vice* nor had they appeared at the arraignment or the pre-trial conference. Hence, the lawyer "entitled" not to be removed or withdrawn was the one who made each of these appearances—the local attorney. The significant question is which rules govern how the Supreme Court determines that an "interest" is significant enough to constitute "property" within the meaning of the Due Process Clause of lawyers in the position of Fahringer and Cambria.

59. *Leis*, 439 U.S. at 439.

60. The survey letter was worded as follows:

February 26, 1980

Iowa

General State Information

Clerk, Iowa Supreme Court

State Capitol

Des Moines, Iowa 50319

Dear Sir:

I am attempting to write an article on the *Pro Hac Vice* application in the various states in the Union. I have researched your statutes and discovered, general information regarding non-admitted attorneys' right to practice in your courts. It would be helpful to my efforts if you would forward any Bar Admission Committee's opinions, Court Decisions (unreported) of non-admitted lawyers (admitted in other states) requests for *Pro Hac Vice* privileges. If you afford a non-admitted lawyer a *hearing* before he or she is denied the privilege, please advise as to the mechanics and nature of this hearing.

As I would like to write this article before the end of summer 1980 your prompt attention to this request is appreciated.

responses were received; all forty-three of those bar association officials generally responded that the *pro hac vice* applicant is freely admitted when he fulfills the requisites of the applicable rule. The applicable rules of the various states support the conclusion that simple compliance results in the applicant's admission. Moreover, as Justice Stevens noted in *Leis*, Ohio has at least impliedly given foreign attorneys a cognizable right to appear in her courts by routinely allowing such practice.<sup>61</sup> For instance, in *State v. Ross*<sup>62</sup> the Ohio Court of Appeals' affirmation of a state trial court's refusal to admit out-of-state counsel on grounds that out-of-state counsel refused to limit his out-of-court statements adds some support for Stevens' premise. In *Ross*, the Ohio court implied that the denial of the right to appear *pro hac vice* without proper reasons was reversible error.<sup>63</sup>

(3)(a) *The Attorneys Interest—A Liberty Interest under Federal Law?*

The final issue was whether the attorneys had a federal liberty interest in appearing *pro hac vice*. The New York lawyers claimed that their "reputations might suffer as a result of the court's denial of their *pro hac vice* request." Relying on the narrow view of federally created interests adopted in *Paul v. Davis*,<sup>64</sup> the Court answered this query as well in the negative. In *Paul*, the court of appeals held that plaintiff was denied procedural due process where local police officers sent a circular to stores describing plaintiff as an "active shoplifter" without giving him notice or a hearing before the circular was sent. The Court reversed, holding that defamation standing alone was insufficient to implicate a liberty interest under federal law.<sup>65</sup> Thus a hearing was not required before the circular was sent. The Court, however, distinguished its previous decisions where governmental defamation implicated a federal liberty interest. Because in those cases there was also involved an interference with some specific constitutional guarantee or with some "other more tangible" interest created by state law.<sup>66</sup> Since these other tangible interests were not involved in *Paul*, no liberty interest was involved. Hence, the development of *Paul's* stigma-plus test resulted. The most amazing aspect of *Paul* is how the Court distinguished the apparently controlling case of *Wisconsin v. Constantineau*.<sup>67</sup> The Court in *Constantineau* invalidated on due process grounds a state statute that allowed a sheriff to label an individual an alcoholic by posting his name in a public place, without giving him prior notice and a hearing. The *Paul* Court emphasized that the chal-

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Yours very truly,

Carlton Bailey

Assistant Professor of Law

61. *Leis*, 439 U.S. at 453 (Stevens, J., dissenting).

62. 36 Ohio App. 2d 185, 304 N.E.2d 396 (1973).

63. The court of appeals made an extensive inquiry into the reasons for the trial judge's details of permission for an out-of-state attorney to appear *pro hac vice*. The implication is that the absence of a proper reason would have been reversible error. *Leis*, 439 U.S. at 455 (Stevens, J., dissenting).

64. 424 U.S. 693 (1976).

65. *Id.* at 709. That is, the stigma of defamation must be accompanied by an interference with some specific constitutional guarantee of stigma *plus*.

66. *Id.* at 710.

67. 400 U.S. 433 (1971).

lenged procedure in *Constantineau* involved more than just defamation; it also deprived the person of the opportunity to purchase alcoholic beverages within city limits.<sup>68</sup>

*Paul* is good authority for the *Leis* Court's holding if the precedent of *Constantineau* is wholly ignored or "cavalierly" distinguished as Monaghan has charged.<sup>69</sup> Monaghan concluded that *Paul* had narrowed the "federal content" of "liberty" to specific constitutional guarantees: rights previously recognized by the Court, an understanding of liberty as freedom from personal restraint as defined by the Framers, and interests that attain constitutional status because they have been initially recognized under state law.<sup>70</sup> The *Leis* decision proved Monaghan an accurate harbinger: the Court cited *Paul* as support for the premise that the New York lawyers did not establish a federal liberty interest within the strict uses outlined in *Paul*.<sup>71</sup>

The application of the *Paul* rationale to *Leis* reveals that the argument that the denial of a *pro hac vice* application "might" cause injury to the professional reputation of the two lawyers was a weak reed. As Monaghan correctly instructs, *Paul* only requires the imposition of procedural due process in several specific instances, and standing alone, defamation does not qualify as a "liberty" interest.<sup>72</sup> *Paul* does not, however, begin and end the liberty interest analysis.<sup>73</sup> A few recent Court cases interpreting the general scope of the liberty interest follows.

### (3)(b) *The Liberty Interest*

In June 1981, the Court decided the case of *Connecticut Board of Pardons v. Dumschat*.<sup>74</sup> By a 7-2 vote, the Court said no to the central question posed in that case:

whether the fact that the Connecticut Board of Pardons has granted approximately three-fourths of the applications for commutation of life sentences creates a constitutional 'liberty interest' or 'entitlement' in life term inmates so as to require that Board to explain its reasons for denial of an application for communication.<sup>75</sup>

A majority of the Court held that recent cases "suggest that state law is the only source of a prisoner's liberty worthy of federal constitutional protection."<sup>76</sup> Justice White agreed with the majority in *Dumschat* that the deprivation of the right to good time credits was not guaranteed by the Constitution. But he stopped short of adopting the full pitch of the Court by holding that neither *Wolff v. McDonnell* nor *Meachum v. Fano* is fairly characterized as suggesting that all liberty interests entitled to constitutional pro-

68. Monaghan, *Of Liberty and Property*, 62 CORNELL L. REV. 405, 424 (1977) [hereinafter cited as *Liberty and Property*].

69. *Id.* at 424.

70. Monaghan goes on to say "It is only state conduct that officially removes the interest from the recognition and protection previously afforded by the state which involves due process guarantees. *Id.* at 425.

71. *Leis*, 439 U.S. at 443.

72. *Liberty and Property*, *supra* note 68, at 425.

73. See generally, Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89, 95-96.

74. 452 U.S. 458 (1981).

75. *Id.* at 459.

76. *Id.* (emphasis in original).

tection must be found in state law.<sup>77</sup>

In *Wolff v. McDonnell*,<sup>78</sup> the Court held that abrogation of a prisoner's good time credits implicates his liberty interest in subsequently obtaining release from incarceration. Although the Court recognized that Nebraska was not constitutionally obligated to establish a credit system, by creating "a right to a shortened prison sentence through the awarding of credits for good behavior," the state had allowed inmates to retain a liberty interest that could only be terminated for serious behavior.<sup>79</sup> The *McDonnell* principle, however, is not directly applicable to the *Leis* situation. In *Leis*, there was no comparable "sanction" against Fahringer and Cambria as there was against the Nebraska inmates in *McDonnell*—deprivation of "good time" credits. Fahringer and Cambria could have continued in a consultant capacity with the local attorney, while the inmates in *McDonnell* had no way to mitigate the "penalty" of lost "good time" credits. *McDonnell* provides no support for Justice White's independent liberty interest.

In *Meachum v. Fano*,<sup>80</sup> though the Court held that prisoners did not have a protected "liberty interest" in avoiding transfers between institutions, the Court emphasized the absence of any limitations on such transfers rather than on any particular statutory language.<sup>81</sup> This is some support for White's independent liberty interest. Similarly in *Gagnon v. Scarpelli*,<sup>82</sup> which held that persons on probation also retain a "liberty interest" which cannot be terminated without due process of law, the Court did not consider the weight or nature of the criminal offender's interest in maintaining his parole release as somehow dependent on the specific terms of a statute.<sup>83</sup> These cases provide only minimal support for an independent liberty interest.

One other case has been cited for the independent liberty interest premise. In *Morrissey v. Brewer*,<sup>84</sup> Chief Justice Burger, without evaluating or examining the applicable state statute,<sup>85</sup> held that all persons released on

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77. *Id.* at 467 (White, J., concurring). Justice Stevens in dissent underscored that the liberty worth of constitutional protection was not merely "a statutory creation of the State." He envisioned that individual liberty had "deeper" or more "natural" roots. *Id.* at 468-69 (Stevens, J., dissenting). Only a limited number of federal courts follow Justice Stevens' "natural roots" theory of the liberty right. See, e.g., *Helm v. Hewitt*, 655 F.2d 487 (3rd Cir. 1981); *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *summarily aff'd*, 434 U.S. 1052 (1978); *Vitch v. Jones*, 445 U.S. 480 (1980).

The distinction drawn between the above listed cases and other cases in this area is that due process rights are accorded those "liberty interests" which are statutorily created and denied in those cases where transfers were "discretionary" with the prison authorities. *Id.*

78. 418 U.S. 539 (1974).

79. *Id.* at 542.

80. 427 U.S. 215 (1976).

81. "That life in one prison is much more disagreeable than in another does not itself signify that a fourteenth amendment liberty interest is implicated." *Id.* at 225.

82. 411 U.S. 778 (1972).

83. *Id.* at 781.

84. 408 U.S. 471 (1972).

85. Justice Douglas observed that the state law provided that: "[A]ll paroled prisoners . . . shall be subject at any time, to be taken into custody and returned to the institution." *Id.* at 492 (Douglas, J., dissenting). The statute provided no other criteria for parole revocation. Thus, had the Court relied solely on particular statutory language, it could not have held that parolees possess a constitutionally protected interest in their status.

parole possess an interest in remaining free from incarceration.<sup>86</sup> The Chief Justice thought that the liberty interest of the parolee included many of the "core values" of unqualified liberty. The origin of these "core values" were presumably natural since the Chief Justice did not cite any applicable Iowa statute. The mere loss of these "core values" was insufficient to invoke due process protection. The loss of these "core values" according to the Chief Justice, must be grievous.<sup>87</sup>

Chief Justice Burger concurred with Justice Stewart in *Smith v. Organization of Foster Families*<sup>88</sup> where the Court held, *inter alia*, that a foster child is not constitutionally entitled to an administrative hearing prior to being removed from the foster home. Burger's concurrence emphasized that it was not the weight of the interest which was the determining factor; it was its nature.<sup>89</sup> Moreover, the concurrence added that "not every loss, however 'grievous' invokes the protection of the Due Process Clause."<sup>90</sup> Considering the Chief Justice's concurrence in *Smith*, his prior opinion in *Morrissey* regarding an independent "liberty interest" argument is not persuasive. The implication of *Dumschat* in the *Leis* context is that unless the applicant can show more than a discretionary privilege to practice law *pro hac vice* which has been generously granted in the past, there is no denial of a constitutionally protected "liberty" interest in his request to practice is summarily denied.<sup>91</sup>

Moreover these recent cases confirm that the inmates' liberty interests (or for that matter anyone's liberty interest) stem from, at least, two sources, "positive law" (constitutional, statutory and case law sources) and natural law. The positive law source which is comparable to the "entitlement" theory of property has abundant case support.<sup>92</sup> The "natural law" or second source of the liberty interest as advanced by Justice Stevens,<sup>93</sup> endorsed by Justice Brennan<sup>94</sup> and acknowledged by Justice White,<sup>95</sup> has a problem not only because of its lack of clear definition, but its scarcity of case support.<sup>96</sup>

86. *Morrissey*, 408 U.S. at 482.

87. A biting rebuke to the Chief Justice's position in *Morrissey* is found in *Smith v. Organization of Foster Families*, 431 U.S. 816, 858 (1977):

Not every loss, however 'grievous,' invokes the protection of the Due Process Clause. Its protections extend only to a deprivation by a State of 'life, liberty, or property.' And when a state law does operate to deprive a person of his liberty or property, the Due Process Clause is applicable even though the deprivation may not be 'grievous.' *Id.* at 858 (Stewart, J., concurring) (citation omitted).

Curiously, Justice Stewart was joined in this concurrence by Justice Rehnquist and Chief Justice Burger.

88. 431 U.S. 816 (1977).

89. *Id.* at 858.

90. *Id.*

91. See *supra*, note 45 and accompanying text.

92. See *supra*, note 39.

93. *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting).

94. *Smith*, 431 U.S. at 845.

95. *Dumschat*, 452 U.S. at 467 (White, J., concurring).

96. *Meachum*, 427 U.S. at 230. The dissent of Justice Stevens was joined by Justices Brennan and Marshall with no cases in support of their proposition that, "all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects rather than the particular rights or privileges conferred by specific laws or regulations." *Id.* at 230. See also *Helms*, 655 F.2d at 494. Judge Rose acknowledges the "natural law's" existence, discusses the court's "movement" in that direction citing cases and then juxtaposes the "natural law's" "minority" position against the "positive" law grant version of the

The majority which anchored its holding on the *Roth* line of cases, may have expected the dissenters to argue from the natural law or the positive law theories. However, the dissenters chose a route which was not well established in the case law and ultimately, a less persuasive one.

### C. *Two Ancillary Propositions in Leis*

The Court cited two cases for two general propositions: (a) "[t]his Court, on several occasions, has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis;"<sup>97</sup> and (b) "[t]hese decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another."<sup>98</sup> As will be seen, the cases cited by the Court do not furnish authority for these two propositions.

#### (1) *Norfolk—The First Case in Support*

In the first case, *Norfolk and Western R.R. Co. v. Beatty*,<sup>99</sup> the plaintiffs filed an action in federal court challenging the constitutionality of an Illinois Supreme Court rule<sup>100</sup> which granted state courts unlimited discretion in allowing practice by foreign attorneys. Under this rule, the state court required plaintiffs' out-of-state attorneys to associate with local counsel but only in a supporting role. The plaintiffs did not attack this ruling as arbitrary but instead attacked the rule as unconstitutional. The court disagreed with plaintiffs by holding that the state procedure controlled and that the rule was not unconstitutionally applied to the plaintiffs. Since this case was summarily affirmed by the Court, the rationale of the district court commands analysis.

Judge Harlington Wood, Jr.'s opinion for the district court examined the plaintiffs' assertion of the denial of a constitutional right. The plaintiffs relied on *Spanos v. Skouras Theatres Corp.*,<sup>101</sup> which held that an out-of-state attorney could recover his fee in a Sherman Act suit even though he was not admitted to practice in the state or federal district where the collec-

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majority in *Meachum*. There was no discussion in support of the "natural law" theory, nor was there any suggestion how this dicta may have had an effect on the outcome of this case. Indeed, Judge Rosen appears to have jettisoned this cursory observation when analyzing the merits of the case. *Id.* at 494-95.

97. *Leis*, 439 U.S. at 443.

98. *Id.* at 443. See Comment, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711 (1967) [hereinafter cited as *Interstate and Federal Practice*]. Recent decisions indicate that there may be immunity from sanctions [for unauthorized practice] for non-resident attorneys who perform certain categories of services which might generally be thought part of "the practice of law." Such relaxation seems to reflect a recognition by the courts that there is a very important difference between activity by the layman and by the non-resident attorney in terms of the threats to interests the state may legitimately seek to protect. Nevertheless, the exceptions are very imprecise in scope; the non-resident attorney proceeds at his own risk, and the price of error may be high." *Id.* at 1717. See generally Sherman, *The Right to Representation by Out-of-State Attorneys in Civil Rights Cases*, 4 HARV. C.R.-C.L.L. REV. 65 (1968).

99. 423 U.S. 1009 (1975), summarily *aff'd*, 400 F. Supp. 234 (S.D. Ill. 1976).

100. SUP. CT. R. 110A § 707 Foreign Attorneys in Isolated Cases:

Anything in these rules to the contrary notwithstanding, an attorney and counselor-at-law from any other jurisdiction in the United States, or foreign country, may in the discretion of any court in the trial or argument of any particular cause in which, for the time being, he is employed.

101. 364 F.2d 161 (2d Cir. 1966), *cert. denied*, 385 U.S. 987 (1966).

tion action was pending. Judge Wood quickly distinguished *Spanos*<sup>102</sup> because no state statute or court rule regulating the practice of law was at issue. He then quoted extensively from *Spanos*'s dissenting opinion which concluded that federal and state courts "ought to have the power to regulate who practices before them. . . ." <sup>103</sup> Additional support was found by Judge Wood in the dissenting opinion in *Silverman v. Browning*.<sup>104</sup> In *Silverman*, the plaintiffs sought intervention by a federal court that would permit them to employ an out-of-state attorney *pro hac vice* in their civil litigation in state court. Admission of the out-of-state attorneys had been denied under a Connecticut statute similar to that of Illinois. The federal district court, however, abstained, holding that a federal court was not the proper forum to decide initially whether "good cause" existed to grant admission to the out-of-state attorneys. Judge Wood then held that the Illinois rule was not generally unreasonable since it did not bar all out-of-state lawyers, nor was it unreasonable in this case since "limited" participation of the out-of-state counsel with local counsel was permitted. The plaintiffs' argument that various factors rendered the rule unconstitutional was rejected.<sup>105</sup> Judge Wood emphasized that upholding the validity of the rule preserved the most significant aspect of the *Silverman* opinion—"the state's great interests in the control and supervision of the practice of law in its own courts through reasonable requirements for licensing and admission."<sup>106</sup>

*Leis*, of course, did not involve a direct attack on the constitutionality of the Ohio rule as did the *Norfolk* attack on the Illinois rule. This factor alone, according to Judge Wood, would distinguish *Leis* from *Norfolk*, as he distinguished *Spanos* from *Norfolk*.

The majority in *Leis*, by citing *Norfolk* but not critically analyzing how that case's "principles" apply to *Leis*, committed the same error as Judge Wood when he failed to consider the central theme of *Spanos*.<sup>107</sup> The *Leis* Court's reliance on *Norfolk* is also troubling because that case is a "hodge podge" of quotations and contains conclusions without supportive reasoning or case citations. Although the Court summarily affirmed *Norfolk*, there is no trace of constitutional principles or authority in *Norfolk* to support the two propositions proffered in *Leis*: (a) "this Court . . . has sustained state bar rules that excluded out-of-state counsel from practice altogether or on a case-by-case basis" and (b) "the Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another."<sup>108</sup>

## 2. *Brown*—The Second Case on Support

The *Leis* court also relied on *Brown v. Supreme Court of Virginia*,<sup>109</sup> as

102. "That case involved a Sherman Act Suit in Federal Court. . . . As the constitutionality of a state statute or Supreme Court rule regulating the practice of law in the state was not challenged the case is thus distinguishable." *Norfolk*, 400 F. Supp. at 236.

103. *Id.* at 237.

104. 359 F. Supp. 173 (D.C. Conn. 1972), *aff'd*, 411 U.S. 941 (1973).

105. *Norfolk*, 400 F. Supp. at 237.

106. *Id.* at 237.

107. *Spanos*, 364 F.2d at 170.

108. 414 U.S. 1034 (1973), *summarily aff'd*, 359 F. Supp. 549 (E.D. Va. 1973).

109. 359 F. Supp. at 562.

additional support for the two listed propositions. The *Brown* opinion is "wholly inapposite"<sup>110</sup> to the issues in *Leis*. The lawyers in the companion cases of *Brown* and *Titus v. Supreme Court of Virginia*<sup>111</sup> did not seek to appear in a "particular" matter *pro hac vice*, but instead sought general admission to the state bar of Virginia on the ground of comity or reciprocity. The majority in *Leis* assumed that if it was permissible for a state to deny an out-of-state lawyer the right to practice generally for failure to comply with state supreme court rules, the state could certainly deny this right to practice on a "limited basis" when the out-of-state attorney failed to apply for *pro hac vice* status or was unable to show that he was "entitled" to practice in Ohio on a limited basis.<sup>112</sup> This reason misses the mark. *Brown* concerned the constitutionality of a rule which required a bar applicant to reside in the state as a condition for admission upon motion without examination.<sup>113</sup> The focus of that court's opinion was whether this residency requirement for bar admission by reciprocity was constitutionally sustainable when it differed from the residency requirement imposed on those who successfully passed the bar examination.<sup>114</sup> Although the court approved Virginia's residency requirement,<sup>115</sup> this decision, in the words of the *Brown* court, was not "pertinent" to *pro hac vice* appearances.<sup>116</sup>

It is undisputed that each state has a valid interest in assuring that attorneys admitted to the bar are legally competent and ethically fit.<sup>117</sup> Where an applicant for a bar examination is denied admission solely because of his residency, the federal courts have on occasion overturned such decisions.<sup>118</sup> However, some other durational requirements (up to six months) have been upheld.<sup>119</sup>

The question of whether a lawyer has a fourteenth amendment interest in being allowed to 'appear in state courts without meeting the state's bar admission requirements,' 99 S. Ct. at 701, is wholly different from the question of the validity under the privileges and immunities clause of state rules which deny equal access to an explicit scheme of state requirements for bar admission by examination.<sup>120</sup>

*Brown's* "residency" requirement in the admission by reciprocity case is like

110. *Id.* at 552.

111. 414 U.S. 1034 (1973), *summarily aff'd*, 359 F. Supp. 549 (E.D. Va. 1973).

112. *Leis*, 439 U.S. at 441-42.

113. *Brown*, 359 F. Supp. at 553.

114. *Id.* at 552.

115. In *Brown*, 359 F. Supp. at 554, the three judge court, relying heavily on *Martin*, 368 U.S. at 25 held that the Supreme Court of Virginia had the "constitutional right to separately classify applicants taking the bar examination and those foreign attorneys who seek admission by comity or reciprocity." Rejecting the contention that the classification was in violation of the Equal Protection Clause, the court noted that the "test is whether the difference in treatment is an invidious discrimination." [quoting *Lehnhausen v. Lake Shore Auto Parts, Co.*, 410 U.S. 356 (1973)].

116. *Brown*, 359 F. Supp. at 554.

117. See *infra* notes 223-24 and accompanying text.

118. *Smith v. Davis*, 350 F. Supp. 1225 (S.D. W.Va. 1972); *Lipman v. Van Zant*, 329 F. Supp. 391 (N.D. Miss. 1971); *Webster v. Wofford*, 321 F. Supp. 1259 (N.D. Ga. 1970); *Keenan v. Board of Law Examiners*, 317 F. Supp. 1350 (E.D. N.C. 1970). See generally, Note, *A Constitutional Analysis of State Bar Residency Requirements under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461 (1979) [hereinafter cited as *Privileges and Immunities*].

119. *Privileges and Immunities*, *supra* note 118 at 1462-63.

120. *Id.* at 1465 n.21.

the residency requirement for applicants seeking general bar admission.<sup>121</sup> The residency requirement is more akin to those lines of cases than to the *Leis* fourteenth amendment approach.<sup>122</sup> *Norfolk* and *Brown* added nothing to the *Leis* opinion. The central focus of the *Leis* majority and the most compelling premise are evident in the *Roth-Bishop* line of cases.

#### D. *The Forgotten Precedents*

In the *Leis* per curiam opinion, the Court did not consider its prior decisions that defined the "rights" that are possessed by applicants<sup>123</sup> seeking admission to the bar and by attorneys<sup>124</sup> defending against disbarment. Initially this omission would appear curious. A partial clue to understanding this curiosity may be found in a 1958 article by William H. Rehnquist,<sup>125</sup> where the author's biting commentary castigated the Supreme Court's decision in *Schware v. Board of Bar Examiners*<sup>126</sup> and *Konigsberg v. State Bar of Calif.*<sup>127</sup> In *Schware*,<sup>128</sup> the Court declined to debate whether the practice of law was a "right" or a "privilege" but deemed it "sufficient to say that a person cannot be prevented from practicing except for valid reasons" and that an applicant's past affiliations with the Communist Party does not justify an inference that he presently has a bad moral character. *Konigsberg*<sup>129</sup> held that absent a rational basis in the record an applicant could not be denied admission to the bar. With respect to these decisions, the author noted "but what could be tolerated as a warmhearted aberration in the local trial judge becomes nothing less than a constitutional transgression when enunciated by the highest court of the land."<sup>130</sup> The essence of the "constitutional transgression," as the young author and later Associate Justice of the Supreme Court viewed it, was:

121. *Golden v. State Bd. of Law Examiners*, 452 F. Supp. 1082 (D. Md. 1978) (residency rule does not violate either Equal Protection Clause or art. IV), *appeal docketed*, No. 78-1447 (4th Cir. July 24, 1978).

122. U.S. CONST. amend XIV, § 2, cl. 1 states: "The citizens of each state shall be entitled to all privileges and immunities of citizens in several states." See also *Privileges and Immunities*, *supra* note 118, at 1462.

123. *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957); *Konigsberg v. State Bar*, 366 U.S. 36 (1961).

124. *In re Ruffalo*, 390 U.S. 544 (1968).

125. Rehnquist, *The Bar Admission Cases: A Strange Judicial Aberration*, 44 A.B.A.L.J. 229 (1958) [hereinafter cited as *Judicial Aberration*].

126. 353 U.S. 232 (1957).

127. 366 U.S. 36 (1961).

128. 353 U.S. at 239 n.5.

129. The case was remanded to the California bar committee for further hearings. *Konigsberg* introduced further evidence of good moral character (unrebutted), reiterated disbelief in the overthrow of the government, and denied that he had ever knowingly been a member of an organization advocating such action, but again refused, on first amendment grounds, to answer questions about Communist Party membership. Again, the committee denied his application, but this time on the explicit ground that his refusal to answer "has obstructed a proper and complete investigation of [his] qualifications for admission." The state supreme court refused review, and set the stage for *Konigsberg*, 366 U.S. 36 (1961). The Supreme Court sustained the denial of admission in *Konigsberg* by concluding that the state's interest in ascertaining the fitness of the employee for the post outweighed subjecting the employee to a searching inquiry regarding his communist affiliations. Of course, *Baird v. State Bar*, 401 U.S. 1 (1971) held that applicants may not be denied admission to the bar for refusing to disclose whether they belonged to "subversive" groups or to list all organizations to which they belonged. *Baird* severely limits the applicability of *Konigsberg II*.

130. *Judicial Aberration*, *supra* note 125, at 232.

[t]he most serious criticism of the Court's opinions in *Schwartz* and *Konigsberg* is not that they require such persons to be admitted to practice law—a result about which thoughtful people may disagree—but rather that they reach their result by a line of reasoning which appears to be good for these cases only. Just as surely as *Schwartz* and *Konigsberg* cannot *rationaly* be limited to communist bar applications, they cannot *practically* be applied to other classes of cases without making the Supreme Court of the United States an appellate court of general jurisdiction.<sup>131</sup> [Emphasis in the original].

It was Justice Rehnquist's analysis in *Bishop* that the state statute or rule granting an "entitlement" could also omit procedural guarantees of the constitution which formed a significant portion of the *Leis* opinion. Hence, according to Rehnquist in *Leis*, absent a state rule, statute or regulation intertwined with the source of the entitlement conferring procedural due process, there is no entitlement to due process. The *Schwartz* and *Konigsberg* rational basis test is specifically excluded under the Rehnquist analysis because the state rule or source did not specify it as an entitlement. The *Leis* Court's failure to discuss *Schwartz* and *Konigsberg* is not surprising after considering this history. Yet the fact that the legal principles established in *Schwartz* and *Konigsberg* are followed by lower courts raises serious questions regarding the image of the Court as a disinterested and intellectually honest decision maker.<sup>132</sup> *Schwartz* and *Konigsberg* held, *inter alia*, that a state statute may not limit the applicability of the Due Process Clause. Furthermore, query whether the *Leis* Court sought to overrule *Schwartz* and *Konigsberg* by ignoring them.<sup>133</sup> If it did, the effect of not mentioning these two cases suggests that the Court has determined that *pro hac vice* statutes or rules, like the rules governing general admission to practice, qualification for the bar examination or any other rule granting an entitlement, may exclude or limit application of the Due Process Clause. If the state rules or statutes omit the procedural guarantees of the constitution, then the individual is not "entitled" to that process. The reason for omitting a discussion of *Konigsberg* and *Schwartz* by the *Leis* majority appears to be explainable but not credible.<sup>134</sup>

131. *Id.* at 232.

132. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211 (1963) [hereinafter cited as Israel].

In a nation that prides itself on being a democracy, the absence of any practical legislative process for correcting the Court's constitutional decision always presents a potential barrier to the complete acceptance of judicial review. To overcome this obstacle, the Court must operate within a framework that maintains its image as a disinterested decision maker applying those fundamental values reflected in the Constitution. A general willingness to adhere to precedent has always been an important aspect of this framework. Certainly, the Court could not have maintained its role as the interpreter of a document that symbolizes continuity if its decisions had, as Justice Jackson once claimed, 'a mortality rate almost as high as authors'. So too, the view of the Court as an impersonal adjudication has depended to some degree on the assumption that the judge, unlike the legislator, is sharply restricted in relying upon his personal predilections by the necessity of following the decisions of his predecessors. *Id.* at 216-217 (citations omitted).

133. *Id.* at 217. "On the one hand, constitutional law, even more than other areas of the law, must be subject to change. And while this often can be achieved by distinguishing or even ignoring inconsistent precedents, there are times when intellectual honesty and proper application of the new rule by the lower courts require that a prior decision be directly overruled."

134. "On occasion, the Court has even gone so far as to declare that its previous decisions already had been overruled *sub silentio* by the 'tide' of later cases." *Id.* at 225. *Schwartz* and *Konigsberg* are of sound precedential value. There is no "tide" of cases undercutting the principles

It has been noted that the request for *pro hac vice* admission in *Leis* could have been compared to "other 'rights' which have been deemed to be worthy of due process protection."<sup>135</sup> The following discussion shows the potential for that comparison.

## II. FREEDOM FROM ARBITRARY ADJUDICATIVE PROCEDURES

The facts of *Leis* imply that Judge Morrissey's "decision" to deny Fahringer and Cambria's *pro hac vice* application to represent Flynt and Hustler Magazine, without reasons or a hearing, may have been not only arbitrary<sup>136</sup> but more significantly, a denial of their first amendment rights. According to one commentator,<sup>137</sup> the Court has determined that whether a constitutional right exists does not control when due process must precede governmental action resulting in an individual's loss of private employment. Having established this premise, the commentator concludes that "hearings on *pro hac vice* applications are [an] appropriate and needed means for revealing the character of a judge's reasons for denying admission."<sup>138</sup> Presumably such hearings would unmask all ill-motivated judges and reduce arbitrary decisions. The analysis to this conclusion needs additional development because a "hearing" may not be "the process due."

The Supreme Court has recognized that the fundamental due process guarantee of a right to be heard may be impaired unless the decision maker is required to state the reasons for his decision.<sup>139</sup> The requirement of an explanation contributes to accuracy and fairness by promoting consideration of all the relevant factors and by enabling the parties and reviewing courts to ensure that no error has occurred.<sup>140</sup>

Rule 23(c)<sup>141</sup> of the Federal Rules of Criminal Procedure requires a federal judge, upon request, to make findings of fact in a non-jury criminal trial. The Second Circuit has emphasized the desirability of special findings in the absence of timely request.<sup>142</sup> The importance of findings as an aid to appellate review has prompted several courts of appeals to require findings on specific issues in order to determine whether a conviction was validly

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established by these two opinions. Indeed, the flow of the "tide" appears to be in the opposite direction. See, *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (state disciplinary proceedings must protect the constitutional rights of the person subject to discipline); *Birnbaum v. Trussell*, 371 F.2d 672 (2d Cir. 1966) (whenever there is a substantial interest . . . involved in the discharge of a public employee, he can be removed on neither arbitrary grounds nor without a procedure calculated to determine whether legitimate grounds do exist; *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966) (states may not exercise its power to select bars in an arbitrary or discrimination fashion).

135. *Fuentes v. Shevin*, 407 U.S. 67 (1972), but see *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), *Bell v. Burson*, 402 U.S. 535 (1971), *Goss v. Lopez*, 419 U.S. 565 (1975).

136. See *supra* notes 55-59 and accompanying text.

137. *Pro Hac Vice Appearances*, *supra* note 4, at 144.

138. *Id.* at 144-45.

139. *Goldberg v. Kelley*, 397 U.S. 254, 267 (1970).

140. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

141. FED. R. CRIM. P. 23. Trial by Jury or by The Court: (c) Trial without a jury: In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the finding of fact appear therein.

142. *United States v. Rivera*, 444 F.2d 136, 138 (2d Cir. 1971); *United States v. Jones*, 360 F.2d 92, 96 (2d Cir. 1966), *cert. denied*, 385 U.S. 1012 (1967).

obtained.<sup>143</sup>

The importance of findings as a procedural safeguard for minimizing error and reducing the danger of arbitrary action has also been recognized in non-criminal proceedings.<sup>144</sup> Moreover, it has been held with increasing frequency that due process requires government officials to provide an explanation for a wide range of adverse administrative actions.<sup>145</sup> However, there are no constitutional decisions which require a state judge to give reasons or provide specific findings for denying *pro hac vice* applications. But there are state supreme court rules which so provide.

The Second Circuit had to decide whether an explanation is required in the rare case where bench trial verdicts are facially inconsistent.<sup>146</sup> It analogized the situation to *North Carolina v. Pearce*<sup>147</sup> where, upon retrial following a successful appeal, more severe sentence was imposed than after the initial trial. The Supreme Court held that the more severe sentence may be imposed if reasons for the enhanced sentence "affirmatively appears" in the record.<sup>148</sup> Relying on *Pearce*, the Second Circuit concluded that "petitioner's case is similar to *Pearce* in that it involves action by a state judge that may well be invalid, yet might be shown to be valid if adequately explained (citations omitted); we think due process requires an explanation for such action."<sup>149</sup>

This is not to say that a hearing should be granted before a *pro hac vice* application is denied. Even where due process is applicable, the Supreme Court has recognized that a hearing is not always required. For example in *Mathews v. Eldridge*,<sup>150</sup> the Court held that the Due Process Clause of the fifth amendment does not require a recipient of social security disability benefit payments to receive an evidentiary hearing prior to the termination of such benefits.<sup>151</sup> As the Court held earlier,<sup>152</sup> the very nature of due process precludes establishing an inflexible procedure to be applied without variation to vastly diverse situations.<sup>153</sup> "[C]onsiderations of what procedures due process may require under any given set of circumstances must begin with the examination of the precise nature of the government function involved, as well as the private interest that has been affected by government action."<sup>154</sup>

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143. *E.g.*, *United States v. Pinner*, 561 F.2d 1203 (5th Cir. 1977); *United States v. Conners*, 606 F.2d 269 (10th Cir. 1979); *cf.* *Mladinich v. United States*, 371 F.2d 940 (5th Cir. 1967).

144. FED. R. CIV. P. 52(a) states: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially, and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58—If an opinion or memorandum or decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

145. *See* *Wolff v. McDonnell*, 418 U.S. 539 (1974) (prison discipline); *Gagnon v. Scarpelli*, 411 U.S. 778, (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *United States v. Chairman, State Bd. of Parole*, 500 F.2d 925, 934 (1974), *vacated and remanded as moot sub. nom.*; *Regan v. Johnson*, 419 U.S. 1015 (1974) (parole release).

146. *Rivera v. Harris*, 643 F.2d 86, 96 (2d Cir. 1981).

147. 395 U.S. 71 (1969).

148. *Id.* at 726.

149. *Rivera*, 643 F.2d at 96.

150. 424 U.S. 319 (1976).

151. *Mathews*, 424 U.S. at 335.

152. *McElroy*, 367 U.S. at 895.

153. *Id.*

154. *Mathews*, 424 U.S. at 335.

The *Mathews* Court arrived at its holding by articulating an express three-factor test for determining that "process is due." That three factor test consists of: (a) the private interest affected; (b) the risk of error in the challenged procedures; and (c) the burden imposed on government by more demanding procedural requirements.<sup>155</sup> Before the *Mathews* test may be applied, a right entitled to due process protection must be identified<sup>156</sup> as an interest considered worthy of due process protection. *Roth, Arnett, Bishop, and Dumschat* establish that neither property interest nor a liberty interest was shown by the New York lawyers in *Leis*.

### III. THE DISSENT IN *LEIS*

Considering the succinct opinion of the *Leis* majority, the dissenters chose neither a comparative<sup>157</sup> nor an alternate theory approach. It chose instead to present a combination of arguments without a central theme. Justice Stevens<sup>158</sup> opened the analysis for the dissent by announcing that a lawyer's interest in pursuing his calling is protected by the Due Process Clause of the fourteenth amendment.<sup>159</sup> This was an impressive start because this was an area of analysis that promised a "right" worthy of protection by the Due Process Clause. Yet, it was an analysis raised but never seriously discussed by the dissenters and avoided by the majority.<sup>160</sup> The obvious authoritative and cogent analytical basis for such a discussion was *Schwartz and Konigsberg*.<sup>161</sup> But, while it is implicit in Justice Stevens' initial comment that he views the right to practice law as fundamental,<sup>162</sup> he added no analysis to this implied assertion. A "fundamental" right of course need not be cloaked in terms such as "property" or "liberty" because it is accorded independent due process protection.<sup>163</sup>

Justice Stevens next assailed the majority's conclusion that a lawyer has no constitutional protection against a capricious exclusion.<sup>164</sup> He cited *Morrissey* as support for his propositions that: (1) the "right privilege"<sup>165</sup> distinction was jettisoned; and (2) the nature of the parolee's contingent liberty along with the state's "implicit promise" that it would not be revoked arbitrarily required constitutional protection for the parolee.<sup>166</sup> This argument is persuasive except that *Morrissey* has been understood by the Supreme Court and lower federal courts<sup>167</sup> as meaning that the "explicit" or "enforce-

155. *Id.* at 335.

156. *See supra* notes 48 and accompanying text.

157. The dissent could have compared the status of the two New York lawyers with that of the welfare recipient in *Goldberg*, 397 U.S. at 254, and parolees threatened with the revocation of parole or probation in *Morrissey*, 408 U.S. at 471.

158. *Leis*, 439 U.S. at 445 (Stevens, J., dissenting). Mr. Justice Stevens was joined in his dissent by Mr. Justice Marshall and Mr. Justice Brennan.

159. *Id.*

160. *Id.* at 444.

161. *See supra* notes 125-129 and accompanying text.

162. "The question presented by this case is whether a lawyer abandons that protection [due process] when he crosses the border of the state which issued his license to practice. . . ." *Leis v. Flynt*, 439 U.S. at 445 (Stevens, J., dissenting).

163. *See supra*, notes 24 and 48 and accompanying text.

164. *Leis*, 439 U.S. at 445 n.1 (Stevens, J., dissenting).

165. *See generally, Adjudicative Due Process, supra* note 26, at 445-468.

166. *Leis*, 439 U.S. at 448.

167. *See supra* note 149.

able entitlement" created by state law is controlling. Justice Stevens' call to examine the "nature" of the activity however is consistent with *Roth*.<sup>168</sup> Hence, on this point he makes no appreciable advancement on or rebuttal to the majority opinion. His "nature of the activity" argument offered more promise. Justice Stevens asserts that the "implicit promise"<sup>169</sup> Ohio made to the two New York lawyers is a significant area for analysis.<sup>170</sup> He does not, however, give it the analysis he claims this argument demands.

The dissent in *Leis* also concluded that the "right" of out-of-state lawyers to appear *pro hac vice* was premised on the prevalence of the practice and the distinguished performance of foreign counsel in celebrated cases.<sup>171</sup> Because the custom was so well recognized, the dissent argued that once a lawyer established his "qualifications" there was no reason to suppose he would be denied;<sup>172</sup> the dissent does not provide case analysis in support of this position. Though the dissent characterized the *Leis* facts as a "situation in which the interests of justice would be served. . .,"<sup>173</sup> the absence of case authority in support of this assertion weakens this premise. As discussed above, this argument by the dissent has not only statistical but analytical support as well.<sup>174</sup>

Justice Stevens concluded that Ohio rules,<sup>175</sup> precedents,<sup>176</sup> and practice<sup>177</sup> gave non-resident lawyers an unequivocal expectation that the exercise of discretion on *pro hac vice* applications will be based on permissible reasons. In an attempt to support this contention, Justice Stevens extracted an "implication" from *State v. Ross*<sup>178</sup> "that the denial of a right to appear

168. See *supra* notes 24 and 48 and accompanying text.

169. *Leis*, 439 U.S. at 448 (Stevens, J., dissenting).

170. *Id.* at 448-50. See *supra* notes 56-59 and accompanying text.

171. *Leis*, 439 U.S. at 450 (Stevens, J., dissenting). Citing exemplary cases, Justice Stevens begs the issue of showing the constitutional authority supporting his assertion. It has been urged that the majority in *Leis* may have concluded that these "celebrated" cases cited by the dissenters were not significant because they were non-Ohio cases. This is certainly true in the *Paul* "mutual understanding" sense.

172. The dissent implies that one method for certifying your qualification for *pro hac vice* admission is to be considered a specialist and the out of state "specialist" must be given a legitimate reason on the record for denying his request to appear *pro hac vice*. *Id.* at 451-52 (emphasis in original).

173. *Id.* at 452.

174. See *supra* notes 56-62 and accompanying text.

175. SUP. CT. R. 1(8c) (Ohio) allows: (a) "participation by a non resident of Ohio in a cause being litigated in this state when such a participation is with leave on the judge hearing such cause."

(b) "Canon 3 of Ohio's Code of Professional Responsibility recognized the indispensability to many modern attorneys of the ability to pursue their clients' interests across state lines:

[t]he legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice."

(c) "Rule 10(E) of the Rules of Practice of the Court of Common Pleas, Hamilton County, Ohio, requires 'any attorney who accepts private employment in any criminal case' to file a specified form. Once that form is endorsed by a judge, as occurred here, the attorney becomes 'attorney of record' who 'shall not be permitted to withdraw except upon the written motion for good cause shown.'"

176. *Leis*, 439 U.S. at 457 (Stevens, J., dissenting).

177. *Id.* at n.19.

178. 36 Ohio App. 2d 185, 304 N.E.2d 396 (1973).

*pro hac vice* without a proper reason was reversible error."<sup>179</sup>

*Ross*' applicability, however, to a case where (a) the applicant fails to make a pre-trial motion for *pro hac vice* status and (b) the judge summarily overrules a post arraignment application for such status without reasons, is doubtful. In *Ross*, the judge gave specific reasons for overruling the pre-trial *pro hac vice* motion.<sup>180</sup> Moreover, after being given an opportunity to be heard on his *pro hac vice* application, the applicant refused to abide by the Court's order.<sup>181</sup>

Justice Stevens would have presented a more cogent argument if he had emphasized the theory identified as the "right to be free from arbitrary government action." Over one hundred years ago, the Supreme Court, in *Ex parte Garland*<sup>182</sup> invalidated a federal statute excluding confederate sympathizers from practice in federal courts. And in *Konigsberg* and *Schwartz*, the Supreme Court held that California and New Mexico violated the fourteenth amendment by arbitrary application of a vague standard in order to deny bar admission to applicants who had formerly belonged to the Communist Party.<sup>183</sup> Justice Stevens did explain, however, in the latter half of

179. "It has, however, been generally recognized that an attorney not admitted to practice in Ohio, but admitted to practice and in good standing in another state, to represent a party in a particular action, is a matter lying within the sound discretion of the trial court. Thus, we must determine whether there has been an abuse of discretion in this instance." *Id.* at 188.

Other appellate courts have held or stated in dicta that admission *pro hac vice* to trial courts within their jurisdiction may not be denied without cause. See *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975) (denied inappropriate except upon showing of the unethical conduct); *McKinzie v. Burris*, 255 Ark. 330, 344, 500 S.W.2d 357, 366 (1973) (trial court may not impose "arbitrary numerical limitation on the number of [*pro hac vice*] appearances by an attorney" with expertise in the relevant area). See also *Munoz v. District Court*, 446 F.2d 434 (9th Cir. 1971); *Atchison, Topeka & Santa Fe Ry. v. Jackson*, 235 F.2d 390, 393 (10th Cir.); *Brown v. Wood*, 257 Ark. 252, 258, 516 S.W.2d 98, 102 (1974); *Cooper v. Hutchinson*, 184 F.2d 119, 123 (3d Cir. 1950); *Smith v. Brock*, 532 P.2d 843, 850 (Okla. 1975).

180. "The original trial judge, who was later disqualified, rendered a written decision denying the application for participation of the out-of-state counsel indicating that the decision was predicated at least in part upon a finding of unprofessional conduct by the out-of-state attorney in connection with a press conference and rally." *Ross*, 36 Ohio App. 2d at 190. This is a clear case of whether the record supports the trial judge's decision. Yet *Leis* involves a situation where the judge summarily dismisses and gives no reasons.

More, this is not a garden variety *Cooper v. Hutchinson*, 184 F.2d 199 (3d Cir. 1950) case—The type of case that goes no further than to say that a constitutional issue is protected if an attorney admitted *pro hac vice* is removed in midstream for no reason at all and without a chance to be heard (quoting from *Ross*, 36 Ohio App. 2d at 400). Some have argued whether *Leis* was a mid-stream removal. See *supra* notes 57-59 and accompanying text.

181. *Ross*, 304 N.E.2d at 401-07. However an on-the-record hearing is not required in the Fifth Circuit when there is no dispute as to the material facts. See *United States v. Dinitz*, 538 F.2d 1214, 1223-24 (5th Cir. 1976). *Ross v. Red*, 501 F.2d 1172 (6th Cir. 1975) and *In re Evans*, 524 F.2d 1004 (5th Cir. 1975).

*Dinitz* and *Evans* are customarily considered together, even though *Evans* was decided two years after *Dinitz* and even though *Evans* is clearly distinguishable in certain respects.

In that case [*Evans*], an attorney had made a formal pretrial motion for admission *pro hac vice* in a criminal tax evasion case and the district judge had denied the motion. The panel granted a Writ of Mandamus compelling the district court to admit the attorney. In doing so, the panel outlined certain procedural requirements applicable to *pro hac vice* motions (cite omitted) and declared that only misconduct "rising to the level of disbarment" would give a district judge the discretion necessary to deny a *pro hac vice* appearance. *United States v. Dinitz*, 538 F.2d at 1223.

182. 71 U.S. (4 Wall.) 333 (1867).

183. The Supreme Court has long held that the fourteenth amendment prohibits state imposition in an arbitrary standard in order to deny employ opportunities to individuals. See, e.g., *Yick*

his dissent, why the *Roth* trilogy was misapplied by the *Leis* majority and therefore why the freedom from arbitrary government action need not be moored to specific state procedure.<sup>184</sup> As Justice Stevens saw this case, it was a "liberty interest" which Fahringer and Cambria sought to protect, not a "property interest." And more, he thought the *Leis* majority wrong for giving such a rigid judicial construction to the words "life, liberty or property."<sup>185</sup> It was not case law that Justice Stevens quoted to support this position, but the collective experience of Ohio and the rest of the nation with out-of-state practitioners.<sup>186</sup> This argument, of course, was rejected by the majority.<sup>187</sup> Since Justice Stevens' "prevalence of the activity" argument was not anchored on any discernible case precedents, its rejection was predictable.

The *Leis* majority failed to note or discuss applicable precedent<sup>188</sup> and the dissenters noted applicable and probably dispositive cases but failed to discuss them.<sup>189</sup> The limits of *Leis* and alternative theories may now be discussed separately.

Wo v. Hopkins, 118 U.S. 356 (1886); Wieman v. Updegraff, 344 U.S. 183 (1952); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956).

See Jones v. Helms, 452 U.S. 412 (1980) where the Court per Justice Stevens interpreted *Yick Wo* to be applicable to the general contention that general rules cannot be applied to arbitrary and discriminatory ways. The movant must show how he is being treated differently (or unequally) by the enforcement of said rules. Hence, it appears that the movant carries the burden of showing how the rule has been arbitrarily or discriminatorily applied. If no reasons need be given and are not given for the agency's actions, this burden appears impossible to sustain; but see note 223 *infra* and accompanying text.

Jones held, *inter alia*, that a Georgia statute which deems a parent who willfully and voluntarily abandons his or her dependent child is guilty of a misdemeanor and those parents who commit that offense within Georgia and thereafter leave the state are guilty of a felony, does not impermissibly infringe upon the constitutional right to travel nor does it violate the Equal Protection Clause.

184. *Leis v. Flynt*, 439 U.S. at 456-57 (Stevens, J., dissenting).

The mode of analysis employed by the Court in recent years has treated the fourteenth amendment concepts of "liberty" and "property" as though they defined mutually exclusive, and closed categories of interest, with neither shedding any light on the meaning of the other. Indeed, in some of the Court's recent opinions it has implied that not only property, but liberty itself, does not exist apart from specific state authorization or any express guarantee in the Bill of Rights (citations omitted).

185. *Id.* at 456-57 n.29.

I continue to adhere to the view that neither the Bill of Rights nor the laws of the sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of the individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source. (Stevens, J., dissenting) (citations omitted).

In this excerpt, Justice Stevens pointedly explains why he could write the majority in *Bishop* and dissent in *Leis* and *Meachum*, because property rights of an individual are created solely by state law. He does not address the hard questions of why such distinctions should be made between these two "rights" or, assuming the distinction is made, how do we determine a "liberty" interest from a "property" interest.

186. "It is not only Ohio experience with out-of-state practitioners, but that of the entire nation as well, that compels the judgment that no state may arbitrarily reject a lawyer's legitimate attempt to pursue this aspect of his calling." *Leis*, 439 U.S. at 457 (Stevens, J., dissenting).

187. *Id.* at 441-44.

188. See *supra* notes 125-29 and accompanying text.

189. See *supra* notes 160-63.

VI. THE LIMITS OF *LEIS*A. *The Arkansas Experience*

Prior to 1975, Arkansas *pro hac vice* law was "celebrated" in two opposing Arkansas Supreme Court opinions which chronicled the legal exploits of a Tennessee lawyer, James S. Cox.<sup>190</sup> In *McKinzie v. Burris*,<sup>191</sup> the petitioner defendants in a medical malpractice action sought an order to strike the name of James S. Cox as associate counsel of record for the plaintiffs because he was not licensed to practice in Arkansas. The trial court denied the motion to strike, and the Arkansas Supreme Court affirmed on certiorari, holding that a non-resident attorney should be allowed to practice in Arkansas on a limited basis where he or she: (a) has associated with local counsel; (b) has not been involved in general practice in Arkansas; and (c) has developed some degree of expertise in the particular field of litigation in which he or she is engaged. On the other hand, in *Brown v. Wood*,<sup>192</sup> the Arkansas Supreme Court upheld on certiorari the trial court's order striking Cox' name as attorney of record because the court held the trial court's action did not grossly, arbitrarily and capriciously abuse its discretion in view of its concern about the extent of Cox' practice in the state. Accordingly, the *Brown* court added a fourth condition to the out-of-state attorney's application for admission under Arkansas' pre-1975 *pro hac vice* rule—<sup>193</sup>

(d) [t]he extent of [the out-of-state attorney's] practice in Arkansas, and elsewhere, and the potential effect of this extensive practice on the ability of the judge to control and expedite his docket as well as the progress of cases in which [he or she] participated without sacrificing the interest of litigants, witnesses and other participants in his court.<sup>194</sup>

The *Brown* court's emphasis on the impact of the non-resident's extensive practice on the trial judge's docket control changed the admission focus to a more subjective standard. This new emphasis was sanctioned by the Arkansas statute for non-resident admission.<sup>195</sup> In 1975, however, § 25-108 was superceded by Rule XIV<sup>196</sup> of the rules governing admission to the bar enti-

190. *McKinzie v. Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973); *Brown v. Wood*, 257 Ark. 252, 516 S.W.2d 98 (1973).

191. 255 Ark. at 366 (1973).

192. 257 Ark. 252, 516 S.W.2d at 101.

193. ARK. STAT. ANN. § 25-108 (Repl. 1962):

Non-resident attorneys at law of record shall be allowed to practice law in all the courts of this state of equal jurisdiction of the court or courts to which they have been admitted to practice and are members of the bar in good standing in the state of their residence, under such terms and conditions and requirements as may be prescribed by the rules or practice of any court in which any such non-resident attorney at law seeks to practice.

194. *Brown*, 516 S.W.2d at 101.

195. See *supra* note 193.

196. ARK. STAT. ANN. Vol. 3A (Repl. 1979) Rule XIV reads:

A lawyer residing outside the State of Arkansas who has been admitted to practice law in the Supreme Court of the United States or in the United States Court of Appeals for the circuit in which he resides or in the Supreme Court or the highest appellate court of the state of residence, and who is in good standing in the court of his admission, will be permitted by comity and by courtesy to appear, file pleadings and conduct the trial of cases in all courts of the state of Arkansas. . . .

A non-resident lawyer will not be permitted to engage in any case in an Arkansas court unless he first signs a written statement, to be filed with the court, in which the nonresident lawyer submits himself to all disciplinary procedures applicable to Arkansas lawyers.

tled "Practice by Comity," thereby replacing the *Brown* and *Burris* conditions for *pro hac vice* admissions.

Rule XIV has been interpreted strictly by the Arkansas Supreme Court to require an applicant to satisfy each of its conditions before admission *pro hac vice* is granted. In *Walker v. State*,<sup>197</sup> the Arkansas Supreme Court held that a motion for continuance to file a brief was subject to dismissal if a non-resident attorney failed to comply with Rule XIV within a specified time. As the court put it "[a] non-resident attorney will be permitted to appear in the Arkansas Courts by Comity and courtesy *only* upon satisfying the condition set forth in Rule XIV Rules Governing Admission to the Bar." (emphasis added).<sup>198</sup> The court emphasized that specific compliance with Rule XIV results in the admission of a non-resident attorney. Moreover, the language of Rule XIV appears to entitle an out-of-state attorney to admission once he has satisfied the requirements of (1) residing outside the admitting state; (2) being admitted to practice law in the United States Supreme Court or in the United States Court of Appeals for the circuit in which he resides or the highest appellate court of the state of his residence; (3) being in good standing in the court of his admission; (4) having signed a written statement which has been filed with the court, in which he submits himself to all disciplinary procedures applicable to Arkansas lawyers; and (5) having resided in a state that accords a similar comity and courtesy to Arkansas lawyers. But, in addition, he may be required in the discretion of the court to (6) associate with local counsel admitted to practice and reside in Arkansas.<sup>199</sup> Therefore, Arkansas does provide a "source in state law" granting the *pro hac vice* applicant an "entitlement" to admission within the meaning of *Leis*. Three states adjacent to Arkansas have provided in their state laws an "entitlement" to out-of-state attorneys to practice law without a license.

### B. *Tennessee's Pro Hac Vice Rule*

Tennessee Supreme Court Rule 7, § 8.06 entitled "Licensing" provides, *inter alia*, that a "non-resident attorney associated with attorneys in this state . . . as a matter of courtesy"<sup>200</sup> will be allowed to practice there without a license. This Supreme Court Rule establishes no other condition or limitation on the *pro hac vice* applicant. Accordingly, *Roth* nor its progeny may support the denial of a *pro hac vice* application in Tennessee under facts as those found in *Leis*.

### C. *The Oklahoma and Texas Rules*

Both Oklahoma statute 201<sup>201</sup> and Texas statute<sup>202</sup> provide that a *pro*

197. 274 Ark. 124, 622 S.W.2d 193 (1981).

198. *Id.* at 194.

199. *See infra* note 200.

200. SUP. CT. R. 37 (8.06) (Tenn. 1980):

Non-resident attorneys associated with attorneys in this state in any case pending here who do not desire to practice regularly in this state will be allowed as a matter of courtesy to appear in such case in which they may be thus employed without procuring a license when introduced to the court by a member in good standing. . . .

201. OKLA. STAT. ANN. tit. 5, § 17 (West 1969). Any regularly admitted practicing attorney in the courts of record of another state, having business in courts of Oklahoma, may, on motion, be permitted to practice for purpose of such business; but it must appear that he has associated with

*hac vice* applicant must do so on motion and must associate with local counsel. Oklahoma does differ, however, by excluding the association requirement where the state in which the applicant is admitted allows admission of out-of-state counsel without associating. Though the Texas rule requires the applicant to satisfy additional conditions, it, like Oklahoma, appears to be an entitlement state. However, Texas does specifically reserve discretion in the trial court to deny the motion notwithstanding the successful satisfaction of the foregoing conditions and statements.<sup>203</sup> Moreover, in the leading Texas Supreme Court case of *State Bar v. Belli*,<sup>204</sup> the court emphasized that *pro hac vice* admissions is the province of the trial judge.<sup>205</sup> In *Belli*, the Texas state bar association sought an exceptional writ from the state supreme court to permanently enjoin a foreign attorney from future practice in Texas courts. The Texas Supreme Court denied the writ on the basis that (a) admission *pro hac vice* was the province of the trial judge; (b) the foreign attorney was not presently seeking admission or practicing in Texas; and (c) any action to enjoin a foreign attorney from admission *pro hac vice* would more properly be sought in the court where the admission was being sought.<sup>206</sup> Even so, the discretion to deny a *pro hac vice* application is not absolute in Texas. Because prior to a *pro hac vice* denial the judge must make specific findings, identify that he is somehow dissatisfied with whether the non-resident attorney is reputable and that the non-resident attorney will not observe the ethical standards required of attorneys in Texas.<sup>207</sup> The trial judge is required to support all denials with specific reasons.

Most state statutes and rules governing *pro hac vice* admissions are entitlement states within the meaning of *Roth* and *Leis*.<sup>208</sup> In most states the only significant condition for the *pro hac vice* applicant is to associate with local counsel;<sup>209</sup> even so, some states exclude the association with local counsel requirement when the applicant's state does not include such a requirement.<sup>210</sup> Some states, however, repose the admission decisions in the discretion of the trial judge.<sup>211</sup> Other states grant admission where the applicant is recommended to the court by certain persons.<sup>212</sup> A few grant admission where the applicant's state allows *pro hac vice* applicants admission by simple permission.<sup>213</sup> In some states *pro hac vice* applications are denied where the applicant's state fails to provide reciprocal *pro hac vice* rules<sup>214</sup> or where all the applicant's pleadings are not signed by local counsel.<sup>215</sup> Most

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him a resident licensed attorney of Oklahoma unless his state permits Oklahoma attorneys to practice therein without associating local attorneys.

202. TEX. REV. STAT. ANN. art. 308 (Vernon 1973).

203. *Id.* at 6(c).

204. 382 S.W.2d 475 (1964).

205. *Belli*, 382 S.W.2d at 476.

206. *Id.* at 477.

207. *See supra* note 203 and accompanying text.

208. *See, e.g.*, Rules Governing Admiss. to Bar XIV (Ark. 1975); MINN. STAT. ANN. § 481.02 (West 1971).

209. *See, e.g.*, ALASKA CIV. R. § 1 (1973); SUP. CT. R. 37 (8.06) (Tenn. 1980).

210. *See, e.g.*, NEB. REV. STAT. § 7-103 (1977); OKLA. STAT. ANN. tit. 5 § 17 (West 1979).

211. *See, e.g.*, GA. CODE ANN. § 24-4507 (1976); WISC. STAT. ANN. § 256 (West 1979).

212. *See, e.g.*, N.D. CENT. CODE § 27-11-27 (1974).

213. *See, e.g.*, SUP. CT. R. 14:4 (Va. 1979).

214. *See, e.g.*, N.C. GEN. STAT. § 84-4.1 (1975).

215. *See, e.g.*, SUP. CT. R. 1.21-2 (N.J. 1979).

state rules or statutes provide "a source in state law" entitling *pro hac vice* applicants to admission pursuant to the *Roth-Bishop* line of cases.

Though the Supreme Court has recognized state created interests called "entitlements" in various cases,<sup>216</sup> the *Leis* Court determined that Ohio law did not grant an entitlement to out-of-state attorneys seeking *pro hac vice* admission.<sup>217</sup> One commentator has defined the limits of *Leis* as follows:

[i]n those states having an unambiguous *pro hac vice* procedure the applicant will be able to claim an entitlement to admission even where the trial court exercises limited discretion. Upon denial of *pro hac vice* admission, the applicant's appeal will be most difficult in states having vague and ambiguous statutes, rules and regulations. Almost no possibility of success exists in states which grant the trial judge unfettered discretion.<sup>218</sup>

The commentator's conclusion that review for abuse of discretion is possible only where the judge's discretion is statutorily limited seems suspect. He relies only on *Roth* as authority for his premise, but *Roth* cannot be read without a consideration of *Bishop*,<sup>219</sup> which reveals that the enforceable procedural rights can be contained in state statutes, rules, regulations, or a mutual understanding.<sup>220</sup> As *Bishop* particularly emphasized, one may be entitled to even less of an "entitlement" where the statute appears unambiguous.<sup>221</sup>

Justice Stevens concluded that the majority opinion in *Leis* misapplied *Bishop* to the "liberty interest" he identified in *Leis*.<sup>222</sup> In any event, regardless of how *Bishop* is read, a finding of no "property" or liberty interest in a *pro hac vice* application does not foreclose inquiry into other approaches to the denial of admission *pro hac vice*.

## VI. OTHER APPROACHES TO THE DENIAL OF ADMISSION *PRO HAC VICE*

### A. *Equal Protection*

A limited list of alternatives to challenge a denial of *pro hac vice* admission would include the denial of equal protection, first amendment, and sixth amendment rights. It has been urged by at least one commentator, Don C. Keenan, that the most persuasive alternative theory when no statutory property right exists is the denial of equal protection.<sup>223</sup> Citing *Schwartz* and *Konigsberg* as the chief cases supporting this theory, Keenan argues that: (a) states, though free to determine who may be admitted to practice law, may not make such determinations in an arbitrary or discriminatory manner; and (b) in terms of equal protection there was no difference between the *pro hac vice* applicant and the applicant in *Schwartz*.<sup>224</sup> The petitioner in *Schwartz*, though, never having practiced law in New Mexico, was held to have had an interest in not being excluded "from the practice of law

216. See *supra* note 135.

217. See *supra* notes 21-22.

218. Keenan, *Pro Hac Vice: Revitalizing a Wounded Speciality*, 4 AM. J. TRIAL ADVOC. 23, 27 (1980) [hereinafter cited as *Wounded Speciality*].

219. See *supra* notes 37-39 and accompanying text.

220. *Bishop*, 426 U.S. at 344.

221. See *supra* notes 37-40 and accompanying text.

222. See *supra* notes 184-85 and accompanying text.

223. *Wounded Speciality*, *supra* note 218, at 27.

224. *Id.* at 28.

. . . in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment."<sup>225</sup> In 1971, the Court described the practice of law as a "right for one who is qualified by his learning and his moral character."<sup>226</sup> Another commentator has concluded, however, that even with this argument an out-of-state lawyer would be forced to show a property interest as required by *Bishop, Roth, etc.*

The liberty to pursue a profession, however invokes due process protection only when governmental action threatens to exclude an individual entirely from pursuing his chosen profession [citations omitted]. Assuming an attorney, like Fahringer possessed an inherent right to practice law, that right would not extend to appearances *pro hac vice* because he would still be free to pursue his legal career in a state in which he was admitted to the bar. To protect his interest in representing a particular client, he would have to demonstrate a property interest in that representation.<sup>227</sup>

This conclusion has case support. The "liberty to pursue a profession" has invoked due process protection in situations where the government action threatened to exclude an individual entirely from pursuing his chosen profession. For example, the Due Process Clause or the Equal Protection Clause is violated when the government discriminates on racial grounds against a class of persons seeking to pursue a profession. The Court in *Yick Wo v. Hopkins*<sup>228</sup> held that the city of San Francisco could not deny permits to Chinese laundry operators when denial was solely based on race. The Court reasoned that, "no reason for it [the different treatment] exists except hostility to the race and nationality to which the petitioners [*Yick Wo, et al*] belong, and which in the eye of the law, is not justified."<sup>229</sup> In *Yick Wo* the arbitrariness was apparent to the Court. However, where a judge may deny *pro hac vice* applications without reasons the arbitrariness may not be apparent. Where the *pro hac vice* statute or rule leaves unfettered discretion in the trial judge or is ambiguous, it is unclear how the equal protection theory protects the applicant from a judge who fails to give reasons for a denial.

*Schware* and *Yick Wo* support the view that due process prohibits determinations that are arbitrary or discriminatory,<sup>230</sup> and *Roth* requires procedural due process where the applicant shows the deprivation of a "property" interest. Yet neither *Schware* nor *Yick Wo* appear to be helpful where the judge need not give reasons for a denial of a *pro hac vice* application and the reason is not apparent.

## B. The Sixth Amendment Analysis

The sixth amendment<sup>231</sup> guarantees a criminal defendant the right to the assistance of counsel before he can be validly convicted.<sup>232</sup> An essential element of the sixth amendment's protection is that a defendant must be

225. *Id.* at 28.

226. *See supra* note 129 and accompanying text.

227. *Pro Hac Vice Appearances, supra* note 4, at 139.

228. 118 U.S. 356 (1886).

229. *Yick Wo*, 118 U.S. at 357-58.

230. *Schware*, 353 U.S. at 238-39.

231. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his [d]efense."

232. *Holloway v. Arkansas*, 435 U.S. 475 (1978); *Faretta v. California*, 422 U.S. 806 (1975); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 35 (1963); *Betts v.*

afforded a reasonable opportunity to secure counsel of his choice. In *Powell v. Alabama*, where the court held that the right of an accused in a capital case to have counsel for his defense was one of the fundamental rights guaranteed by the due process clause of the fourteenth amendment, the Court stated "[i]t is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."<sup>233</sup> Twenty-two years after *Powell*, the court in *Chandler v. Fretag*<sup>234</sup> held that a criminal defendant was deprived of due process when he was denied a continuance to enable him to secure counsel of his choice and forced to stand trial immediately without counsel.<sup>235</sup>

A trilogy of cases from the Sixth Circuit confirms that *Chandler* is still good law. In *United States v. Johnston*,<sup>236</sup> *Giacolone v. Lucas*<sup>237</sup> and *Linton v. Perini*,<sup>238</sup> the Sixth Circuit considered when the denial of a continuance to secure counsel becomes so arbitrary as to deprive the defendant of a fair opportunity to select his own counsel in violation of the sixth amendment. The court found such a deprivation in *Johnston* and *Perini* but not in *Lucas*; it employed a test of balancing the trial Judge's discretionary power to deny continuances against the sixth amendment's right to counsel of choice.<sup>239</sup> Moreover, *Perini* identified "a reasonable opportunity to employ and consult with counsel" as a key consideration in the right to counsel under the sixth amendment.<sup>240</sup> The court in *Perini* defined the limits of the state's intrusion on the defendant's right to counsel of his or her choice. "[C]onversely, a state may not arbitrarily interfere with this right [sixth amendment] in the name of docket control. Evidence that a defendant was denied this right arbitrarily and without adequate reason is sufficient to mandate reversal without a showing of prejudice."<sup>241</sup> The balancing test approach used to resolve the tension between the sixth amendment commands and the court's discretion to deny continuances has been adopted by other circuits.<sup>242</sup> The balancing test approach is an indicator that the sixth amendment right to counsel is not unlimited.<sup>243</sup>

The right to retain counsel of one's choice "cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of Justice, and deprive such courts of the exercise of their inherent powers to control the

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Brady, 316 U.S. 455 (1942); *Johnson v. Zerbst*, 304 U.S. 458 (1937); *Powell v. Alabama*, 287 U.S. 45 (1932).

233. *Powell*, 287 U.S. at 53.

234. 348 U.S. 3 (1954).

235. *Id.* at 10.

236. 318 F.2d 288 (6th Cir. 1963).

237. 445 F.2d 1238 (6th Cir. 1971).

238. 656 F.2d 207 (6th Cir. 1981).

239. *Id.* at 210-11.

240. *Id.* at 211.

241. *Id.*

242. *United States v. Leavitt*, 608 F.2d 1290 (9th Cir. 1979); *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978); *United States v. Inman*, 483 F.2d 738 (4th Cir. 1973).

243. *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978); *United States v. Vargasmartinez*, 569 F.2d 1102 (9th Cir. 1978); *United States v. Gray*, 565 F.2d 88, (5th Cir. 1978); *United States v. Poulack*, 556 F.2d 83 (1st Cir. 1977), *cert. denied*, 434 U.S. 986 (1977); *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972), *cert. denied sub nom.*; *Santoro v. United States*, 409 U.S. 1063 (1972); *United States v. Hampton*, 457 F.2d 299, 301 (7th Cir. 1972), *cert. denied*, 409 U.S. 856 (1972).

same."<sup>244</sup> The public has a strong interest in the prompt, effective, and efficient administration of justice; the public's interest in the dispensation of justice that is not unreasonably delayed has great force.<sup>245</sup> Further, the right to the counsel of one's choice has been limited when the lawyer of choice is an out-of-state lawyer not admitted to practice in the jurisdiction where the client's case is pending.<sup>246</sup> In *Ross v. Reda*,<sup>247</sup> the court agreed that even if defendant retained competent local counsel, the denial of his out-of-state counsel "significantly" weakened his sixth amendment claim to a lawyer of his choice. But the court emphasized that it did not deprive him of the right to counsel.<sup>248</sup> More importantly, *Reda*, *Fretag*, *Johnston*, *Lucas* and *Perini* all appear not to support Flynt and Hustler's right to have the New York lawyers represent them.

In *Leis*, it was local counsel who attended all appearances and informed the two New York lawyers that the trial judge would not allow them to appear on behalf of the defendants.<sup>249</sup> *Reda* supports the view that the defendants in *Leis* were not denied their sixth amendment right to counsel.

The "continuance" cases of *Johnston*, *Lucas* and *Perini*, discussed above, portend that unless Flynt and Hustler can show that the trial court deprived them of a "fair opportunity and a reasonable time to select their own counsel," a sixth amendment deprivation will not be found. Hence, the defendants must appeal the denial of their lawyers' *pro hac vice* application or request a continuance until the lawyers of their choice are approved. The "continuance" cases allow a defendant to appeal a denial of his selected counsel's *pro hac vice* application or request a continuance until the lawyers of their choice are approved. The "continuance" cases allow a defendant to appeal a denial of his selected counsel's *pro hac vice* application or request a continuance until the counsel of his choice is approved. A deprivation of his rights will be found only after balancing the discretionary power of the trial judge to deny continuances with the defendant's right to the counsel of his choice.<sup>250</sup>

### C. *Litigation—A Form of First Amendment Expression*

Freedom of expression is among the basic liberties protected by the first amendment. The first amendment, of course, is applicable to the states under the fourteenth amendment.<sup>251</sup> A key consideration at the inception of this analysis is that "the existence or nonexistence of a 'property interest,' which is crucial to due process matters, has no relevance to the first amendment framework."<sup>252</sup> This proposition was affirmed by a unanimous

244. *Lee v. United States*, 235 F.2d 219, 221 (1956); *Smith v. United States*, 288 F.2d 259, 261 (1923).

245. *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978).

246. *Ross v. Reda*, 510 F.2d 1172 (6th Cir. 1975), cert. denied, 423 U.S. 892 (1975). See, e.g., *Thompson v. Cassidy*, 249 F.2d 91, 92 (4th Cir. 1957).

247. *Ross*, 510 F.2d at 1173.

248. *Id.* at 1173.

249. *Leis*, 439 U.S. at 438.

250. See *Linton*, 656 F.2d at 207.

251. *Northern Penna Legal Services Inc. v. County of Lackawanna*, 513 E. Supp. 678, 684 (M.D. Penn 1981).

252. *Id.* at 684 [quoting from *Mount Healthy School Dist. v. Doyle*, 429 U.S. 274 (1977)].

Supreme Court in *Mount Healthy School Dist. v. Doyle*.<sup>253</sup> In *Doyle*, an untenured teacher sought relief from a decision not to renew his contract by school board officials. The teacher maintained that the action was in retaliation for certain statements he had made to a radio station. Justice Rehnquist, writing for a unanimous court, stated:

[The teacher's] claims under the first and fourteenth amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him, . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected first amendment freedoms. . . .<sup>254</sup>

Rehnquist further wrote that the first amendment analysis must occur in two stages. First, the trier of fact was to determine if the exercise of a constitutional right was a "substantial" or "motivating" factor behind the official action. If so, then the second stage involves the burden of proof shifting to the defendants to demonstrate by a preponderance of the evidence that the same result would have occurred without the improper motive.<sup>255</sup>

In *Northern Penn. Legal Services v. County of Lackawanna*,<sup>256</sup> a federal district court found, *inter alia*, that the defendant's decision to terminate certain contracts with the plaintiff was in retaliation for its participation in certain law suits, and held that this was a denial of the plaintiff's first amendment rights. As the *Lackawanna* court stated, "[I]itigation itself is a form of expression protected by the first amendment."<sup>257</sup>

Under a first amendment analysis, the lawyers in *Leis* may circumvent the *Roth* "source in state law" requirement. Judge Morrissey, like the defendant *Lackawanna* was not required by local law to provide reasons for a denial of a *pro hac vice* application. And as in *Lackawanna*, the judge's denial appears to be based solely on the nature of the case. Accordingly, this denial of the *pro hac vice* application in *Leis* "appeared" to be "motivated" by the lawyers' exercise of their first amendment right within the meaning of *Doyle* and *Lackawanna*. In any event, the lawyers' prior activities did not command a denial of their application absent other undisclosed reasons. The lawyers had: (1) appeared for these defendants in 1976 and 1977; (2) entered appearances in the present and a companion case by local counsel; and (3) no evidence of disciplinary action against them. On this showing, *Doyle* and *Lackawanna* require the judge to demonstrate that his denial would have occurred without the improper motive.

Mr. Justice Stevens was correct when he called *Leis* the "classic situation in which the interests of Justice would be served by allowing the defendant to be represented by the counsel of his choice."<sup>258</sup> *Leis* is a "classic situation" for a trier of fact to determine that it was the exercise of a constitutional right, freedom of expression, that was a motivating factor in the

253. *Mount Healthy*, 429 U.S. at 274.

254. *Id.* at 283.

255. *Id.* at 284.

256. *Northern Penna.*, 513 F. Supp. at 684 (citation omitted).

257. *Id.* at 684 [citing *In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979)]. See also, *In re Primus*, 436 U.S. 414, 431 (1978); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 585-86 (1971); *NAACP v. Button*, 371 U.S. 415 (1963).

258. *Leis*, 439 U.S. at 452 (Stevens, J., dissenting).

denial of the lawyer's *pro hac vice* application. *Leis* involved a classic case of unpopular clients—Flynt and Hustler magazine—and an unpopular cause—publication of alleged pornographic material. This arguably satisfies the first stage of the *Doyle* test.<sup>259</sup>

If the trier of fact determines the first stage in favor of the two lawyers, the burden shifts to the Ohio common pleas judges to show by a preponderance of evidence that the same result would have occurred without the improper motive. This requires the court to provide reasons for its *pro hac vice* denials—at least in cases where a denial of first amendment rights are alleged. This may be regarded as the more viable attack on *pro hac vice* denials where no reasons are given by a court.

#### CONCLUSION

The precedential value of *Leis* appears to be limited. Even within the context of its own facts the out-of-state lawyers in *Leis* appeared to have established the “mutual understanding” for *pro hac vice* admission required by *Perry*. Only a few states have a *pro hac vice* rule like the one in Ohio. Applicants denied *pro hac vice* admission in those states may not be denied admission by *Leis* if the applicant can show either an equal protection or a first amendment violation. And lastly, most states like Arkansas provide within their rules governing admissions, an entitlement to appear *pro hac vice* if all the requisites of the rules are complied with. Although the *Roth-Arnett-Bishop* trilogy may, according to a majority of the Supreme Court, proscribe the reach of the fourteenth amendment's Due Process Clause, this proscription has limited applicability to *pro hac vice* admissions.

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259. But Professor Richard disagrees. He asserts that in *Lackawanna*, the defendants penalized the plaintiffs for what they said. In *Leis*, the court told defendant he could have his say, “but not through just any attorney.” This author sees quite a difference. My rejoinder to Professor Richards is: the plaintiffs in *Lackawanna* like the defendants in *Leis* did not know the reason why the defendants in *Lackawanna* terminated their long standing contracts, because no reasons were given. The court in *Lackawanna* allowed the plaintiffs (consistent with *Doyle*) to show that the constitutionally protected communication played a “substantial part” or was a “motivating factor” in the defendant's decision. Since there were no other discernible reasons for the denial of the New York lawyers' applications in *Leis*, a showing that their protected communication of representing an unpopular client was a “motivating factor” is enough to satisfy the first of the two stage *Doyle* test.