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A High Water Mark: The Article IV, Section 2, Privileges and Immunities Clause and Nonresident Beach Access Restrictions

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NOTES

A HIGH WATER MARK: THE ARTICLE IV, SECTION 2, PRIVILEGES AND IMMUNITIES CLAUSE AND NONRESIDENT BEACH ACCESS RESTRICTIONS

*Susan M. Cordaro**

> I sat in the sun and watched the bathers on the beach. They looked very small. After a while I stood up, gripped with my toes on the edge of the raft as it tipped with my weight, and dove cleanly and deeply, to come up through the lightening water, blew the salt water out of my head, and swam slowly and steadily in to shore.[1]

INTRODUCTION

From Hemingway[2] to the television program *Baywatch*, our association between time at the beach and carefree relaxation and enjoyment is clear. However, because few Americans own property in oceanfront communities such as Malibu, California, beach access is a contentious issue on the East and West coasts.[3]

Existing legal doctrine permits implementation of certain barriers to beach access,[4] including nonresident restrictions enacted by local governments to control crowding, cost, or the character of public beaches.[5] This Note employs the following hypothetical example of "Beachville" to demonstrate the nature and impact of nonresident beach access restrictions:

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* J.D. Candidate, 2004, Fordham University School of Law. I would like to thank Professor Abner Greene for his invaluable assistance from the outset of this project. As always, there are no sufficient words to thank: my parents, John and Elizabeth, and my brothers, Greg and Mike, for their constant encouragement and support; Anne Desmond, for always emphasizing the importance of education; and, of course, Sean Desmond, for his inspiration and kindness, and for making every day like a day at the beach.

1. Ernest Hemingway, The Sun Also Rises 238 (Charles Scribner's Sons 1970) (1926).
2. *Id.*
3. *See infra* notes 13-19 and accompanying text.
4. *See infra* Part I.
5. *See infra* notes 6-19 and accompanying text.

> Rachel, a resident of a crowded urban neighborhood in State *X* with few parks and limited waterfront access, travels for less than one hour via commuter rail to State *Y*, planning to spend the day swimming and relaxing. Rachel walks from the rail station to a beach owned and operated by the local town of Beachville, carrying only a bag with her lunch, a book, and a towel on which to sit. Unbeknownst to Rachel, in response to concerns regarding growing crowds and the fiscal impact of maintaining the beach, the Beachville town council has enacted a statute that bars nonresidents like Rachel from entering the property. She is turned away from the beach entrance, and returns home frustrated by the wasted trip and her treatment by residents of the neighboring state.

Similar policies received widespread attention in recent years. For example, in 1994, Brenden P. Leydon encountered a nonresident beach access restriction when he attempted to jog past the entrance gate of Greenwich Point, a 147-acre town beach in Connecticut.[6] With its oceanfront location, numerous ponds, pathways, picnic areas and nature preserve,[7] Greenwich Point offered an appealing setting for exercise on an August day. Because Mr. Leydon did not reside in the town of Greenwich,[8] however, the official on duty refused his entrance to the beach, enforcing an explicit statutory restriction: non-Greenwich residents (other than guests of town residents) could not "enter, remain upon or use public beaches."[9] Because of Leydon's nonresident status, town officials also denied his subsequent attempts to obtain beach access permits[10] before his successful court challenge to the restrictions.[11]

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6. Leydon v. Town of Greenwich, 777 A.2d 552, 560 (Conn. 2001); *see also* David M. Herszenhorn, *Connecticut Court Overturns Residents-Only Beach Policy*, N.Y. Times, July 27, 2001, at B5.

7. *Leydon*, 777 A.2d at 559.

8. Leydon resided in Stamford, Connecticut. *Id.* at 560.

9. *Id.* at 558 n.5 (quoting the challenged provisions of the Greenwich municipal code).

10. *Id.* at 560.

11. Leydon filed suit, and, in 2001, the Supreme Court of Connecticut ruled in his favor, holding that the nonresident restrictions violated the First Amendment of the U.S. Constitution, as well as parallel state constitutional provisions. *Id.* at 557. The trial court had ruled in favor of the Town of Greenwich, rejecting Leydon's common-law claims, *id.* at 563, and finding that Leydon failed to demonstrate that he intended to engage in the type of expressive activity protected by the First Amendment. *Id.* at 561-63. Leydon appealed to the Appellate Court, which ruled in his favor, holding that the nonresident restriction violated state common law requiring municipal parks to be held in trust rather than only benefiting local residents. *Id.* at 558 (citing Leydon v. Greenwich, 750 A.2d 1122 (Conn. 2000)). The Town of Greenwich's petition for appeal was then granted by the Connecticut Supreme Court. *Id.* at 559. However, rather than upholding the Appellate Court's decision based on common-law doctrine, the Connecticut Supreme Court departed from the practice of resolving common-law claims before constitutional questions. In the court's view, the common-law public trust doctrine alone, *see infra* notes 36-46 and accompanying text, would not provide nonresident access to the shore, for the "broccoli" shape of the beach area requires one to pass over the dry portion of the beach to reach the sea. *Leydon*, 777 A.2d at

While the Connecticut Supreme Court invalidated the Greenwich restriction based on the First Amendment and parallel state constitutional provisions,[12] no one legal doctrine currently provides a conclusive answer to questions of beach access—particularly where nonresident restrictions are at issue.[13] Under a veritable patchwork of beach access policies that vary state-by-state, towns continue to employ nonresident access restrictions ranging from fee differentials to outright exclusions.[14] The town of Madison, Connecticut, places financial and logistical obstacles in the way of nonresident access at its local beach.[15] A recent proposal in Manchester-by-the-Sea, Massachusetts, would have denied *nonresidents and dogs* access to town beaches.[16] In Manhattan Beach, California, neighborhood residents, angry over mounting trash and noise complaints, proposed regulations to fence off a dune and require advance parking reservations in an effort to restrict nonresident access to a public beach.[17] According to one resident, "[the beach] used to be our little neighborhood park and now all of Southern California is using it."[18] And, recently, owners of oceanfront property in California unsuccessfully challenged easements over private land, exacted before

559, 564 n.17. Also, because legislative action could alter the scope of the public trust doctrine, the court turned to federal First Amendment and state constitutional principles. *Id.* at 565 n.20, 565-66.

12. *Id.* at 557. See *infra* note 54 for a detailed discussion of the relevant state constitutional provisions.

13. For example, when presented with First Amendment arguments relating to nonresident restrictions on beach access, not all courts interpret the scope of constitutional protections as the Connecticut Supreme Court did in *Leydon*. *See* Daly v. Harris, 215 F. Supp. 2d 1098, 1105-09 (D. Haw. 2002) (upholding differential access fees to a beach in the Hanauma Bay Conservation District). For a discussion of each court's First Amendment analysis, see *infra* notes 54-62 and accompanying text. Further complicating matters, common-law rules such as the public trust doctrine do not always provide broad access to the sand and shore for nonresident visitors. *See infra* Part I.A.

14. *See* Marc R. Poirier, *Environmental Justice and the Beach Access Movements of the 1970s in Connecticut and New Jersey: Stories of Property and Civil Rights*, 28 Conn. L. Rev. 719, 743-47 (1996). Poirier chronicles the efforts to challenge beach access restrictions in Connecticut, New York, and New Jersey as more towns enacted exclusionary policies. *Id.* at 755 n.126; *see also* Gewirtz v. City of Long Beach, 69 Misc. 2d 763 (N.Y. Sup. Ct. 1972) (describing an attempt to amend city charter to exclude nonresidents from a public beach).

15. At $10 per person, plus $10 per car, a nonresident family of four would pay $50 to enter the town beach in Madison—and the passes must be bought at Town Hall, which is closed on Saturdays and Sundays. Sudhin S. Thanawala, *Town Beaches Still Not So Open*, Hartford Courant, Sept. 26, 2002, at B1. As in Greenwich, Madison closed its beaches to nonresidents prior to the Connecticut Supreme Court's decision in *Leydon v. Town of Greenwich*. *Id.*

16. *Community Briefing: Selectmen Reject Parking Sticker*, Boston Globe, Sept. 26, 2002, at Globe North 2.

17. Sandra Murillo, *A Dust-Up over Sand Dune; Recreation: Manhattan Beach Residents Call for New Limits*, L.A. Times, June 4, 2002, at B4.

18. *Id.*

1987, for pedestrian or bicycle access to the public portion of the beach.[19]

A nonresident's interest in spending a day at the beach and building sand castles might, at first impression, appear to fall outside the core protections of the U.S. Constitution. However, state or local actions that discriminate on the basis of residential status can directly contradict nation-building constitutional provisions, including the Article IV, Section 2, Privileges and Immunities Clause.[20] Article IV, Section 2 protects residents[21] of one state from discriminatory treatment while temporarily visiting another.[22] Courts have employed the Privileges and Immunities Clause to invalidate statutes ranging from higher commercial shrimp fishing license fees for nonresidents of South Carolina,[23] to restrictions on nonresident access to medical services in Georgia.[24]

Where beach access turns on residential status, Article IV, Section 2 provides a relevant, yet often overlooked, means of defining the legal limits of nonresident exclusion from activities including public beach access. While Mr. Leydon, as a citizen of Connecticut,[25] could not invoke this constitutional provision,[26] this Note explores the potential

19. Daniel v. County of Santa Barbara, 288 F.3d 375 (9th Cir. 2002) (denying injunctive relief because Daniel did not seek compensation through appropriate procedures where the state exercises eminent domain for a public purpose), *cert. denied*, 123 S. Ct. 466 (2002). The year 1987 stood as the key date in *Daniel* because of the United States Supreme Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), which held that exacting an easement over private property in exchange for a building permit required compensation as a permanent physical occupation under Takings Clause analysis. *Daniel*, 288 F.3d at 382. After the Supreme Court declined to hear an appeal from the Ninth Circuit's ruling in *Daniel*, a lawyer for David Geffen, an entertainment executive who had previously filed a similar suit, stated that he will continue to pursue other claims to defeat efforts by the California Coastal Commission to provide access to the beach over private property. David G. Savage & Kenneth R. Weiss, *Justices Bolster Beach Access; Supreme Court Rejects Landowner Claims of Unfair Property Seizure*, L.A. Times, Oct. 22, 2002, at A1; *see also* Timothy Egan, *Owners of Malibu Mansions Cry, This Sand is My Sand*, N.Y. Times, Aug. 25, 2002, at A1 (describing ongoing disputes between California property owners and the California Coastal Commission regarding public beach access).

20. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. Article IV, Section 2 is also referred to as the "Comity Clause" or the "Privileges and Immunities Clause." *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L.J. 1385, 1398 (1992).

21. The Supreme Court has come to view "citizen" and "resident" as terms that are "essentially interchangeable" as part of Article IV, Section 2, Privileges and Immunities analysis. Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978) (quoting Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975)).

22. *See* Saenz v. Roe, 526 U.S. 489, 501 (1999) (citing Paul v. Virginia, 75 U.S. 168 (1869)).

23. Toomer v. Witsell, 334 U.S. 385 (1948).

24. Doe v. Bolton, 410 U.S. 179 (1973).

25. *See supra* note 8.

26. *See* United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208

for a nonresident visitor to the state where a beach is located to put forth an Article IV, Section 2 claim if faced with a complete bar on access such as in the "Beachville" hypothetical.

Article IV, Section 2, as applied by the Supreme Court, does not completely bar disparate treatment.[27] To determine whether Article IV, Section 2 protects nonresidents who seek to engage in particular activity, the Court in *Baldwin v. Fish & Game Commission* established a threshold test.[28] The *Baldwin* test inquires whether a regulated activity is "fundamental" to national unity, measured in the Court's opinion by the activity's "bearing upon the vitality of the Nation as a single entity."[29]

Considering nonresident beach access restrictions in light of the Court's holding in *Baldwin* illuminates the shortcomings of this test, for it fails to provide for the efficient or effective administration of the goals of the Privileges and Immunities Clause.[30] The threshold test is inefficient as applied to beach access because it requires local government officials to predict whether a particular activity may be deemed "fundamental" in light of limited case law, when governments are better equipped to focus on the nature of the potential harm brought by nonresidents and the appropriate means to address that harm. Moreover, the *Baldwin* threshold test is ineffective in light of the history and past application of Article IV, Section 2. As this Note argues, using the example of beach access restrictions, the threshold test can exclude activities that are in fact relevant to the Privileges and Immunities Clause's nation-building objectives.[31]

A preferable test for state and local laws that restrict nonresident access to natural resources would not focus on the "fundamental" character of the restricted activity. Instead, courts should first examine whether nonresidents produce a specific harm to a state-owned resource. If a local government quantifies a "peculiar"[32] harm

(1984) (finding that under Article IV, Section 2, only out-of-state visitors, not state residents, could challenge a municipal hiring restriction that favored city residents); *see also infra* notes 183-88 and accompanying text.

27. *See Saenz*, 526 U.S. at 502 (citing *Toomer*, 334 U.S. at 385); Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978) (upholding a higher fee structure for nonresidents seeking a permit to hunt elk in Montana); *see also* Laurence H. Tribe, American Constitutional Law § 6-37, at 1262 (3d ed. 2000); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 492 (1981) ("Some, but not all, public benefits can be reserved for the exclusive or preferential use of the state's inhabitants. The task of separating which can and cannot be reserved poses impressive obstacles.").

28. *Baldwin*, 436 U.S. at 371.

29. *Id.* at 383, 388.

30. *See infra* Parts II-III.

31. *See infra* notes 66-69 and accompanying text.

32. *Toomer*, 334 U.S. at 398.

created by nonresidents, courts should then determine whether the particular harm justifies the extent of the restriction employed.[33]

Applying the preferred test, this Note argues that the Privileges and Immunities Clause of Article IV, Section 2 should invalidate restrictions that completely exclude nonresidents from town beaches and other state or locally-owned or operated natural resources where the enacting governmental body fails to demonstrate a substantial relation between the exclusion and a specific, quantifiable harm created by nonresidents.[34] Further, this Note argues that even under the *Baldwin* threshold test, the nonresident restrictions described in the "Beachville" hypothetical contravene the protections of the Privileges and Immunities Clause because a total nonresident exclusion results, as opposed to the minimal fee differential imposed in *Baldwin*.[35]

Part I of this Note describes common-law and constitutional doctrines relating to beach access in order to account for the varying public access rules among the states that—in many cases—permit the enactment of nonresident access restrictions. Where state or local governments treat resident and nonresident access to public resources differently, Parts II & III of this Note examine the compatibility of such exclusionary policies with Article IV, Section 2. Part II examines the history of the Article IV, Section 2, Privileges and Immunities Clause and details the development of constitutional doctrine under this provision. Part II also explores the involvement of land resources and local (rather than state) government in beach access policies and argues that these factors should not alter the result of Article IV, Section 2 analysis. Finally, Part II.C determines that the relationship between Article IV, Section 2 and the Commerce Clause reinforces the conclusion that nonresident beach access restrictions violate the Privileges and Immunities Clause, for the objectives of both provisions include economic and social harmony among residents of the states under the Constitution.

Part III first demonstrates that even if a privilege and immunity must be "fundamental" to receive constitutional protection, Article IV, Section 2 should invalidate restrictions that totally exclude nonresident access, as opposed to merely imposing a higher nonresident user fee. Part III concludes by proposing an alternative to the *Baldwin* test. The proposed test examines whether

33. *See infra* Part III.B.

34. The preferred test proposed in this Note does not entail a dramatic departure from the second prong of the Court's existing Privileges and Immunities Clause cases where the activity in question satisfied the Court's threshold test of "fundamental" rights and activities. *See* United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 222 (1984).

35. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978). For a further discussion of the distinction between fee differentials and total exclusions, see *infra* Part II.A.3.

nonresidents would create a distinct, quantifiable harm if given access to natural areas such as beaches, and whether a restriction excluding them is substantially related to addressing the specific harm.

I. THE TIDE EBBS AND FLOWS: A STATE-BY-STATE SYSTEM FOR DETERMINING THE SCOPE OF BEACH ACCESS

In most states, interpretation and application of the common-law "public trust doctrine" remains the primary measure of the scope of public beach access.[36] As the discussion that follows in this section demonstrates, common-law protections vary state-by-state and, in many cases, permit the enactment of nonresident access restrictions.

A. *Statutory and Common-Law Beach Access Rules*

In the late nineteenth century, the Supreme Court summarized the public trust doctrine in *Illinois Central Railroad Co. v. Illinois*:[37]

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . . .[38]

As described by the Court, the public trust doctrine derives from Roman laws that ensured access to the sea and the shore.[39] The doctrine continues to provide public access to land held in the public trust for a range of uses, including fishing and navigation in most states, and recreational swimming in others.[40]

The traditional geographic scope of access under the public trust doctrine extends to the mean high-tide line, so that the area of land preserved for public use generally includes only the "wet sand" portion of a beach.[41] Where strictly limited to access below the high-water mark, without passage over the land above the high-tide line, the real impact of the public trust doctrine is limited. However, each

36. *See* Jack H. Archer et al., The Public Trust Doctrine and the Management of America's Coasts 19-22 (1994); David C. Slade et al., Putting the Public Trust Doctrine to Work 4-9 (1990).

37. 146 U.S. 387 (1892).

38. *Id.* at 435.

39. Slade, *supra* note 36, at 15.

40. *See* Archer, *supra* note 36, at 22-25. The public trust doctrine does not protect recreational swimming in Maine and Massachusetts. *Id.* at 24-25. However, in Wisconsin, the public trust doctrine extends to protect even waterskiing. *Id.* at 24 (citing State v. Village of Lake Delton, 286 N.W.2d 622 (1979)).

41. *See id.* at 15; *see also* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 360-61 (N.J. 1984).

state can define additional boundaries in developing and applying the doctrine in order to broaden its scope.[42]

In the latter part of the twentieth century, some states adopted more expansive public access protections than others.[43] For example, the Supreme Court of New Jersey expanded the reach of the public trust doctrine in that state to the dry sand, recognizing the need to cross this portion of the beach to access the area below the mean high-tide line.[44] The court also granted residents and nonresidents alike the additional right to rest and play on the beach as an outgrowth of access to the wet sand and sea.[45] In another case, the New Jersey Supreme Court used the public trust doctrine to strike down a fee structure that charged nonresidents more than residents for a beach pass.[46]

State legislatures, as well as courts, may broaden the scope of the public trust doctrine. For example, Oregon enacted legislation to preserve access to dry sand areas and access paths of which the public had made "frequent and uninterrupted" recreational use.[47] The Texas Open Beaches Act also provides public access to beaches acquired through prescription, dedication, or continuous right, and also prohibits the creation of structural barriers that would impede existing beach access.[48]

Even with legislative and legal options for expanding the scope of the public trust doctrine, the expansive protections provided in states such as New Jersey—including access to the dry sand and prohibiting nonresident discrimination—remain the exception rather than the norm. Not all states provide broad access to the shore through the

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42. Archer, *supra* note 36, at 13. The Supreme Court confirmed this longstanding tradition of vesting states with the ability to determine if, and how far, the public trust doctrine will extend beyond the land covered by the tides in *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988).

43. For a state-by-state listing of the scope of common-law protections under the public trust doctrine, see Slade, *supra* note 36, at 44-50.

44. *See Matthews*, 471 A.2d at 365 (holding that the public may access the dry sand area on privately-held beaches where reasonably necessary to enjoy access to the water); Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972) (finding that the area upland of the mean high tide line at municipally owned beaches should be made available to all).

45. *Matthews*, 471 A.2d at 365 ("Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed.").

46. *See Neptune City*, 294 A.2d at 55-56. *But see* Poirier, *supra* note 14, at 805. Poirier argues that the expansion of the public trust doctrine in New Jersey did not fully deliver on its potential for expansive beach access, citing ongoing practices in New Jersey that hinder public use. *Id.* at 805-06.

47. Or. Rev. Stat. § 390.610 (1994). *But see* Purdie v. Attorney General, 732 A.2d 442 (N.H. 1999) (holding that a state statute that provided for public access above the mean high tide line constituted a taking of private property, thereby requiring compensation).

48. Tex. Nat. Res. Code Ann. § 61.011 (Vernon 2001); *see also* Moody v. White, 593 S.W.2d 372, 374 (Tex. Civ. App. 1979) (upholding the Texas Open Beaches Act and finding a public right to use a beach on Mustang Island).

public trust doctrine. A 1647 colonial ordinance in Massachusetts granted ownership of the area between the high and low tide marks to private parties, limiting public access to the shore.[49] Today, in neither Massachusetts nor Maine does the public trust doctrine protect access to the shore for swimming.[50]

B. *Beach Access and the Federal Constitution*

In states with common law public trust doctrine protections, private citizens or local governments may still attempt to restrict beach access.[51] Particularly where municipal government both holds and maintains oceanfront public property, communities often argue that only local residents should have a right to beach access.[52] Therefore, in cases such as *Leydon* where the scope of the state's public trust doctrine does not preclude all possible restrictions on access,[53] courts may consider constitutional arguments to invalidate statutes that prevent individuals from enjoying public property.

In *Leydon*, the Connecticut Supreme Court held that the nonresident restrictions enacted in Greenwich violated the First Amendment of the U.S. Constitution and parallel state constitutional provisions.[54] According to the Connecticut court, Leydon, if admitted to Greenwich Point, "intended to express himself by conversing with others on topics of social and political importance."[55] Consequently, the court found the requisite level of expressive activity to proceed in analyzing the restrictions under the First Amendment. Finding support in other jurisdictions that considered beaches with park-like amenities,[56] the court concluded that Greenwich Point constitutes a

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49. *See* Fafard v. Conservation Comm'n, 733 N.E.2d 66, 70 (Mass. 2000).

50. Archer, *supra* note 36, at 24-25.

51. *See supra* notes 14-19 and accompanying text.

52. *See supra* notes 15-18 and accompanying text.

53. *See supra* note 11.

54. Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001). Noting that state constitutional provisions (Article First, §§ 4, 5, 14) provide "greater protection for expressive activity than that provided by the first amendment to the federal constitution," *id.* at 573, the court analyzed and found the nonresident restriction to violate both. *Id.* at 573-75. The sections of Article First of the Connecticut Constitution cited by the court included: section 4 ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."); section 5 ("No law shall ever be passed to curtail or restrain the liberty of speech or of the press."); and section 14 ("The citizens have a right, in a peaceable manner, to assemble for their common good, and to apply to those invested with the powers of government, for redress of grievances, or other proper purposes, by petition, address or remonstrance."). Conn. Const. art. 1, §§ 4, 5, 14 (West 2001).

55. *Leydon*, 777 A.2d at 562 n.13 (internal quotations omitted). Particularly, the court cited Leydon's plan to participate in an interview on the beach with a newspaper reporter on at least one occasion. *Id.*

56. *Id.* at 569-70 (citing Paulsen v. Lehman, 839 F. Supp. 147, 161 (E.D.N.Y. 1993) (finding Jones Beach State Park to be a "traditional public forum"); Naturist Society, Inc. v. Fillyaw, 958 F.2d 1515, 1522 (11th Cir. 1992) (concluding that Florida's John D.

traditional public forum.[57] As a traditional public forum, the court subjected the government's ability to limit expressive activities at Greenwich Point to the most rigorous forum-based First Amendment scrutiny, and found that the nonresident restriction was not a reasonable "time, place, and manner" regulation "narrowly tailored to serve a significant government interest . . . leav[ing] open ample alternative channels of communication."[58] Therefore, the Greenwich statute violated the U.S. Constitution.[59]

However, another court considering whether the First Amendment precluded differential treatment between state residents and nonresidents at a public beach reached a different result than the court in *Leydon*.[60] In a case involving differential fees for nonresident entrance to the Hanauma Bay Conservation District in Hawaii, a federal district court declined to consider whether the area constituted a traditional public forum.[61] The court reasoned that conversing with relatives during a visit to the beach did not reach the requisite level of expressive activity protected by the First Amendment.[62]

While New Jersey's expansive interpretation of the public trust doctrine exceeds the protections extended by many states,[63] particularly in terms of protecting nonresident access,[64] other legal doctrines can further define the extent to which local governments may discriminate against visitors who seek to enter public beaches.[65]

MacArthur Beach State Park is a public forum)).

57. *Id.* at 568.

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed . . . . [Such locations include] streets and parks which have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Leydon, 777 A.2d at 567 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

58. *Id.* at 567-68, 572.

59. *Id.* at 572-73; *see also* Warren v. Fairfax County, 196 F.3d 186 (4th Cir. 1999) (holding that a nonresident restriction in a public mall area in front of a government office center served no compelling interest and violated the First Amendment).

60. Daly v. Harris, 215 F. Supp. 2d 1098 (D. Haw. 2002).

61. *Id.* at 1106.

62. *Id.* ("The contemplated conversation and association for the purposes of engaging in such conversation, though literally speech and association, do not advance 'knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values and consequences of the speech that is protected by the First Amendment." (quoting Swank v. Smart, 898 F.2d 1247, 1251 (7th Cir. 1990))).

63. *See supra* notes 42-46.

64. *See* Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972).

65. Other student notes have addressed the question of beach access restrictions, proposing various approaches to the issue. James Kehoe identified the public trust doctrine as the preferred solution in response to reductions in beach access, arguing for its expansion via federal legislation. James M. Kehoe, Note, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 Fordham L. Rev. 1913 (1995). A 1973 student article discussed dedication, implied

While some courts have considered whether beach access restrictions violate the First Amendment of the U.S. Constitution, disagreement among jurisdictions as to whether a trip to the beach involves the level of expression needed to trigger the Amendment's protections demonstrates that the public forum doctrine, like the public trust doctrine, may not preclude nonresident beach access restrictions in all jurisdictions. Accordingly, Part II of this Note explores the Article IV, Section 2, Privileges and Immunities Clause, a constitutional provision that Part III concludes should serve to invalidate beach access restrictions that entirely exclude individuals, based only on their nonresident status.

II. DIVING IN: THE PRIVILEGES AND IMMUNITIES CLAUSE

A. *The Scope and Objectives of Article IV, Section 2*

Some distinctions between residents and nonresidents in terms of the benefits and burdens of residency in a given state, such as voting rights, inhere in the federal structure of the United States government.[66] As one commentator stated, "the framers could not have intended to incapacitate states totally from disadvantaging nonresidents because the effect would have been to destroy the integrity of one of the basic units of the federal system that they envisioned—the state."[67] At the same time, in order to promote trade and civic relations between residents of the various states, another objective of the Founding included the need to limit differential treatment among citizens within the federal system and to create a strong national government.[68]

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dedication, jus publicum, the public trust doctrine, and application of the Equal Protection Clause of the Fourteenth Amendment as potential means to address nonresident restrictions on beach access. Note, *Public Access to Beaches: Common Law Doctrines & Constitutional Challenges*, 48 N.Y.U. L. Rev. 369 (1973). Regarding the Equal Protection Clause, the note projected that future courts would "more rigorously appl[y]" prohibitions on arbitrary distinctions among various groups, including nonresidents of beach communities. *Id.* at 390-91. However, under Equal Protection analysis as applied today, nonresident classifications do not undergo heightened scrutiny. *See* Varat, *supra* note 27, at 513-15. Therefore, in terms of identifying a particular constitutional provision that protects against nonresident discrimination, the Article IV, Section 2, Privileges and Immunities Clause becomes relevant. *See infra* Part II-III.

66. *See* United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 218 (1984) (citing Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978)).

67. Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. Pa. L. Rev. 379, 387 (1979).

68. *See infra* notes 83-89 and accompanying text; *see also* Cass R. Sunstein, The Partial Constitution 25-26 (1993). Sunstein argues that the Constitution's central provisions, including the Privileges and Immunities Clause, all reflect the need to prevent "the distribution of resources or opportunities to one group rather than to another solely on the ground that those favored have exercised the raw political power to obtain what they want." *Id.* at 25.

In an 1869 Supreme Court opinion, Justice Field, discussing Article IV, Section 2, noted that "no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."[69] Determining precisely which activities contribute to the goal of national unity, and which can be reserved for state residents, frames the underlying challenge of applying the Privileges and Immunities Clause. As Jonathan Varat writes:

> If a state may exclude nonresidents from elementary and secondary public schools, may it also exclude them from public institutions of higher education or public hospitals? Even if it may not deny access entirely, may a state charge a nonresident more for these services than it charges residents? May a state exclude nonresidents entirely from, or charge them more for, the use of the state's courts, public parklands, public highways, or public transportation systems?[70]

The limited opportunities that courts have found to analyze what level of treatment one state must afford visiting residents from another makes this task all the more difficult.[71]

Questions such as those identified by Varat arise when residents of one state choose to travel to another state on a temporary basis—for reasons ranging from a daily commute for employment, to visiting another state's recreational areas as a weekend traveler. In a 1999 decision, *Saenz v. Roe*, the Supreme Court described the "right to travel" as not expressly articulated in the Constitution yet "firmly embedded" in constitutional protections.[72]

The Court in *Saenz* distinguished three components of the "right to travel."[73] The first component includes the right of ingress and egress for a resident of one state traveling to another, the source of which the Court did not locate in a particular constitutional provision.[74] The Court located the second component of the "right to travel" in the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution, which prevents states from treating unfavorably residents of other states who visit on a non-permanent basis.[75] The

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69. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868); *see also* Toomer v. Witsell, 334 U.S. 385, 395 (1948) ("The primary purpose of [the Privileges and Immunities Clause] . . . was to help fuse into one Nation a collection of independent, sovereign States.").

70. Varat, *supra* note 27, at 492.

71. "[T]he Privileges and Immunities Clause of Art. IV, § 2 of our Constitution . . . is not one the contours of which have been precisely shaped by the process and wear of constant litigation and judicial interpretation over the years since 1789." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 378-79 (1978).

72. Saenz v. Roe, 526 U.S. 489, 498 (1999) (internal citations omitted).

73. *Id.* at 500.

74. *Id.*

75. *Id.* at 501. Chief Justice Rehnquist, in a dissenting opinion joined by Justice Thomas, did not object to use of Article IV, Section 2 to protect temporary visitors to states other than their place of permanent residence, writing, "[n]onresident visitors of other States should not be subject to discrimination solely because they live out of

Court distinguished temporary visitors from a third category—those who decide to reside permanently in a new state—for whom the Court has located an "additional source of protection" in the Privileges or Immunities Clause[76] of the Fourteenth Amendment.[77]

Under the second component of the right to travel, derived from Article IV, Section 2, courts will not uphold restrictions that prevent nonresident visitors from accessing certain benefits available to residents, ranging from fishing licenses[78] to construction jobs.[79] Such restrictions contradict the right of a resident of State *A* to be afforded equal treatment while visiting State *B*.[80] However, Article IV, Section 2 does not prohibit nonresident discrimination in all areas.[81] Therefore, Privileges and Immunities analysis must inquire whether the Constitution protects a particular benefit from state policies that exclude nonresidents visiting from another state.[82] In order to conduct such an analysis, however, this Note first discusses the history of Article IV, Section 2, then provides an overview of its application by various courts.

State." *Id.* at 512-13 (Rehnquist, C.J., dissenting). The dissent issued by Rehnquist instead focused on the Court's use of the Privileges or Immunities Clause of the Fourteenth Amendment to protect individuals who relocate permanently to another state. *Id.* (Rehnquist, C.J., dissenting).

76. *Id.* at 502-03. In *Saenz*, the Court invalidated a California statute that placed a cap on the amount of welfare benefits new residents of the state could receive, finding that the Privileges or Immunities Clause of the Fourteenth Amendment protects new arrivals (whose "bona fides" of citizenship are unquestioned) against discrimination in accessing benefits for consumption in that state. *Id.* at 505. The Court's use of the Fourteenth Amendment's Privileges or Immunities Clause in *Saenz* caused some speculation regarding the scope of a potential "revival" since conventional wisdom after the *Slaughter-House Cases* held that the Clause was not a likely candidate for resolving constitutional questions. Laurence Tribe, however, argues that the decision did not announce a major change of course in the Court's view of the Clause, but instead reflected the Court's comfort and interest in framing issues in terms of the structures of federalism. *See* Laurence H. Tribe, Saenz *Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—Or Reveal the Structure of the Present?*, 113 Harv. L. Rev. 110 (1999); *see also* Tim A. Lemper, *The Promise and Perils of "Privileges or Immunities":* Saenz v. Roe, 23 Harv. J.L. & Pub. Pol'y. 295, 320-21 (1999) ("*Saenz* may afford a reading of the Privileges or Immunities Clause which advances the Rehnquist Court's constitutional vision without inaugurating a new era of fundamental rights 'privileges or immunities' jurisprudence.").

77. This Note, in accordance with the language of the Constitution and the vast majority of academic works on the subject, refers to the Article IV provision as the Privileges *and* Immunities Clause, and the Fourteenth Amendment provision as the Privileges *or* Immunities Clause.

78. Toomer v. Witsell, 334 U.S. 385 (1948).

79. United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208 (1984).

80. *See Toomer*, 334 U.S. at 395.

81. *See* Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978) (upholding a higher fee structure for nonresidents seeking a permit to hunt elk in Montana).

82. *Id.* at 388.

1. The Ratification and Purpose of Article IV, Section 2

Article IV of the Articles of Confederation is a close relative of Article IV, Section 2 of the U.S. Constitution.[83] The lineage of Article IV, Section 2 traces back even further, to pre-Revolutionary colonial charters that permitted colonists to retain legal privileges on par with those who remained in England while in America or other British colonies.[84] David Bogen contends that while the charters retained for colonists the rights they enjoyed in England to encourage colonialism, the purpose of such protections shifted with enactment of the Articles of Confederation to preserve a "common nationality" after independence from the king.[85]

When delegates to the Constitutional Convention of 1787 adopted Article IV, Section 2, they did not transcribe the language of the Privileges and Immunities Clause directly from the Articles of Confederation.[86] Reference to "free inhabitants"[87] was changed to "citizens," express language regarding free ingress and egress among the states[88] disappeared entirely, and the regulation of interstate commerce was transferred to the new federal government.[89]

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83. *See* Saenz v. Roe, 526 U.S. 489, 501 (1999). Article IV of the Articles of Confederation provided in part:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restriction shall not extend so far as to prevent the removal of property imported into any state, to any other state, of which the Owner is an inhabitant . . . .

Articles of Confederation art. IV.

84. The Virginia Charter provided: "[A]ll and every the Persons being our Subjects, which shall dwell and inhabit within . . . the said several Colonies . . . shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions . . . ." David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 Case W. Res. L. Rev. 794, 796-97 (1987) (citing The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 3788 (F. Thorpe ed., 1909)); *see also* Zobel v. Williams, 457 U.S. 55, 79 n.9 (1982) (O'Connor, J., concurring) ("The Rhode Island Charter gave members of that Colony the right 'to passe and repasse with freedome . . . .'" (citing Z. Chafee, Three Human Rights in the Constitution of 1787, at 177 (1956))).

85. Bogen, *supra* note 84, at 817.

86. For the text of Article IV of the Articles of Confederation, see *supra* note 83.

87. Articles of Confederation art. IV. For the text of Article IV of the Articles of Confederation, see *supra* note 83.

88. Articles of Confederation art. IV. For the text of Article IV of the Articles of Confederation, see *supra* note 83.

89. "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8; *see also* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 379-80 (1978) ("[S]eparation [of the Privileges

The Clause received limited attention during the Convention's debates—the discussion that did occur focused primarily on the requirements of citizenship, rather than exploring the nature or scope of the "privileges and immunities" protected.[90] Debate on the Clause did not broaden during the ratification process. James Madison referred to the Clause in *The Federalist* as an example of the Constitution's improvement on the Articles of Confederation, for, he argued, prior language regarding "free inhabitants" possessed "a confusion of language here which is remarkable."[91] Not until the nineteenth century did courts begin to define the extent and nature of protection provided by the term privileges and immunities.[92]

2. Article IV, Section 2 and the Supreme Court

A recurring debate among scholars and courts interpreting the Privileges and Immunities Clause focuses on whether Article IV, Section 2 embodies protections for rights defined by "natural law" or whether the Clause measures protections only by the particular positive legal rights provided by law to residents of the visited state. The first part of this section addresses the natural law arguments put forth to support the view that the Privileges and Immunities Clause embodies and protects certain rights that derive from individual liberty and a democratic structure of government. Part II.A.1.b then compares a different view of the Clause, adopted by modern courts, that limits its protection to certain benefits of residence created by law in each state.

Part II.A.1.c reviews the Court's application of Article IV, Section 2. The final sections of Part II explore the relationship between the Privileges and Immunities Clause and other legal doctrines, including the dormant Commerce Clause and the involvement of state-owned property. This section concludes that while the modern anti-discrimination interpretation of Article IV, Section 2 is appropriate, examining beach access restrictions under the "fundamental" activities test employed by courts to determine which state-conferred privileges and immunities fall within the scope of protection demonstrates the weaknesses of the Court's test in *Baldwin*.

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and Immunities Clause and the Commerce Clause] may have been an assurance against an anticipated narrow reading of the Commerce Clause."); Bogen, *supra* note 84, at 835-36.

90. Bogen, *supra* note 84, at 837-38 (citing Notes of Debates in the Federal Convention of 1787 Reported by James Madison 439 (A. Koch ed. 1966)); *see also* Simson, *supra* note 67, at 384 ("[I]t seems reasonable to infer that familiar principles—specifically, those spelled out in the provision of the Articles of Confederation on which the clause plainly was based—were widely understood to inform the clause.").

91. Bogen, *supra* note 84, at 840 n.118 (quoting The Federalist No. 42, at 269-71 (James Madison) (J. Cooke ed., 1961)).

92. *See id.* at 841.

a. *The "Natural Law" View*

Some commentators argue that Article IV, Section 2 encompasses rights defined by larger principles of free society, rather than merely establishing a basic comity between residents and nonresidents in light of state-created rights.[93] Proponents of the natural law view include Chester James Antieau, who argues that the Supreme Court has "perverted" the intended objectives of the Privileges and Immunities Clause, "whose purpose was to protect the natural, basic, fundamental rights" of those "sojourning" in a state other than their own.[94] Another commentator, Christopher Maynard, points to Alexander Hamilton's *Federalist No. 80* as "implicitly" viewing the Privileges and Immunities Clause as a protection for rights found in natural law.[95] Maynard cites Hamilton's argument that the federal judiciary, rather than the states, would best enforce "fundamental rights" encompassed in provisions such as Article IV, Section 2.[96]

By most accounts, the first case to present a comprehensive analysis of the scope of rights protected under the Clause, *Corfield v. Coryell*,[97] embraced the natural rights approach.[98] In *Corfield*, the plaintiff challenged a New Jersey state law that excluded nonresidents of the state from gathering oysters in the state's waters unless on a boat owned by a state resident.[99] Justice Bushrod Washington, on circuit,

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93. *See, e.g.*, Chester James Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 Wm. & Mary L. Rev. 1 (1967). Antieau traces this meaning to a widespread belief in natural rights among those who wrote and ratified the Articles of Confederation and the Constitution. *Id.* at 7; *see also* Douglas G. Smith, *Natural Law, Article IV, and Section One of the Fourteenth Amendment*, 47 Am. U. L. Rev. 351, 359 (1997) ("The Clause . . . went beyond principles of comity, making the citizens of the several states one people and creating positive, conventional obligations in the place of 'unwritten' principles of reason that served as legal default rules.").

94. Antieau, *supra* note 93, at 1.

95. Christopher S. Maynard, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right To Travel*, 51 Case W. Res. L. Rev. 297, 336 (2000).

96. *Id.* at 336-37.

97. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

98. *See* Bogen, *supra* note 84, at 841-42 ("One of the earliest judicial opinions considering the privileges and immunities clause of article IV identified them with fundamental natural law rights."); *see also* Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 381 (quoting Hague v. CIO, 307 U.S. 496, 511 (1939)); Tribe, *supra* note 27, § 6-36, at 1252. However, despite the widespread understanding that the case stood for a natural rights interpretation of privileges and immunities, not all commentators agree. *See, e.g.*, Harrison, *supra* note 20, at 1400 n.48 ("Justice Washington meant to embrace the comity reading."); Nicole I. Hyland, Note, *On the Road Again: How Much Mileage Is Left on the Privileges or Immunities Clause and How Far Will It Travel?*, 70 Fordham L. Rev. 187, 207 (2001). Hyland writes: "Justice Washington's opinion has been criticized for interpreting the Privileges and Immunities Clause as a rights-creating provision. A more plausible reading of the *Corfield* passage, however, is that Article IV, Section 2 did not create these rights, but merely granted protection to interstate travelers with respect to these rights." *Id.*

99. *Corfield*, 6 F. Cas. at 550.

rejected the argument that the right of residents of New Jersey to gather oysters should apply equally to a nonresident in that state.[100] Instead, in an often-cited passage, Justice Washington stated:

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign.[101]

Justice Washington went on to describe the scope of such privileges and immunities as "more tedious than difficult to enumerate."[102] However, Washington did outline a general range of rights within the Clause, including "protection by the government; the enjoyment of life and liberty . . . the right to acquire and possess property . . . to pursue and obtain happiness and safety . . . [and] to pass through, or to reside in any other state."[103]

Modern jurisprudence and other commentators reject an interpretation of the Privileges and Immunities Clause based on natural law protections, arguing that the authors of the Articles of Confederation intended the measure of "privileges and immunities" to be found in a particular state, not in an "abstraction" among the states.[104]

b. *The Modern View: Article IV, Section 2 as an Anti-Discrimination Clause*

The Supreme Court's modern interpretation rejects the view that natural rights define the protections of Article IV, Section 2. An 1868 case, *Paul v. Virginia*,[105] and the 1872 *Slaughter-House Cases*,[106] mark the Supreme Court's departure from viewing Article IV, Section 2 as a provision embodying natural law protections.

In *Paul*, while upholding a Virginia statute that discriminated against corporations of other states because corporations are not "citizens," the Court expressly removed the link between rights protected under Article IV, Section 2 and natural law.[107] Justice Field wrote that "[s]pecial privileges enjoyed by citizens in their own States are not secured in other States by this provision."[108] Instead, he argued, the Clause was intended to promote national unity by putting

100. *Id.* at 552.
101. *Id.* at 551.
102. *Id.*
103. *Id.* at 551-52.
104. Bogen, *supra* note 84, at 843.
105. 75 U.S. (8 Wall.) 168 (1868).
106. 83 U.S. (16 Wall.) 36 (1872).
107. *Paul*, 75 U.S. at 180.
108. *Id.*

"the citizens of each State on the same footing with citizens of other States" in terms of the "advantages resulting from citizenship."[109]

Five years later, the Court in *Slaughter-House* again stated that the rights granted by a state to its own citizens were "the measure of the rights of citizens within [its] jurisdiction."[110] In terms of the protections of privileges "or" immunities included in the Fourteenth Amendment, Justice Miller's majority opinion limited the reach of this clause to only those "privileges and immunities . . . which owe their existence to the Federal government, its National character, its Constitution, or its laws."[111]

After *Slaughter-House*, both Article IV's Privileges and Immunities Clause and the Privileges or Immunities Clause in the Fourteenth Amendment played only minor roles in constitutional jurisprudence as "narrower anti-discrimination" provisions.[112] According to the Court, Article IV, Section 2 does not measure the rights of nonresidents in terms of natural rights nor the rights nonresidents

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109. *Id.*

110. *Slaughter-House*, 83 U.S. at 77; *see also* Hague v. CIO, 307 U.S. 496, 511 (1939) (describing as "the settled view" that Article IV, Section 2 does not import the privileges of a citizen in her home state to another).

111. *Slaughter-House*, 83 U.S. at 79. Justice Miller's characterization of the scope and intent of the Privileges or Immunities Clause in the Fourteenth Amendment has been criticized for being "flatly inconsistent with the history of its framing in Congress and its ratification by the state legislatures." William E. Nelson, The Fourteenth Amendment: From Political Principle to Judicial Doctrine 163 (1988). Nelson argues that those debating and ratifying the Amendment understood the Privileges or Immunities Clause to extend common-law property and contract protections to African-Americans, as well as whites from the North who relocated to the South, and that the Clause was intended to protect certain "basic rights" although the scope of such protections was not made definitive. *Id.*; *see also* Robert J. Kaczorowski, The Politics of Judicial Interpretation: The Federal Courts, Department of Justice and Civil Rights, 1866-1876, at 153 (1985) ("[Justice Miller's] assertion that the primacy of state authority over the natural rights of citizens was well established and recognized is contradicted by the predominant antebellum view of citizenship and the post-Civil War judicial interpretations of citizenship under the Reconstruction Amendments.").

While the Supreme Court surprised the legal community by relying on the Fourteenth Amendment's Privileges or Immunities Clause to protect the right to relocate permanently in a new state in *Saenz v. Roe*, the Court emphasized that this signaled no radical change in its Fourteenth Amendment jurisprudence: "Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, it has always been common ground that this Clause protects the third component [deciding to reside permanently in a new state] of the right to travel." Saenz v. Roe, 526 U.S. 489, 503 (1999) (internal citations omitted). Other commentators agree that *Saenz* did not signal a major shift in the Court's decisions involving privileges and immunities. *See supra* note 76.

112. *See* Lemper, supra note 76, at 297; *see also* Maynard, *supra* note 95, at 341 (arguing that the "anti-discrimination rationale effectively read the [Fourteenth Amendment] Privileges or Immunities Clause out of the Constitution, because the Equal Protection Clause also prohibits discrimination."); Hyland, *supra* note 98, at 204.

possess in their home state.[113] Instead, Article IV, Section 2 establishes a basic parity of treatment between nonresident visitors and residents in a given state, with exceptions for certain benefits that remain outside the scope of protected privileges and immunities.

The following section outlines the tests employed by the Court to determine which activities are protected by the Privileges and Immunities Clause. Where states do attempt to discriminate, courts must determine whether the Privileges and Immunities Clause requires a benefit retained for state residents to be shared with nonresidents. In the twentieth century, the Supreme Court considered several state statutes that discriminated against nonresidents.[114] Nevertheless, the Court did not develop an entirely consistent framework for determining whether the right to engage in a particular activity can in fact be reserved for those actually residing in a particular state.

A threshold test to determine whether Article IV, Section 2 applies to a particular activity emerged in *Baldwin v. Fish & Game Commission*.[115] After an overview of the modern Article IV, Section 2 cases preceding and following *Baldwin*, this Note examines the Court's threshold test, which asks whether a particular right or activity is "fundamental" to national unity.[116] Part III presents a critique of the "fundamental" rights and activities test, and describes and applies a preferred alternative to nonresident beach access restrictions.

c. *Twentieth-Century Privileges and Immunities Analysis: A "Fundamental" Rights and Activities Test Emerges*

In 1948, in *Toomer v. Witsell*, the Court applied the Privileges and Immunities Clause to invalidate South Carolina statutes that charged nonresidents a $2500 per boat commercial shrimp fishing license fee (while residents paid only $25).[117] The Court in *Toomer* described the Privileges and Immunities Clause as "designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy."[118] However, the Court conceded that Article IV, Section 2 did not prohibit all instances of nonresident discrimination.[119]

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113. *See supra* notes 105-09 and accompanying text.
114. *See infra* notes 117-38 and accompanying text.
115. 436 U.S. 371, 383, 388 (1978).
116. *Id.* at 383.
117. Toomer v. Witsell, 334 U.S. 385, 389 (1948). The Court found the fee differentials in South Carolina to be so extreme that, for all intents and purposes, nonresidents were excluded from fishing. *See infra* Part II.A.3.
118. *Id.* at 395.
119. *Id.* at 396 ("Like many other constitutional provisions, the privileges and immunities clause is not an absolute.").

Accordingly, the Court created a test establishing the boundaries of such exceptions to ensure that "valid independent" reasons beyond nonresident status supported disparate treatment: "the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them."[120] In the case of commercial shrimp fishing, the Court rejected South Carolina's rationale for discriminating against nonresidents—the risk of over-harvesting—because nonresidents do not use different equipment or methods that would contribute to resource depletion in a manner disproportionate to state residents.[121] Therefore, applying its test, the Court found no reasonable relationship between South Carolina's virtual exclusion of nonresidents and the state's rationale for enacting the statute.[122]

The Court applied the *Toomer* test inconsistently, if at all, in subsequent cases involving Article IV, Section 2 challenges. Within a one-month period of 1978, for example, the Court took diverging approaches to resolving privileges and immunities claims in two separate cases.

In May 1978, the Court decided *Baldwin v. Fish & Game Commission*, upholding a Montana statute that required nonresidents of the state to pay higher fees than residents for elk-hunting licenses.[123] Justice Blackmun's majority opinion first emphasized that recreational, rather than commercial, hunting was at issue, as well as the expense of managing the state's elk population.[124] Further, the Court noted that the statute imposed a higher fee rather than entirely excluding nonresidents from hunting in Montana.[125]

Stressing the role of Article IV, Section 2 in promoting national unity and a "norm of comity,"[126] Blackmun further described the outlying boundaries of the Clause—areas where residents and nonresidents are distinguished, such as voting, eligibility for elected office, and other "services" that need not be made available on an equal basis.[127] Adding a threshold step to the inquiry described in *Toomer*,[128] Blackmun concluded, "[o]nly with respect to those 'privileges' and 'immunities' *bearing upon the vitality of the Nation as*

120. *Id.* (citations omitted). The Court added that in applying this test, courts should give "due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.*

121. *Id.* at 398-99.

122. *Id.* at 403.

123. Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978).

124. *Id.* at 375 n.11.

125. *Id.* at 388. For a discussion of the distinction between differential fees and nonresident exclusion under Article IV, Section 2, see *infra* Part II.A.3.

126. *Baldwin*, 436 U.S. at 380-82 (citations omitted).

127. *Id.* at 383.

128. *See supra* text accompanying note 120.

a single entity must the State treat all citizens, resident and nonresident, equally."[129]

Applying this test to recreational hunting where appellants were neither deprived of their livelihood nor precluded from travel within Montana, the Court concluded that "[w]hatever rights or activities may be 'fundamental' under the Privileges and Immunities Clause . . . elk hunting by nonresidents . . . is not one of them."[130]

Dissenting, Justice Brennan hypothesized that a natural rights view grounded in *Corfield*'s reference to "fundamental" rights influenced the Court's analysis of the Montana statute.[131] Instead, Brennan would have rejected an examination of whether a right is "fundamental" because this inquiry has "no place in our analysis of whether a State's discrimination against nonresidents . . . violates the Clause."[132]

Brennan proposed returning to a framework that focuses on why a particular state has acted to discriminate against nonresidents. Disparate treatment would be allowed where nonresidents cause the problem that the state targets, and where the discrimination bears a substantial relation to the problem created by nonresidents.[133]

Just one month later, Justice Brennan's opinion for a unanimous Court in *Hicklin v. Orbeck* applied the test he proposed in *Baldwin*.[134] In *Hicklin*, the Court called *Toomer* the "leading modern exposition of the limitations the [Article IV, Section 2, Privileges and Immunities] Clause places on a State's power to *bias employment opportunities in favor of its own residents*."[135] Examining an "Alaska Hire" statute,[136] which gave hiring preferences to Alaska residents over nonresidents, the Court determined that nonresidents were not the "peculiar source of the evil" identified by the state—high unemployment levels.[137] Therefore, the state's justification for discrimination was not sufficient to uphold the statute.[138]

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129. *Baldwin*, 436 U.S. at 383 (emphasis added).
130. *Id.* at 388.
131. *Id.* at 396-97 (Brennan, J., dissenting).
132. *Id.* at 402 (Brennan, J., dissenting). Brennan pointed to several cases examined by the Court under Article IV, Section 2 where a particular right was not first examined to determine its fundamentality, *id.* at 401, such as *Toomer* and *Doe v. Bolton*, 410 U.S. 179 (1973) (holding that individuals must be afforded equal access to medical services when visiting a state in which they do not reside).
133. *Baldwin*, 436 U.S. at 402.
134. Hicklin v. Orbeck, 437 U.S. 518 (1978) (invalidating an Alaska law that gave hiring and firing preferences to state residents over nonresidents).
135. *Id.* at 525 (emphasis added).
136. *Id.* at 520 n.1 (citing Alaska Stat. Ann. §§ 38.40.010-.090 (1977)).
137. *Id.* at 527 (internal quotations omitted).
138. *Id.* at 527-28.

d. *The Status and Shortcomings of the "Fundamental" Privileges and Immunities Test*

What is the status of the "fundamental" activity test today? At no point did the Court in *Hicklin* discuss whether the right in question—the right to seek employment opportunities—is "fundamental," defined by its relationship to "the vitality of the Nation as a single entity."[139] However, where *Baldwin* emphasized the recreational nature of elk-hunting in differentiating between those rights that are "fundamental" and those that do not demand comity,[140] the Court's prior and subsequent case law[141] indicate that the commercial character of the Alaska Hire statute would likely bring it within the realm of Article IV, Section 2 protection if the fundamentality test were applied.[142] While the Court did not examine the "fundamental" nature of the right in question in *Hicklin*, the opinion did not contain the definitive statement rejecting such a test once and for all that Justice Brennan advocated in *Baldwin.*

In later cases, the Court referenced the test of "fundamental" rights in some instances, but not in others. In 1982, in a concurring opinion in *Zobel v. Williams*, Justice O'Connor proposed locating all cases involving the "right to travel" in Article IV, Section 2.[143] Moreover, O'Connor wrote that the test described in *Baldwin* should apply to questions concerning the right to travel.[144] In 1984, the Court examined a municipal construction hiring ordinance under Article IV, Section 2, and applied the *Baldwin* threshold test to find employment "fundamental" to national unity.[145] Four years later, in a 1988 decision finding that Virginia's bar residency requirement violated the Privileges and Immunities Clause, seven Justices joined an opinion applying *Baldwin*'s two-step test, including the first step examining

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139. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978).

140. *Id.* at 388.

141. *See infra* notes 145-46 and accompanying text.

142. *See infra* Part II.B (regarding the link between Article IV, Section 2's anti-discrimination protections and the dormant Commerce Clause). In *Hicklin*, the Court indicated that while the appellants did not challenge the statute on Commerce Clause grounds, "the mutually reinforcing relationship between the Privileges and Immunities Clause . . . and the Commerce Clause . . . renders several Commerce Clause decisions appropriate support for our conclusion." *Hicklin*, 437 U.S. at 531-32.

143. Zabel v. Williams, 457 U.S. 55, 76 (1982) (O'Connor, J., concurring) (finding that a state statute inappropriately based distribution of proceeds from oil rights on duration of state residence).

144. *Id.* (O'Connor, J., concurring). Justice O'Connor wrote:

> If the Privileges and Immunities Clause applies to Alaska's distribution system, then our prior opinions describe the proper standard of review. . . . [I]f the nonresident engages in conduct that is not "fundamental" because it does not "bea[r] upon the vitality of the Nation as a single entity," the Privileges and Immunities Clause affords no protection.

Id. (citing *Baldwin*, 436 U.S. at 387, 383).

145. United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 219, 222 (1984).

whether the activity bears sufficiently on the "vitality of the Nation as a single entity."[146]

In *Saenz v. Roe*, while resolving the case on Fourteenth Amendment grounds, the majority opinion discussed Article IV, Section 2 as prohibiting discrimination where "there is no substantial reason for the discrimination beyond the mere fact that [those discriminated against] are citizens of other States."[147] The Court's only mention of "fundamental" rights, without additional explanation, came in a footnote, citing *Corfield*, that parenthetically referred to "fundamental rights protected by the Privileges and Immunities Clause" that "include the right of a citizen of one state to pass through, or to reside in any other state."[148]

Recent Article IV, Section 2 cases that do not examine whether a right is "fundamental" involve commercial activity that would likely satisfy the Court's test as applied previously.[149] Therefore, the Court offers no definitive reason to believe that the threshold "fundamental" test does not remain on "stand-by" for analysis when a new nonresident restriction arises for consideration, such as beach access.

Numerous commentators share the concerns regarding the "fundamental" rights and activities test articulated by Justice Brennan in his dissent in *Baldwin*.[150] In lieu of the threshold test, David Bogen would prohibit differential treatment unless there is a valid reason for denying nonresidents the rights afforded "state natives."[151] Gary Simson finds that the test contradicts the original purpose of Article IV, Section 2,[152] while Jonathan Varat challenges the Court's finding

146. Supreme Court of Va. v. Friedman, 487 U.S. 59, 64 (1988) (internal quotations and citations omitted); *see also* Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (holding that New Hampshire's bar residency requirement violates the Privileges and Immunities Clause).

147. Saenz v. Roe, 526 U.S. 489, 502 (1999) (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

148. *Id.* at 501 n.14 (internal quotations omitted) (quoting Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit Judge)).

149. *See* Lunding v. N.Y. Tax Appeals Tribunal, 522 U.S. 287, 315 (1998) (finding a New York tax law provision to violate the Privileges and Immunities Clause because the state failed to show a substantial reason for refusing to allow nonresidents to deduct alimony payments). However, not all decisions protecting out-of-state visitors from discrimination focus on the commercial nature of the activity in question. In *Doe v. Bolton*, 410 U.S. 179 (1973), the Supreme Court held that states could not restrict access to medical care, including abortion services, to state residents. Arguably, paying for hospital services is a commercial activity, but the Court appeared more concerned with a restriction on access to medical care than the impact on trade if nonresidents could not seek treatment in Georgia. According to the Court, "a contrary holding would mean that a State could limit to its own residents the general medical care available within its borders. This we could not approve." *Id.* at 200.

150. *See supra* notes 131-32 and accompanying text.

151. *See* Bogen, *supra* note 84, at 857-58.

152. *See* Simson, *supra* note 67, at 385.

that certain activities fall outside of the Clause's nation-building objectives. Varat writes:

> [T]he idea that disadvantaging nonresidents more than is necessary to compensate for any peculiar problems they pose will "frustrate the purposes of the formation of the Union" only when the disadvantage affects a fundamental activity reflects either an unduly limited view of what those purposes are, or an empirically dubious assumption about human nature.[153]

And, summarizing the underlying sentiment of those who would reject the Court's threshold inquiry, Laurence Tribe terms the "fundamental" rights or activities test "unsatisfactory."[154]

Part III of this Note employs the example of nonresident beach access restrictions to support the criticism put forth by these commentators regarding the Court's "fundamental" activities test in *Baldwin*. Activities such as beach access, which appear "recreational" in character, may therefore escape Article IV, Section 2 analysis under the Court's test as applied in *Baldwin*. However, as this Note argues, beach access involves substantial issues that lie at the core of the Clause's nation-building objectives, from economic activity to the sharing of resources and the interaction of diverse populations. In particular, beach access restrictions contradict Article IV, Section 2 where governments enact total exclusions, as opposed to resident/nonresident fee differentials.

3. Distinguishing Bans on Nonresident Access from Differential User Fees

In order to better understand the underlying problems created by the Court's "fundamental" activities test, an important distinction must be drawn between restrictions that entirely block nonresident access to a service or activity and fee differentials. Prior Supreme Court cases treat total bans less favorably than fee differentials and thereby demonstrate that the extent of the government-enacted ban provides a better measure of threats to national unity than does an inquiry into the nature of the regulated activity.

In *Baldwin*, the Court noted that the higher license fee charged for elk hunting by nonresidents did not constitute a total exclusion, without stating what result such an exclusion would have on the outcome of the case.[155] In cases where a total exclusion existed rather than a fee differential, from denying nonresident access to abortion

153. Varat, *supra* note 27, at 511.

154. Tribe, *supra* note 27, § 6-37, at 1269 ("One highly unsatisfactory way [to resolve the limits of the Privileges and Immunities Clause] is to restrict the clause to a list of 'fundamental' privileges—as the Court did in *Baldwin*.").

155. *See* Baldwin v. Fish and Game Comm'n, 436 U.S. 371, 388 (1978).

services[156] to residency requirements for the practice of law,[157] the Court consistently invalidated complete bans on access. In *Toomer v. Witsell*, the Court struck down a fee differential that it defined as so extreme that the "practical effect is virtually exclusionary."[158] Therefore, the Court analyzed the South Carolina statute as though it were a total exclusion.[159] However, the Court in *Toomer* noted that its holding would not preclude a state from passing along the cost of additional conservation or enforcement measures to nonresidents via graduated license fees.[160]

In one attempt to use the Privileges and Immunities Clause to challenge differential pricing between residents and nonresidents for beach access, in *Daly v. Harris*, the U.S. District Court for the District of Hawaii held that nonresidents could in fact be required to pay $3 for access to the beach at Hanauma Bay when residents could enter for free.[161] The plaintiffs argued that the fee interfered with "fundamental" rights, including the right to access a public forum, the "right to intrastate travel," and the right to access the Hawaii shoreline.[162] Of the rights the plaintiffs put forth, the court found none sufficiently "fundamental" to fall within the scope of Article IV, Section 2 protections, or other constitutional provisions.[163]

In *Daly*, however, the distinction between residents and nonresidents concerned a fee differential[164] rather than the outright ban on nonresident access at Greenwich Point and in "Beachville."[165] While the opinions in *Daly* and *Baldwin* did not indicate what result

156. Doe v. Bolton, 410 U.S. 179 (1973).
157. Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985).
158. Toomer v. Witsell, 334 U.S. 385, 396-97 (1948).
159. *Id.*
160. *Id.* at 398-99.
161. Daly v. Harris, 215 F. Supp. 2d 1098, 1102 (D. Haw. 2002).
162. *Id.* at 1110.
163. *Id.* at 1110-11. The court deemed a right "fundamental" when it "bear[s] upon the vitality of the Nation as a single entity." *Id.* at 1110 (quoting Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978)). The court subsequently found that "access to the beach" did not fall within the class of protected "fundamental" rights. *Id.* at 1111-12. In examining the remaining arguments put forth by plaintiffs, the court examined the plaintiffs' challenge regarding the right to "intrastate" travel and the right to access the shore of Hawaii under the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 1112. Additionally, the court examined and rejected the claimed right to access a public forum under the First Amendment rather than Article IV, Section 2. *See supra* notes 60-62 and accompanying text.
164. *Daly*, 215 F. Supp. 2d at 1102.
165. *See* Leydon v. Town of Greenwich, 777 A.2d 552, 559 (Conn. 2001). Courts in two other states that have considered fees for beach access under the public trust doctrine permit their use if the fees are reasonable, if the money collected benefits the beach area, and so long as *nonresidents were charged no more than residents*. *See* Archer, *supra* note 36, at 107 (citing City of Dayton Beach Shores v. State, 483 So. 2d 405 (Fla. 1985) and Neptune City v. Avon-by-the-Sea, 294 A.2d 47 (N.J. 1972)). Under the Privileges and Immunities Clause, Gary Simson would uphold fee differentials so far as they do not "exceed the sum essential to compensate the state's taxpayers for payments made in nonresidents' behalf." Simson, *supra* note 67, at 399.

would occur with total exclusions in place, prior cases indicate that a different kind of restriction *on the same underlying activity* would lead, at a minimum, to a more rigorous analysis, if not a different outcome.[166] For this reason, this Note argues that the protections offered by Article IV, Section 2 should relate directly to the level of the differential treatment extended by local governments, measured against the justification for the restriction, rather than examining the right or activity in question. Therefore, Part III examines fee differentials and total bans in the beach access context, and determines that local governments will, in many cases, justify reasonable fee differentials. However, total exclusions, such as in the "Beachville" hypothetical, should not survive the Article IV, Section 2 inquiry.

B. *Article IV, Section 2: A Close Relative of the Commerce Clause*

As descendants of Article IV of the Articles of Confederation,[167] the Privileges and Immunities Clause and the Commerce Clause[168] are linked both historically and in case law. The specific relationship between the Clauses relates to the scope of the "dormant" Commerce Clause doctrine, which precludes states in many cases from acting in a manner that interferes with interstate commerce.[169] As this section demonstrates, dormant Commerce Clause analysis could apply to nonresident restrictions where residents of one state are given preferential access to a natural resource, such as a public beach, over residents of another. However, even if application of the Commerce Clause does not extend to invalidate exclusionary beach access policies, this line of cases reinforces a finding under Article IV, Section 2 that activities that appear to be exclusively recreational in nature invoke the nation-building principles from which both clauses derive, and which nonresident exclusions contradict.

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166. *See supra* notes 155-59 and accompanying text.

167. *See supra* Part II.A.1.

168. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3.

169. No specific provision of the Constitution expressly prohibits state action that interferes with interstate commerce, yet such a prohibition is implied from the structure of government and the Article I, section 8 grant of power to Congress to regulate Interstate Commerce. *See* S. Pac. Co. v. Arizona, 325 U.S. 761 (1945); *see also* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 298 (1851) (recognizing limitations on state regulatory power in light of the constitutional grant of power to Congress to regulate commerce). State action that "'clearly discriminates against interstate commerce'" and lacks a non-protectionist justification will be invalidated under the Court's current application of the dormant Commerce Clause. Tribe, *supra* note 27, § 6-2, at 1031 (citing Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992)). In addition, a "facially neutral" law must be examined to compare the burden the regulation places on interstate commerce and the local benefits the law seeks to achieve. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

In *Hicklin*, the Court referred to a "mutually reinforcing relationship" between the two clauses based on their roots in the Articles of Confederation and "their shared vision of federalism."[170] In addition, the dormant Commerce Clause precludes activities by local governments that interfere with interstate commerce.[171] However, where a state or local government participates in, rather than regulates, a market, such activity is exempted from dormant Commerce Clause analysis: "when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause."[172]

In many cases, a fine line divides discrimination that invokes Article IV, Section 2 rather than the dormant Commerce Clause. The question of which provision applies certainly does not center on whether an activity is commercial: as cases discussed previously in Part II illustrate, state statutes affecting nonresident access to commercial or economic benefits, such as licenses for shrimp fishing, fall within the scope of Privileges and Immunities analysis.[173]

Where state action involving commercial activity is at issue, both the Privileges and Immunities Clause and the dormant Commerce Clause could be relevant, although the protections provided by each are not identical. In certain circumstances, one line of cases may act to invalidate a statute even if the other would allow it. For example, in *United Building & Construction Trades Council v. City of Camden*, the Court noted that although the city's hiring statute would fall within the dormant Commerce Clause doctrine's "market participant" exception, analysis under Article IV, Section 2 could proceed.[174] And, in a recent Ninth Circuit case, the court turned to the dormant Commerce Clause to invalidate a differential fee structure for nonresident hunters which, after *Baldwin*, could not be challenged on Article IV, Section 2 grounds.[175] Therefore, each clause is likely

170. Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978); *see also* Sunstein, *supra* note 68, at 32-33 ("Both clauses are aimed at partiality in the form of discrimination against out-of-staters. Both focus on the theme of representation—justifying an active judicial posture when discrimination alerts courts to the likelihood that unrepresented people have been harmed."); Jide Nzelibe, *Free Movement: A Federalist Reinterpretation*, 49 Am. U. L. Rev. 433, 436 (1999) ("Some limitations, such as the dormant Commerce Clause and the Comity Clause, limit the powers of states against other states or against the federal government in order to promote a political, social, and economic union.").

171. Dean Milk Co. v. Madison, 340 U.S. 349, 354 (1951) (invalidating a municipal milk pasteurization statute that discriminated against out-of-state dairies where "reasonable nondiscriminatory alternatives" existed).

172. White v. Mass. Council of Constr. Employers, 460 U.S. 204, 208 (1983) (citations omitted).

173. *See* Toomer v. Witsell, 334 U.S. 385 (1948).

174. United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 220 (1984). "[C]oncern with comity cuts across the market regulator-market participant distinction that is crucial under the Commerce Clause." *Id.*

175. Conservation Force, Inc. v. Manning, 301 F.3d 985 (9th Cir. 2002). "Although

relevant to beach access restrictions where both commercial and recreational issues may arise.

Courts apply rigorous scrutiny under the dormant Commerce Clause in cases where "a state [mandates] that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders."[176] If a public beach can be characterized as a "natural resource," a heightened level of scrutiny would result.[177] Consequently, the nonresident restriction must be narrowly tailored to further a legitimate governmental interest, with no less-discriminatory means available.[178]

However, in an era marked by the Supreme Court's restrictive view on what activities do in fact substantially affect commerce,[179] successfully linking a local restriction on beach access to interstate commerce inquiry becomes more challenging. Therefore, Article IV, Section 2 becomes more important in examining restrictions on activities that may appear recreational, rather than commercial, but that nevertheless discriminate based on nonresident status and affect relations between the various states. The Supreme Court has said that the primary consideration for invoking Article IV, Section 2 should be parity of treatment, not commercial activity.[180] Some point to the introductory language of the "privileges and immunities" provision in the Articles of Confederation, which spoke of "mutual friendship and intercourse" among residents of the various states, to support such an interpretation of the Privileges and Immunities Clause that extends beyond economic activities.[181]

While a close relationship exists between the Commerce Clause and Article IV, Section 2, the Clauses are employed in case law to address somewhat different aspects of the same underlying goal. Therefore,

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the Commerce and Privileges and Immunities Clauses have a mutually reinforcing relationship . . . the analytical framework for addressing challenges under each clause is not identical." *Id.* at 993 (internal citations and quotations omitted).

176. Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 576 (1997) (finding a tax structure that benefits camps primarily serving state residents to violate the dormant Commerce Clause) (quoting New England Power Co. v. New Hampshire, 455 U.S. 331, 338 (1982)); *see also Conservation Force*, 301 F.3d at 995-96.

177. *See Camps*, 520 U.S. at 576-77.

178. *Conservation Force*, 301 F.3d at 995 (citing Sporhase v. Nebraska, 458 U.S. 941, 957-58 (1982)). In *Conservation Force*, the court found that nonresident hunting restrictions in Arizona satisfied the legitimate interests inquiry because of the need to meet conservation goals. *Id.* at 997. However, the nonresident restriction was not narrowly tailored because the state failed to demonstrate that other remedies that do not discriminate were not available. *Id.* at 998.

179. *See, e.g.*, Sally F. Goldfarb, *The Supreme Court, The Violence Against Women Act, and the Use and Abuse of Federalism*, 71 Fordham L. Rev. 57, 110-16 (2002) (describing shifts in the Court's interpretation of the Commerce Clause).

180. "It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce." United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 220 (1984).

181. *See* Tribe, *supra* note 27, § 6-37, at 1260.

while examining the relationship between the Privileges and Immunities Clause and the Commerce Clause provides a better understanding of the underlying objectives of each, the protections of Article IV, Section 2 should not be limited to those interests that are economic or commercial in nature.

C. *Land Resources, Local Government Ownership, and the Privileges and Immunities Clause*

Part II.A.2 examined the tests employed by courts to determine whether a particular activity or right falls within the scope of Article IV, Section 2. Additionally, because beach access restrictions often involve property owned or operated by a municipal government (rather than the state itself), two further questions arise regarding the scope of Privileges and Immunities protections. Part II.C.1 discusses the Supreme Court's determination that *municipal* regulation falls within the purview of the Privileges and Immunities Clause even though Article IV, Section 2 refers to the rights of *state* citizenship. Part II.C.2 then examines several Privileges and Immunities cases that involved access to commonly-held property, and argues that state ownership of a resource should not preclude application of Article IV, Section 2 to beach access regulations.

1. Municipal Regulation and Article IV, Section 2

The text of Article IV, Section 2 refers to "Citizens of each *State*" and "the Privileges and Immunities of Citizens in the several *States*."[182] Would this constitutional provision invalidate beach access restrictions imposed by a town such as Beachville against this Note's hypothetical nonresident, Rachel? Could a plaintiff like Brenden Leydon, as a resident of Connecticut, bring an Article IV, Section 2 claim against Greenwich?

In 1984, the Supreme Court used the Article IV, Section 2, Privileges and Immunities Clause to invalidate a municipal statute requiring that residents of Camden, New Jersey fill forty-percent of contractor and subcontractor positions on city construction projects.[183] Writing for the Court, Justice Rehnquist determined that "[t]he fact that the ordinance in question is a municipal, rather than a state, law does not somehow place it outside the scope of the Privileges and Immunities Clause."[184]

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182. U.S. Const. art. IV, § 2 (emphasis added).

183. *United Bldg. & Constr. Trades Council*, 465 U.S. at 208. After discussing the applicability of the Privileges and Immunities Clause to municipal acts, the Court then applied the two-step test set forth in *Baldwin*, finding pursuit of a common calling to be fundamental to preservation of national unity, and no substantial relationship between the problem identified by the legislature and the statutory restrictions. *Id.* at 219, 222.

184. *Id.* at 214.

Addressing the argument that the purpose and language of Article IV, Section 2 is restricted to state action, the Court responded that a municipal statute excluding nonresidents would deny an out-of-state visitor the parity of treatment required by the Clause in the same way that a statewide prohibition would.[185] However, such a challenge must be brought by an out-of-state resident, for the Court found that residents of the state in question can object only "at the polls."[186]

Therefore, while Rachel, this Note's hypothetical visitor to "Beachville," could as a resident of State *X* challenge a municipal beach restriction in State *Y* using the Privileges and Immunities Clause, she could not do so in her home state.[187] Such a result is certainly unsettling where a right of equal treatment is extended to residents of forty-nine other states, but not to most residents of the very state where the city or town that retained an activity or benefit for its citizens is located.[188] If discrimination against nonresidents is unconstitutional in the interstate context, then, logically, one would predict that such exclusion is inappropriate in all cases. However, the opposite result is found in *Camden*, illustrating one drawback of pursuing an Article IV, Section 2 claim if remedies are available that provide a broader scope of protection.

2. Land Resources Under Article IV, Section 2

Several Supreme Court opinions refer to special considerations under Article IV, Section 2 in cases involving property held in common by the people. In *Corfield*, Justice Washington posited that legislatures need *not* provide nonresidents the same level of access to

185. *Id.* at 217.

186. *Id.*

187. Interestingly, the Court's opinion in *Camden* explains that an individual visiting another state need not be treated as an average resident of New Jersey, but can challenge a statute that prevents him or her from "enjoy[ing] the same privileges as the New Jersey citizen *residing in Camden*." *Id.* (emphasis added).

188. Justice Blackmun dissented in *Camden* because he believed that Article IV, Section 2 should not apply to municipal actions, and pointed to "the perverse effect of vesting non-New Jersey residents with constitutional privileges that are not enjoyed by most New Jersey residents themselves." *Id.* at 230 (Blackmun, J., dissenting). Some commentators turn to the Fourteenth Amendment to identify a potential constitutional challenge to remaining intrastate disparities. John Harrison argues that, as an "equality-based," rather than substantive, protection, the Privileges or Immunities Clause of the Fourteenth Amendment should serve to level the *intra*state playing field when discrimination among residents of the same state exists. *See* Harrison, *supra* note 20, at 1387-88 ("The main point of the clause is to require that every state give the same privileges and immunities of state citizenship—the same positive law rights of property, contract, and so forth—to all its citizens."); *see also* Smith, *supra* note 93, at 356-57 (arguing that if Article IV, Section 2 establishes parity between residents and visiting nonresidents of a given state, then the Privileges or Immunities Clause of the Fourteenth Amendment ensures equal treatment of residents of the same state, as well as conferring substantive rights).

common property as residents.[189] Over a century later, the Court cited Justice Washington's opinion regarding land held in trust: "It appears to have been generally accepted that . . . [the States] were not obliged to share those things they held in trust for their own people."[190] However, the historical examples given by the Court in *Baldwin* to illustrate this principle relate primarily to wildlife, such as access to oyster beds[191] and birds that are hunted,[192] rather than access to public property for reasons other than harvesting or hunting animals.

Jonathan Varat has examined the relationship between the Privileges and Immunities Clause and issues of "proprietary choice" where common property is involved.[193] He argues that while a state's ownership of property may allow for a certain amount of nonresident discrimination in access, property ownership is not a dispositive factor that excludes analysis under the Clause.[194] To illustrate how a rigid distinction that precludes Privileges and Immunities protection where property is at issue conflicts with the nation-building objectives of the Clause, Varat poses a hypothetical scenario in which California restricts beach access to its own residents.[195] Varat puts forth the California beach question with only a brief analysis of whether it could be upheld, under the assumption that the hypothetical beach closure blatantly contradicts our normative understanding of the treatment that should be afforded nonresidents in a nation comprised of states.

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189. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230).

190. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 384 (1978). In *Baldwin*, the Court went on to outline potential limitations on state ownership, including cases where denying a resource to nonresidents interferes with interstate commerce, federal power, or one's ability to earn a living in the state. *Id.* at 385-86.

191. McCready v. Virginia, 94 U.S. 391 (1876) (holding that a state may reserve for its residents the exclusive right to use its oyster beds).

192. *Baldwin*, 436 U.S. at 384-85. *But see* Zechariah Chafee, Jr., Three Human Rights in the Constitution of 1787, at 177 (1956). Chafee discusses circumstances before the Founding at which time colonies could not prevent subjects of the King in other colonies from fishing or other coastal commercial activity.

193. Varat, *supra* note 27, at 495-99.

194. *Id.* Varat traces the Court's discussion of this topic from *McCready* to *Toomer* in terms of the relevance of state "ownership" of the seaboard and tidelands to nonresident access restrictions (for oyster planting and shrimping, respectively). He concludes:

> Perhaps the most that can be said about state proprietary power over natural resources is (1) that the privileges and immunities clause grants no exception from the normal antidiscrimination rule when a state has no greater claim to ownership than a regulatory power over in-state resources possessed by no one; and (2) when a state's claim of ownership conforms more closely to traditional forms of private ownership, some undefined proprietary interest gives the state somewhat greater power than it would otherwise have to discriminate against the citizens of other states, but not complete immunity from scrutiny.

Id. at 498.

195. *Id.* at 511-12.

Thus, because of the national unity objectives of the Privileges and Immunities Clause, property ownership should not be enough, standing alone, to justify exclusion.[196] A state may attempt to support its rationale for excluding nonresidents from beachfront property by pointing to the nature of commonly held property. However, indications from the Court, and conventional norms regarding the need to share access to limited resources, both suggest that the government's status as property owner should not foreclose analysis under the Privileges and Immunities Clause in a nonresident beach access case.

III. A RISING TIDE: THE EXISTING AND PREFERRED ARTICLE IV, SECTION 2 TESTS APPLIED TO BEACH ACCESS RESTRICTIONS

The previous section describes the evolution of the Supreme Court's Article IV, Section 2 analysis, including the Court's creation of a threshold test in *Baldwin v. Fish & Game Commission*, which held that "[o]nly with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[197] Despite criticism of the *Baldwin* "fundamental" rights and activities analysis under the Privileges and Immunities Clause,[198] the test endures.

Therefore, Part III applies the *Baldwin* test to the case of nonresident beach access restrictions and demonstrates that restrictions like those in "Beachville," which entirely exclude nonresidents, should be struck down under Article IV, Section 2. This analysis of the beach access question also illustrates the underlying problems with the Court's current Privileges and Immunities test.

Part III concludes by describing and applying a more workable and reasonable analysis that should be employed in place of the *Baldwin* test. The preferred Privileges and Immunities analysis eliminates the threshold test of "fundamental" rights, and instead would require local governments to quantify a particular nonresident harm, and to then show a substantial relation between that harm and the extent to which a restriction excludes nonresidents. The test proposed in this Note better reflects the nation-building objectives of Article IV, Section 2, and recognizes that local governments are better equipped to quantify a particular harm than to predict which rights and activities are "fundamental" to national unity.

196. *See* United Bldg. & Constr. Trades Council v. City of Camden, 465 U.S. 208, 221 (1984); Hicklin v. Orbeck, 437 U.S. 518, 528-29 (1978) (citing *Baldwin*, 436 U.S. at 385).

197. *Baldwin*, 436 U.S. at 383.

198. *See supra* notes 150-54 and accompanying text.

A. *Application of the Existing "Fundamental" Activities Test*

Beach access restrictions may, at first glance, seem vulnerable to the judicial treatment elk-hunting received in *Baldwin*.[199] Like elk-hunting, the motivation behind a trip to the beach is usually social or recreational, rather than commercial. For example, citing *Baldwin*'s holding regarding elk-hunting's "recreational" nature, the Ninth Circuit considered a differential fee structure for mooring rights in a recreational boat harbor, and upheld the higher nonresident fees.[200]

However, the "Beachville" hypothetical and the restrictions Brendon Leydon encountered in Greenwich differ from the situation in *Baldwin* and in *Hawaii Boating Association*.[201] While the Court emphasized in *Baldwin* that nonresidents of Montana could continue to hunt elk in the state, albeit after paying a higher fee than residents,[202] an outright ban on nonresidents passing the entrance gate to access the beach should produce a different result. Greenwich not only excluded nonresidents entirely, but also prevented a nonresident of the town from passing a boundary that members of the public residing in Greenwich could cross freely.[203] The resulting nonresident

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199. *See supra* notes 123-30 and accompanying text.

200. Haw. Boating Ass'n v. Water Transp. Facilities Div., Dep't. of Transp., 651 F.2d 661, 666-67 (9th Cir. 1981); *see also* Daly v. Harris, 215 F. Supp. 2d 1098, 1109-11 (D. Haw. 2002) (finding access to the Hawaii shoreline not sufficiently "fundamental" as defined by the Court in *Baldwin*).

201. *Haw. Boating Ass'n*, 651 F.2d 661.

202. *See supra* note 125 and accompanying text.

203. The extent to which government can restrict freedom of movement is an area of debate which invokes the first (free ingress and egress) and third (the right to relocate one's residence) elements of the right to travel, as well as other constitutional provisions including the First Amendment and the Due Process Clause of the Fourteenth Amendment. Denying nonresidents access to a town beach may also involve a restriction on mobility, such as where a nonresident jogger like Brenden Leydon is stopped at the beach entrance. *See supra* note 6 and accompanying text. "Free movement" issues could be explored, but disagreement exists regarding the extent and source of the right to move without regulatory hindrance. Courts have not identified exactly what type of movement is protected by the U.S. Constitution, and no clear delineation of the source of any available protections exists. *See* Andrew C. Porter, Comment: *Toward a Constitutional Analysis of the Right to Intrastate Travel*, 86 Nw. U. L. Rev. 820, 821 (1992) (arguing that the source of the right to interstate and intrastate travel can be found in the "substantive prong" of the Due Process Clause of the Fourteenth Amendment). Porter points to the Supreme Court's reference to "activities that are historically part of the amenities of life as we have known them," such as "walking, strolling, wandering, and loafing" which would point to a prohibition against restrictions on free movement. *Id.* at 820 n.5 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972)).

However, for an in-state plaintiff like Leydon, a split exists among the federal circuits on the question of *intra*state travel based on the right to interstate travel. *Id.* at 821; *see also* Hyland, *supra* note 98, at 238. The Third Circuit examined an anti-cruising statute and found the right to intrastate travel in the Due Process Clause in *Lutz v. City of York*, 899 F.2d 255, 266 (3d Cir. 1990), and the Fifth Circuit resolved a challenge to a curfew ordinance based on a "fundamental right" to free movement in *Qutb v. Strauss*, 11 F.3d 488, 495-96 (5th Cir. 1993). However, other decisions, in examining questions regarding the rights of state residents to re-settle in their state

discrimination affects the ability of individuals to access public areas in neighboring states, and prevents the development of intrastate relations and resource-sharing. Therefore, beach access restrictions differ from the hunting licenses found by the Court to fall outside of the scope of Article IV, Section 2 protections.

The difference between total exclusions and the fee differential in *Baldwin* supports a finding that access restrictions as in "Beachville" contradict the nation-building goals of Article IV, Section 2 to an extent that satisfies the Court's threshold test. In cases after *Baldwin*, such as *United Building & Construction Trades Council v. City of Camden*,[204] when a restriction bears sufficiently on national unity to invoke Article IV, Section 2, courts examine whether a substantial reason exists for the nonresident discrimination, and whether the "degree" of discrimination relates closely to that reason.[205] Part III.B applies these elements of the test to the example of beach access and describes an alternative method to distinguish among activities and rights protected under Article IV, Section 2.

B. *Charting a New Course: Applying a Preferred Privileges and Immunities Test*

The threshold test established in *Baldwin*[206] focuses on the nature of the activity regulated by state or local government, rather than the extent to which nonresident exclusion results. This test can exclude activities that, despite their underlying recreational motivation, do in fact bear upon national unity. Restrictions that prevent nonresident access altogether can interfere with relations between the states and their residents. A test that evaluates the nonresident barrier and the rationale for its enactment, regardless of the character of the underlying activity, better serves the nation-building objectives of the Privileges and Immunities Clause.

For example, while beach access involves primarily recreational activities, a total exclusion disrupts more than an individual's leisure time. Excessive restrictions impair economic activity, the sharing of resources found in a particular state, and the interaction of diverse

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and to access public housing or employment, have found no constitutional protection for intrastate travel. *See* Wright v. City of Jackson, 506 F.2d 900 (5th Cir. 1975). While the free movement issue relates to certain aspects of the right to "travel," mobility restrictions as examined by the federal circuits apply to residents and nonresidents alike. Therefore, a discussion of free movement lies outside of the focus of this Note: the second component of the right to travel located in Article IV, Section 2, which applies to the treatment of temporary visitors by states where they do not reside.

204. 465 U.S. 208 (1984).

205. *Id.* at 222.

206. "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978).

populations in public spaces. The recreational aspects of beach access do not negate this activity's relationship to the federal structure of government.

The preferred Article IV, Section 2 inquiry would not examine whether the regulated activity is "fundamental." Instead, courts would proceed to the inquiry applied in *United Building & Construction v. City of Camden* to identify the "peculiar" problem created by nonresident access, and then determine if the resulting rules relate substantially to the burden imposed by visitors.[207] Therefore, even if the activity is recreational in nature, the state or local government must demonstrate that the restriction relates substantially to addressing the specified problem so that nonresident status does not form the entire basis for exclusion.

In past cases, the Court suggested that the end result of a given restriction is relevant, resolving *Toomer* after observing that the fee differential functioned as an essential ban, and conversely, emphasizing that the fee differential in *Baldwin* did not.[208] This aspect of the analysis should constitute an explicit component of an Article IV, Section 2 analysis that compares the objectives of the governmental body in restricting nonresident access to a resource against the extent of the resulting restriction.

1. Identifying the "Peculiar" Threat Posed by Nonresident Access

Local governments are equipped to describe the additional burden on state resources that nonresidents impose, and can quantify how a given measure will lessen the burden.[209] In the case of beach access, or other activities where conservation issues come into play,[210] quantifiable factors exist for analyzing what additional or particular danger nonresidents pose to the beach resource.[211] As Varat argues,

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207. *United Bldg. & Constr. Trades Council*, 465 U.S. at 222 (quoting Toomer v. Witsell, 334 U.S. 385, 398 (1948)).

208. *See supra* note 125 and accompanying text.

209. *See* David J. Brower, Access to the Nation's Beaches: Legal and Planning Perspectives 53-56 (1978). Brower identifies the following components as necessary to maintain local beaches once access is provided: maintenance (including trash receptacles, anti-littering signage, staff for enforcing regulations and supervising beachgoers' activities, lifeguards, etc.); environmental protections (guarding against the use of off-road vehicles, beach "stabilization" techniques, determination and enforcement of beach capacity, and dune protection); transportation and parking ("parking limitations, air quality and noise implications, and the fact that new highways inevitably bring new development and may merely complicate existing problems"). *Id.*

210. *See* Simson, *supra* note 67, at 400. Simson proposes such a test in terms of hunting licenses for nonresidents: "If the state can show that the prohibition or ceiling is part of a conservation effort carefully calculated to maintain the population of the hunted species, the discrimination survives. If it cannot, the law must fall." *Id.*

211. *See* Varat, *supra* note 27, at 530-31. Varat would require an examination of a resource's abundance, and the need among nonresidents for access to the resource, in

the inquiry should first examine the availability of the resource.[212] Further, this Note argues that the analysis should include an examination of potential threats to the resource: overcrowding, sand erosion, litter, and overburdening amenities such as parking and restroom facilities.[213]

The Court conducted a similar analysis in *Toomer*, and determined that nonresidents looking for shrimp used the same methods and equipment as residents.[214] Therefore, nonresidents did not pose a "peculiar" type of harm, and the Court invalidated the restriction.[215] In most instances, nonresidents will use beach resources in the same manner as residents, causing no "peculiar" type of harm. However, in the example of beach access, nonresidents may in some circumstances damage the resource more than residents, such as by driving and parking when town residents walk or use forms of public transportation to access the shore.

Also, in specific cases where a local resource is so limited in size that it cannot accommodate use beyond the residents of the town responsible for its operation, nonresidents may in fact pose a peculiar harm that can be captured in an analysis of lost value due to overcrowding. Including this factor in the analysis would acknowledge the concerns of local governments if providing access to nonresidents raises fears of both diminished enjoyment and exclusion among those who live in the community that owns and operates the beach.

The proposed inquiry would take into account local concerns regarding the potential for nonresidents to threaten the character of an exclusive town resource, or to reduce its value for residents because of overcrowding, to the extent that such issues can be quantified in terms of attendance figures and available amenities.[216] By requiring the town to provide a concrete measure of the costs associated with nonresident access, restrictions that confront an actual harm can be tailored to address local concerns, while those that simply intend to maintain an "exclusive" or unnecessarily restrictive environment would not fare well under the proposed test.[217]

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determining whether nonresident restrictions should apply. From these guidelines he concludes that state beaches and parks should not be restricted to only state residents. *Id.* at 530-33, 558.

212. *Id.*

213. *See supra* note 209.

214. Toomer v. Witsell, 334 U.S. 385, 403 (1948).

215. *Id.*

216. It should be noted that, in the case of Greenwich, even after extensive publicity surrounding the *Leydon* case and the court's decision to open Greenwich Point to nonresidents, the town released figures which revealed that less than two percent of those entering the municipal beach were not residents of Greenwich. *See* Thanawala, *supra* note 15, at B1.

217. In Greenwich, the statute which limited beach access to town residents referred to the fact that local tax dollars supported and constructed areas such as

2. The Scope of the Nonresident Restriction

After identifying the particular harm that prompted concern and regulation, courts should next consider the level of exclusion chosen by the government in light of the harm. If the problems produced by nonresidents merely create an additional financial burden on local taxpayers, then the collection of additional financial resources through user fees may be appropriate—without excluding nonresidents entirely.[218]

If nonresidents create particular problems because the impact of their use of the resource differs from local residents, then the resulting regulation should relate substantially to that harm. An outright ban need not automatically result. Alternatives such as a lottery or first-come/first-served process for obtaining a predetermined number of nonresident passes could, in many instances, resolve the burden of expanded access.

By analyzing the additional costs and burdens that nonresident access brings, measured against the type of discrimination enacted, courts would reach more consistent and reasonable results than under the *Baldwin* test. Using the preferred test, local governments need not predict, using limited case law, whether a regulated activity is "fundamental" to the structure of the federal system of government.

As this Note argues in applying Article IV, Section 2, beach access restrictions involve more than the ability to swim or walk on an exclusive beach. Instead, one state entirely excluding nonresidents from passing boundaries and accessing property that in-state residents enjoy freely raises fundamental questions regarding the relations among the residents of the several states.

Excluding certain activities from protection under Article IV, Section 2, and thereby permitting nonresident discrimination without requiring justification by the local government, undermines the

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Greenwich Point, as well as the "limited capacity," and the potential for "ecological destruction" at town beaches and other recreational centers. Leydon v. Town of Greenwich, 777 A.2d 552, 558 n.5 (Conn. 2001) (citing the invalidated Greenwich Mun. Code § 7-36). However, based on the affluent character of Greenwich, accounts of the court battle over beach access addressed the socio-economic divide between the town and neighboring cities and states. *See* David M. Herszenhorn, *Greenwich Cites Fear of 'Jerseyfication' in Beach Dispute*, N.Y. Times, Nov. 11, 2000, at B1 ("[The town's brief] seemed to strike an emotional blow, raising the specter of tacky Jersey Shore honky-tonks somehow taking root in the refined quarters of Greenwich, one of the most exclusive suburbs in America."). But, other residents insisted that "regular people" used the town's beaches, and emphasized the need to protect limited municipal resources. *See* David M. Herszenhorn, *After a Court Ruling, Clouds at the Beaches*, N.Y. Times, July 28, 2001, at B1. Certainly, care must be exercised in applying the test advocated in this Note to distinguish between quantifiable threats to beach resources and an underlying resistance to granting outsiders access to exclusive resources.

218. *See supra* Part II.A.3.

underlying nation-building objectives of the Clause. The Court's Privileges and Immunities Clause test in *Baldwin* may be framed to measure the impact of various restrictions on national unity, but, as previously applied, can exclude activities like access to natural resources that directly relate to the effective and productive functioning of the federal system.

As state and local governments further attempt to exclude nonresidents from accessing land resources, the limitations of the Court's Privileges and Immunities jurisprudence will become more evident. A more practical and efficient test would examine any instance of differential treatment, and would prevent discrimination against nonresidents who visit another state where local governments fail to justify the scope of restrictions that purportedly protect and preserve particular natural resources in local communities.

CONCLUSION

Efforts to limit access to publicly-owned natural resources, such as municipal beaches, will continue as overcrowding in urban and suburban neighborhoods extends into oceanfront communities. Examining nonresident beach restrictions under Article IV, Section 2 of the U.S. Constitution (the Privileges and Immunities Clause), which ensures that a resident of State *A* is treated as a "welcome visitor"[219] while in State *B*,[220] demonstrates that the Privileges and Immunities Clause should invalidate restrictions that discriminate based solely on nonresident status.

Analysis of nonresident beach restrictions under the current Article IV, Section 2 framework reveals the shortcomings of the Court's threshold test of whether the privilege or immunity in question is "fundamental" to national unity.[221] However, even as currently applied by courts, the recreational aspects of beach access, and the involvement of commonly-held property, need not remove nonresident restrictions from constitutional analysis under the Article IV, Section 2, Privileges and Immunities Clause. Where beach access restrictions ban nonresidents entirely, such restrictions diverge from the differential fee structures previously upheld by courts for other recreational activities. Even under the Court's analysis in *Baldwin*, outright nonresident beach restrictions should not survive constitutional analysis.

A preferred Article IV, Section 2 test would eliminate examination of the restricted activity's character, and would instead consider only if nonresidents produce a particular harm and whether the nature and scope of the exclusionary measure relates substantially to that harm.

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219. Saenz v. Roe, 526 U.S. 489, 501 (1999).
220. Toomer v. Witsell, 334 U.S. 385, 395 (1948).
221. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 388 (1978).

Using a proposed revised test, this Note argues that in some cases local governments could impose a fee differential, but only in rare situations would an outright ban on nonresident access to natural resources like public beaches be appropriate.