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NEW MEXICO AS HOLLYWOOD'S BACKLOT: AN EXAMINATION OF FILM FINANCING, STATE TAX INCENTIVES, AND CONSTITUTIONAL LIMITATIONS

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I. INTRODUCTION

While Hollywood, California may be the center of the global entertainment industry, it is certainly not the only place on Earth where movies and television shows are produced. In recent decades, globalization, rising domestic production costs, and lower foreign wages and exchange rates have forced more productions abroad. This phenomenon of "runaway production" has grown to an alarming problem of national proportions,¹ costing the American economy both billions of dollars and thousands of jobs.²

A local solution to the national problem of runaway production is state tax incentives for economic development. Currently, over forty states offer some form of production subsidy to encourage companies to film their projects within the United States.³ New Mexico's Film Incentive Program, established in 2002, is one of the nation's most extensive and aggressive, boasting a \$276 million fund earmarked for film and television investment and production.⁴ The program's varied offerings of loans, rebates, and other tax-free initiatives are helping to stem the tide of runaway production, stimulating economic growth, and creating jobs.

As promising as New Mexico's solution sounds, it is not immune from attack. State tax incentives in other industries have been challenged under Article I, Section 8, Clause 3 of the U.S. Constitution for discriminating against interstate commerce.⁵ The Article IV Privileges and Immunities Clause⁶ is an additional barrier to these incentives as it prevents unreasonable distinctions between citizens of different states.⁷ Although the New Mexico Film Incentive Program is not under current

* Class of 2008, University of New Mexico School of Law. Tremendous thanks to Professor Alfred Mathewson for his guidance on this Article. I am also grateful to Deana Bennett, Barry Berenberg, Kate Girard, Richard Hatch, and Margot Sigal for their editorial assistance. I dedicate this work to my nephews, Phynix N. Cantrell-Rabago and Lucius W. Kouris, and to my mother, Cheryl M. Francis.

1. MONITOR CO., U.S. RUNAWAY FILM AND TELEVISION PRODUCTION STUDY REPORT 2 (1999) [hereinafter MONITOR REPORT]. Runaway productions are projects that are developed for initial release or broadcast in the United States but are actually filmed in another country. *Id.* at 2. Please note that this Comment discusses a timely topic. While I have tried to present the most up-to-date information available, this Comment includes sources that may be subject to change in the near future. It is current as of November 16, 2007.

2. *Id.* at 3.

3. CTR. FOR ENTMT' T INDUS. DATA & RESEARCH, THE GLOBAL SUCCESS OF PRODUCTION TAX INCENTIVES AND THE MIGRATION OF FEATURE FILM PRODUCTION FROM THE U.S. TO THE WORLD: YEAR 2005 PRODUCTION REPORT 61 (2006) [hereinafter CEIDR REPORT].

4. N.M. STATE INV. COUNCIL, FILM INVESTMENT PROGRAM OUTSTANDING LOANS SINCE INCEPTION THROUGH JULY 31, 2007 1 (2007), http://www.sic.state.nm.us/PDF%20files/NM_Film_Investment_Program_7.31.07_Final.pdf.

5. *See, e.g.*, *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (energy); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (alcohol); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (manufacturing); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (finance); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (agriculture).

6. U.S. CONST., art. IV, § 2.

7. *See, e.g.*, *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984) (municipal residency); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (flat employment preference); *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371 (1978) (recreational hunting); *Toomer v. Witsell*, 334 U.S. 385 (1948) (commercial fishing).

attack for either of the aforementioned reasons, there is a possibility that it may not pass constitutional muster if challenged in the future.

Part II of this Comment explores the reasons behind runaway production, its economic impact, and the relationship between runaway production and state tax incentives.⁸ Part III describes the specific offerings of the New Mexico Film Incentive Program, including the 25% Film Production Tax Rebate, the Film Investment Loan Program, and Nontaxable Transaction Certificates.⁹ Part IV discusses U.S. Supreme Court precedent regarding state tax incentives and residency restrictions and the implications this precedent could have on New Mexico's fledgling film industry.¹⁰ In conclusion, this Comment argues that New Mexico's Film Incentive Program walks a fine constitutional line in regard to the Dormant Commerce Clause but is well within the parameters of the Privileges and Immunities Clause.

II. THE RELATIONSHIP BETWEEN RUNAWAY PRODUCTION AND STATE TAX INCENTIVES

Hollywood, California. The name evokes images of glitz, glamour, and showbiz, but the harsh reality is that many of today's biggest blockbusters are not wholly filmed there, or even in the United States. *Mission: Impossible III* was shot in Italy and China;¹¹ *The Pink Panther* was filmed in France, Czech Republic, Italy, and Canada;¹² and *Eight Below* was shot in Canada, Greenland, and Norway.¹³ This phenomenon is known in the entertainment industry as "runaway production."¹⁴ Runaway production exists where film and television projects are developed and intended for initial release or broadcast in the United States but are actually filmed in another country.¹⁵

There are two major categories of runaway production: creative and economic.¹⁶ Creative runaways go abroad in order to authenticate a story or setting or to satisfy a certain director or actor preference.¹⁷ For example, the popular *Pirates of the Caribbean* films were shot in part in the Bahamas, St. Vincent and the Grenadines, and the Dominican Republic,¹⁸ as the story involves the adventures of a

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part IV.

11. MISSION: IMPOSSIBLE III (Paramount Pictures 2006); Internet Movie Database, Filming Locations for MISSION: IMPOSSIBLE III, <http://www.imdb.com/title/tt0317919/locations> (last visited Oct. 21, 2007). The movie was filmed in nineteen locations, including twelve in the United States. *Id.*

12. THE PINK PANTHER (Metro-Goldwyn-Mayer 2006); Internet Movie Database, Filming Locations for THE PINK PANTHER, <http://www.imdb.com/title/tt0383216/locations> (last visited Oct. 21, 2007). The movie was filmed in eleven locations, including three in the United States. *Id.*

13. EIGHT BELOW (Walt Disney Pictures 2006); Internet Movie Database, Filming Locations for EIGHT BELOW, <http://www.imdb.com/title/tt0397313/locations> (last visited Oct. 21, 2007).

14. MONITOR REPORT, *supra* note 1, at 2. This report was commissioned by the Directors Guild of America and the Screen Actors Guild to investigate the phenomenon of runaway film and television production by quantifying the extent to which it has been occurring since 1990 and identifying its major causes. *Id.*

15. *Id.*

16. *Id.*

17. See *id.*

18. PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003); Internet Movie Database, Filming Locations for PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL,

swashbuckling pirate and his friends in the Caribbean islands.¹⁹ Economic runaways, the more controversial of the two, are filmed abroad in order to reduce production costs.²⁰ The three top-grossing films in the United States in 2005,²¹ *Star Wars: Episode III-Revenge of the Sith*,²² *The Chronicles of Narnia: The Lion, the Witch, and the Wardrobe*,²³ and *Harry Potter and the Goblet of Fire*,²⁴ were shot almost entirely on four continents—Europe, Asia, Africa, and Australia—despite being produced by American entertainment companies.²⁵ Economic runaways are troubling because they have caused the American entertainment industry to lose billions of dollars and thousands of jobs.²⁶ Economic runaway production is in part remedied by domestic film production incentives, the focus of this Article.²⁷

Filmed entertainment and music exports are a \$33 billion-a-year business in the United States,²⁸ so it is no surprise that film production and distribution is one of the most economically significant industries in this country.²⁹ The industry directly employs over 270,000 workers and boasts an annual payroll of \$10.4 billion.³⁰ While these numbers may seem staggering, runaway production is still of concern to the local and national entertainment industry. Runaway production growth in the United States is “overwhelmingly” fueled by economic runaways.³¹

<http://www.imdb.com/title/tt0325980/locations> (last visited Oct. 21, 2007). PIRATES OF THE CARIBBEAN: DEAD MAN'S CHEST (Walt Disney Pictures 2006); Internet Movie Database, Filming Locations for PIRATES OF THE CARIBBEAN: DEAD MAN'S CHEST, <http://www.imdb.com/title/tt0383574/locations> (last visited Oct. 21, 2007). PIRATES OF THE CARIBBEAN: AT WORLD'S END (Walt Disney Pictures 2007); Internet Movie Database, Filming Locations for PIRATES OF THE CARIBBEAN: AT WORLD'S END, <http://www.imdb.com/title/tt0449088/locations> (last visited Oct. 21, 2007). All three films were also shot at several locations in the United States.

19. See Internet Movie Database, Synopsis for PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL, <http://www.imdb.com/title/tt0325980/synopsis> (last visited Oct. 21, 2007).

20. MONITOR REPORT, *supra* note 1, at 2.

21. Internet Movie Database, Top Grossing Movies for 2005 in the USA, <http://imdb.com/Sections/Years/2005/top-grossing> (last visited Oct. 21, 2007).

22. STAR WARS: EPISODE III-REVENGE OF THE SITH (Lucasfilm Ltd. 2005); Internet Movie Database, Filming Locations for STAR WARS: EPISODE III-REVENGE OF THE SITH, <http://www.imdb.com/title/tt0121766/locations> (last visited Oct. 21, 2007).

23. THE CHRONICLES OF NARNIA: THE LION, THE WITCH, AND THE WARDROBE (Walt Disney Pictures 2005); Internet Movie Database, Filming Locations for THE CHRONICLES OF NARNIA: THE LION, THE WITCH, AND THE WARDROBE, <http://www.imdb.com/title/tt0363771/locations> (last visited Oct. 21, 2007).

24. HARRY POTTER AND THE GOBLET OF FIRE (Warner Bros. Pictures 2005); Internet Movie Database, Filming Locations for HARRY POTTER AND THE GOBLET OF FIRE, <http://www.imdb.com/title/tt0330373/locations> (last visited Oct. 21, 2007).

25. While there are many factors that influence the ultimate decision of where to shoot a film, cost is a major one. See *infra* notes 40–54 and accompanying text. Although this author has no information as to why these particular films were shot abroad, she thought it significant that they all were in light of the runaway production phenomenon.

26. See *infra* notes 55–58 and accompanying text.

27. See *infra* notes 59–76 and accompanying text.

28. CEIDR REPORT, *supra* note 3, at 73.

29. Consumption of filmed entertainment, including cable and satellite TV, broadcast TV, consumer internet, home video, box office, and in-flight entertainment, averaged 1,937 hours per person in 2006. MOTION PICTURE ASS'N OF AM., U.S. ENTERTAINMENT INDUSTRY: 2006 MARKET STATISTICS 49 (2006), <http://www.mpa.org/USEntertainmentIndustryMarketStats.pdf>. That same year, the average person spent \$695.56 on media such as cable and satellite television, box office, home video, recorded music, video games, consumer internet, and consumer books. *Id.* at 50. There were 599 theatrical films released in the United States in 2006, and the average box office gross of all new releases that year was \$15.8 million. *Id.* at 11.

30. U.S. DEP'T OF COMMERCE, THE MIGRATION OF U.S. FILM AND TELEVISION PRODUCTION 16 (2001) [hereinafter DOC REPORT].

31. MONITOR REPORT, *supra* note 1, at 7.

The Directors Guild of America (DGA) and the Screen Actors Guild (SAG), two of the most powerful labor unions in the entertainment industry, commissioned a 1999 study, the *Monitor Report*, to investigate the trend of runaway film and television production.³² The report labeled economic runaway production “a persistent, growing, and very significant issue for the U.S.”³³ It found that economic runaways, including feature films, television movies, television mini-series, and thirty- and sixty-minute television series, rose from 100 in 1990 to 285 in 1998, a 185 percent increase.³⁴

Runaway production, though a critical matter today, is not new to the American entertainment industry. A 1957 Hollywood American Federation of Labor Film Council report noted a surge in projects shot abroad between 1949 and 1957.³⁵ The report lists several factors that led producers to depart, including tax advantages, subsidies, and blocked currencies.³⁶ Nearly fifty years later, globalization is still a big reason why productions run, and few industries, including entertainment, are able to escape its reach.³⁷ Many foreign governments have recognized the tremendous profit potential in developing a film production industry.³⁸ They have established the infrastructure and skilled labor necessary to host production by luring U.S. companies to their borders with generous incentive programs.³⁹

Canada is the top foreign destination where U.S. companies beleaguered by rising domestic production and distribution costs transport their projects.⁴⁰ Canada has instituted “the most extensive incentive program” in the world, featuring a variety of wage and tax credits, financing packages, and investment funds.⁴¹ These

32. *Id.* at 2.

33. *Id.*

34. *Id.*

35. Pamela Conley Ulich & Lance Simmens, *Motion Picture Production: To Run or Stay Made in the U.S.A.*, 21 LOY. L.A. ENT. L. REV. 357, 358–59 (2001) (citing IRVING BERNSTEIN, HOLLYWOOD AM. FED’N OF LABOR, HOLLYWOOD AT THE CROSSROADS: AN ECONOMIC STUDY OF THE MOTION PICTURE INDUSTRY 50 (1957)).

36. *Id.*

37. *See id.* at 361–63.

38. DOC REPORT, *supra* note 30, at 3.

39. *Id.* Canada, Australia, and the United Kingdom are the top foreign destinations where productions run. MONITOR REPORT, *supra* note 1, at 3. In Canada, both the federal and provincial governments offer a wide range of incentives to assist domestic producers and attract foreign production. DOC REPORT, *supra* note 30, at 71–72. In February of 2003, the Canadian government raised its production tax credits from eleven to sixteen percent for foreign producers shooting there. CEIDR REPORT, *supra* note 3, at 35. The Canadian provinces are very competitive in terms of attracting filmmakers, and Ontario, Quebec, Nova Scotia, Alberta, and British Columbia offer tax credits that range from eighteen to forty-five percent for domestic and foreign production. *Id.* at 35–37. The Australian government has implemented a 12.5 percent tax rebate for big-budget film and television productions “lensed Down Under.” *Id.* at 48. To qualify, producers must spend a minimum of \$7.8 million in the country. *Id.* In December of 2005, the British government announced new, major tax credits for films shot in the United Kingdom. *Id.* at 44. Sixteen percent tax credits will be given for films with budgets above \$34.8 million, and twenty percent credits for films with budgets below that figure. *Id.*

40. MONITOR REPORT, *supra* note 1, at 3. Australia and the United Kingdom follow Canada as the top foreign destinations for runaways. *Id.*

41. DOC REPORT, *supra* note 30, at 3. The Office of the U.S. Trade Representative (OUSTR) compiles an annual survey of significant foreign barriers to United States exports. OUSTR, 2006 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, available at http://www.ustr.gov/assets/Document_Library/Reports_Publications/2006/2006_NTE_Report/asset_upload_file929_9220.pdf. The report notes that “Canadian policies prohibit foreign acquisitions of Canadian-owned film distribution firms.” *Id.* at 80. A new distribution firm established with foreign investment dollars may only market its own products. *Id.* “Indirect or direct acquisition of a foreign distribution firm operating in Canada is only allowed if the investor undertakes to reinvest a portion of

incentives can significantly lower budgets, causing productions to realize up to twenty-six percent in total savings.⁴² Canada's incentive program is possible for three reasons. First, due to technological advances, "physical proximity is no longer a requirement for the many persons and sub-industries involved in the film production chain."⁴³ Second, many foreign technicians have comparable expertise to their American counterparts.⁴⁴ Third, rapidly declining exchange rates and lower Canadian wages during the 1990s facilitated runaways north-of-the-border.⁴⁵ As Canada's experience demonstrates, filmmakers have taken advantage of lower foreign labor and production costs when it has been as efficient to produce abroad as in the United States.⁴⁶

Statistics show that Canada's incentive program has made an impact. In 1998, eighty-one percent of runaways ran to Canada.⁴⁷ TV movies were most likely to run there, with ninety-one percent of the 139 runaways⁴⁸ landing in "Hollywood North" that year.⁴⁹ U.S. production of made-for-television movies and mini-series collapsed seventy-three percent, from a 1995 high of 182 movies to a 2003 low of forty-nine, while Canadian production rose 1,786 percent, from seven movies in 1984 to 132 in 2000.⁵⁰

The expansion of production incentives has also impacted theatrical feature-length films. The U.S. market share of production dollars for theatrical releases fell from seventy-one percent in 1998 to forty-seven percent in 2005.⁵¹ In this same period, releases filmed abroad grew in market share from twenty-nine to fifty-three percent.⁵² The number of theatrical releases filmed stateside dropped twenty-two percent between 1998 and 2005, while the number filmed in the rest of the world rose fifty-five percent.⁵³ Feature film production in Canada grew 179 percent during these years.⁵⁴

Runaways impact more than just a film's bottom line. When a production leaves the country, almost all work is performed by non-U.S. cast and crew.⁵⁵ These positions include supporting actors, stunt performers, background performers, assistant directors, production managers, and stage managers.⁵⁶ The *Monitor Report* estimates that 125,100 full-time equivalent industry positions were lost to economic

its Canadian earnings in a manner specified by the Canadian government." *Id.* This may partially explain Canada's success in capturing and retaining foreign production dollars.

42. MONITOR REPORT, *supra* note 1, at 23.

43. DOC REPORT, *supra* note 30, at 4.

44. *Id.* at 3.

45. MONITOR REPORT, *supra* note 1, at 19.

46. DOC REPORT, *supra* note 30, at 4.

47. MONITOR REPORT, *supra* note 1, at 3.

48. *Id.*

49. Joe Sisto, *Outsourcing the Movies: Runaway Productions of American Film and Television in Canada*, 22 ENT. & SPORTS LAW 26, 27 (2004).

50. CEIDR REPORT, *supra* note 3, at 5.

51. *Id.* at 2.

52. *Id.*

53. *Id.* at 3.

54. *Id.*

55. MONITOR REPORT, *supra* note 1, at 16.

56. *Id.* at 16-17.

runaway between 1989 and 1999.⁵⁷ The *DOC Report* describes the story of runaway production as a “story of a substantial transformation of what used to be a traditional and quintessentially American industry into an increasingly dispersed global industry.”⁵⁸

So what can be done to stem the tide of economic runaways and prevent Hollywood from becoming “‘Hollyhasbeen’”?⁵⁹ Domestic production incentives seem to be the answer. Industry insiders have described them as “essential to preserving the U.S. workforce in the American entertainment industry.”⁶⁰ In fact, states from coast to coast are following the lead of successful nations like Canada by wooing production dollars through incentives. Currently, over forty states offer some form of production subsidy.⁶¹

Production incentives seem to be having their desired effect, as domestic production has increased in recent years.⁶² The dramatic increase in production in domestic venues with subsidy programs is hardly coincidental.⁶³ In particular, it appears that U.S. television production is bouncing back. The filming of scripted

57. *Id.* at 16.

58. DOC REPORT, *supra* note 30, at 86.

59. Ulich & Simmens, *supra* note 35, at 357.

60. *Id.* at 370.

61. CEIDR REPORT, *supra* note 3, at 61. New Mexico’s four neighboring states each offer financial incentives for film and television production. Arizona’s Motion Picture Production Tax Incentive Program offers seven types of tax incentives to qualified production companies. Ariz. Dep’t of Commerce, Motion Picture Production Tax Incentives Program Summary (Oct. 19, 2006), <http://www.azcommerce.com/doclib/finance/mopic%20program%20summary.pdf>. The three major incentives are a transaction privilege tax exemption on machinery, printing, leases or rentals of lodging, catered food and drink, and construction contracts; a use tax exemption on machinery, equipment, and other tangible personal property; and income tax credits. *Id.* Utah provides a Motion Picture Incentive Fund, which is a post-performance rebate returning fifteen percent for every dollar spent in the state. Utah Film Comm’n, Motion Picture Incentive Fund, <http://film.utah.gov/incentives/mpif.htm> (last visited Oct. 21, 2007). The state also grants production companies a sales tax exemption on machinery and equipment. Utah Film Comm’n, Sales and Use Tax Exemption, <http://film.utah.gov/incentives/sute.htm> (last visited Oct. 21, 2007). Additionally, Utah’s transient room tax rebate exempts persons occupying a public accommodation for thirty consecutive days or more from sales and use taxes on their accommodation charges. Utah Film Comm’n, Transient Room Tax Rebate, <http://film.utah.gov/incentives/trt.htm> (last visited Oct. 21, 2007). Colorado and Texas offer the most limited incentive packages in the region. The Colorado legislature passed the state’s first-ever film incentive in 2006. Colo. Film, Colorado Film Incentives, <http://www.coloradofilm.org/locationcolorado-film/incentives.htm> (last visited Oct. 21, 2007). The Colorado Film Incentive Program rebates ten percent of the below-the-line cost of projects produced and filmed in Colorado when the production company spends seventy-five percent of its below-the-line budget in Colorado and hires seventy-five percent of its crew locally. *Id.* “Below-the-line” refers to production costs for the technical crew (including production managers, script supervisors, make-up artists, and editors); studio rental; the art department; sets; location fees; housing and transportation; insurance; and taxes. DESI K. BOGNÁR, INTERNATIONAL DICTIONARY OF BROADCASTING AND FILM 27 (2d ed. 2000). In Texas, filmmakers are fully exempt from state and local sales taxes on most items and services bought and rented for production. Tex. Film Comm’n, Financial Incentives in Texas, <http://www.governor.state.tx.us/divisions/film/incentives> (last visited Oct. 21, 2007). The state’s six percent occupancy tax on hotel rooms occupied for more than thirty consecutive days can also be waived. *Id.* Additionally, filmmakers may benefit from a fuel tax refund for fuel used off-road in generators or boats. *Id.* Beginning September 1, 2007, Texas will also offer a grant equal to five percent of in-state spending (6.25 percent for certain underused areas). Tex. Film Comm’n, Production Grants, <http://www.governor.state.tx.us/divisions/film/incentives/grants.htm> (last visited Oct. 21, 2007). Interestingly, despite its limited incentive offerings before the grant program was implemented, Texas was number ten on *P3/Production Update* magazine’s list of the top ten places to shoot in the United States. Jason Deparis, *Top 10 Places to Shoot in the U.S.*, *P3/PRODUCTION UPDATE*, July 2006, at 19, 19–20. Texas received this rank due to the strength of its crew base and infrastructure. *Id.*

62. See CEIDR REPORT, *supra* note 3, at 6–7 (listing increases in various types of productions).

63. *Id.* at 4–5.

television in the United States grew twenty-four percent between 2000 and 2005, while Canadian filming of scripted television fell twenty-three percent.⁶⁴ In fact, the number of scripted productions filmed in the United States, but outside of California, grew fifty-four percent.⁶⁵ This trend may be especially helpful to smaller production centers, which are typically involved with lower-budget productions such as television projects.⁶⁶

On a national level, the American Jobs Creation Act of 2004⁶⁷ is the “closest thing to a federal tax rebate as possible.”⁶⁸ The Jobs Creation Act was designed to curb runaway production.⁶⁹ It applies Internal Revenue Code provisions “to film and television productions *in addition* to any state incentive plan.”⁷⁰ Internal Revenue Code (I.R.C.) section 181 allows any taxpayer investing in a qualifying film project to receive one hundred percent of the loss in the year or years the money is spent.⁷¹ The limit is up to \$15 million per film and \$15 million per television episode up to forty-four episodes.⁷² The incentive, unless extended, expires on December 31, 2008.⁷³ I.R.C. section 199 applies to film, music, video, and all other manufacturing companies that receive income from the sale of their products.⁷⁴ It allows a three-percent tax deduction until 2007, a six-percent deduction from 2007 to 2010, and a nine-percent deduction from 2010 on.⁷⁵

P3/Production Update magazine suggests that the days when “runaway” referred to foreign countries snagging domestic business are over: “With the new wave of tax incentives spreading across this nation, this is no longer the case. The United States and its territories have now become Hollywood’s ‘backlot.’”⁷⁶ The next section will explore how New Mexico became Hollywood’s backlot and demonstrate how New Mexico’s production incentives are not only helping to stem

64. *Id.* at 6. The *CEIDR Report* suggests that “[a] variety of factors, led by the soaring value of the Canadian dollar, have given Canada a runaway film production problem of its own.” *Id.* at 35. “With foreign film production down almost 40 percent from the peak years of 1999 and 2000, the debate in Canada has become how to compete with lower-cost areas like Eastern Europe or American states...that have recently introduced attractive filmmaking subsidies.” *Id.*

65. *Id.* at 6.

66. Smaller production centers are those other than Los Angeles and New York City. See *MONITOR REPORT*, *supra* note 1, at 15.

67. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004) (codified as amended in scattered sections of 26 U.S.C.).

68. Colo. Film, *supra* note 61.

69. *Id.* The Jobs Creation Act seems to have accomplished its objective of discouraging runaway production. The *CEIDR Report* notes that the relative share of television shows (including made-for-television movies, mini-series, and broadcast and cable television shows) produced in the United States versus Canada increased following the passage of the Jobs Creation Act. *CEIDR REPORT*, *supra* note 3, at 6–7. The report also states that the Jobs Creation Act provides considerable benefit to producers of made-for-television movies and mini-series. *Id.* at 6.

70. Colo. Film, *supra* note 61. The incentives are for all taxpayers, whether individuals or corporations. *Id.*

71. I.R.C. § 181(a) (2007); Colo. Film, *supra* note 61.

72. I.R.C. § 181(a)(2)(A); Colo. Film, *supra* note 61.

73. I.R.C. § 181(f); Colo. Film, *supra* note 61.

74. I.R.C. § 199(a)–(d) (2007); Colo. Film, *supra* note 61.

75. I.R.C. § 199(a)(1)–(2); Colo. Film, *supra* note 61.

76. *Deparis*, *supra* note 61, at 19. *Deparis*’ article lists the following states as the top ten places to shoot in the U.S. due to factors such as financial incentives, cost of living, and revenue generated from the film and television industry: (1) Louisiana, (2) New Mexico, (3) Florida, (4) New York, (5) Hawaii, (6) North Carolina, (7) Georgia, (8) Virginia, (9) Utah, and (10) Texas. *Id.* at 19–34. A “backlot” or “lot” refers to a large land area where exterior sets are constructed on a studio complex. *BOGNÁR*, *supra* note 61, at 24, 147.

the national tide of economic runaway production, but are also stimulating economic growth within the state.

III. THE NEW MEXICO FILM INCENTIVE PROGRAM

While an increasing number of states are offering tax credits and incentives to lure Hollywood dollars, New Mexico is actually *investing* in film and has established a \$276 million fund for that purpose.⁷⁷ New Mexico's Film Incentive Program was recognized by the 2005 Center for Entertainment Industry Data and Research production report as one of the most generous and "enormously successful" in the country.⁷⁸

The New Mexico legislature created the Severance Tax Permanent Fund (STPF) in 1973 as an endowment fund to receive severance taxes on natural resources extracted from state lands.⁷⁹ These funds have historically been used to retire debt from bond issues that have funded capital projects.⁸⁰ The STPF is heavily reliant on positive investment returns for growth, as up to ninety-five percent of New Mexico's severance taxes have been available for debt service since 2003.⁸¹ The New Mexico State Investment Council (SIC) is charged with managing and growing New Mexico's permanent fund through professional investment in industries such as film and real estate.⁸² Filmmaking has generated over \$725 million in new revenue for state and local economies,⁸³ and the fund has been called "[t]he force behind New Mexico's film boom."⁸⁴

The New Mexico Constitution mandates a balanced budget.⁸⁵ This mandate facilitated legislation such as the Severance Tax Bonding Act (Act), which regulates the investment in films to be produced in New Mexico.⁸⁶ The Act is consistent with the mandate because it provides a vehicle for the state to make profits rather than

77. CEIDR REPORT, *supra* note 3, at 65; Patrick Goldstein, *The Big Picture: Another Suitor for Filmmakers*, L.A. TIMES, Sept. 30, 2003, at E1; N.M. STATE INV. COUNCIL, *supra* note 4, at 1.

78. CEIDR REPORT, *supra* note 3, at 65-66.

79. N.M. State Inv. Council, Severance Tax Permanent Fund, <http://www.sic.state.nm.us/severance.htm> (last visited Oct. 21, 2007). Article VIII, section 10 of the New Mexico Constitution states:

There shall be deposited in a permanent trust fund known as the "severance tax permanent fund" that part of state revenue derived from excise taxes that have been or shall be designated severance taxes imposed upon the severance of natural resources within this state, in excess of that amount that has been or shall be reserved by statute for the payment of principal and interest on outstanding bonds to which severance tax revenue has been or shall be pledged. Money in the severance tax permanent fund shall be invested as provided by law. Distributions from the fund shall be appropriated by the legislature as other general operating revenue is appropriated for the benefit of the people of the state.

N.M. CONST. art. VIII, § 10(A).

80. N.M. State Inv. Council, *supra* note 79.

81. *Id.*

82. N.M. State Inv. Council, Mission, <http://www.sic.state.nm.us/mission.htm> (last visited Oct. 21, 2007).

83. "3:10 to Yuma" Remake Being Shot in N.M., ALBUQUERQUE J., Oct. 21, 2006, at E1.

84. Simon Romero, *Coming Soon to a Screen Near You: New Mexico*, N.Y. TIMES, Jan. 26, 2004, at C6.

85. See Article IX, section 8 of the New Mexico Constitution, which restricts state indebtedness: No debt shall be so created if the total indebtedness of the state, exclusive of the debts of the territory, and the several counties thereof, assumed by the state, would thereby be made to exceed one percent of the assessed valuation of all the property subject to taxation in the state as shown by the preceding general assessment.

N.M. CONST. art. IX, § 8.

86. Severance Tax Bonding Act, NMSA 1978, § 7-27-5.26 (2007).

borrow money. Under the Act, up to \$15 million may be invested in any one New Mexico film project, provided the total investment is no more than six percent of the market value of the STPF.⁸⁷ Additionally, the State Investment Officer and the SIC are to invest only in projects that (1) are filmed wholly or substantially in New Mexico, (2) possess a distribution contract with a reputable distribution company, (3) employ a majority of New Mexicans on their production crews, (4) have posted a completion bond, and (5) have obtained a full guarantee of repayment of the invested amount in favor of the STPF.⁸⁸

Although this legislation is relatively recent, the film industry is no stranger to New Mexico. Approximately 482 movies and television shows have been filmed in the state since 1898,⁸⁹ when Edison Manufacturing Co. first shot *Indian Day School*.⁹⁰ Even more films were produced in New Mexico throughout the early twentieth century.⁹¹ The Motion Picture Industry Promotion Commission was established in 1970.⁹² The Commission changed its name to the New Mexico Film Office (NMFO) in the 1990s.⁹³ Its current mission is to support the motion picture industry in the state and promote tourism by showcasing New Mexico's natural assets through the medium of film.⁹⁴ The NMFO introduced its Film Incentive Program in 2002.⁹⁵ The program was so successful that, in just two years, the state went from hosting zero to twenty-five projects.⁹⁶

New Mexico's financial structure and regulations such as the Severance Tax Bonding Act have expanded the authority and influence of the New Mexico Film Office, while other western states like California and Colorado are downsizing their

87. *Id.* § 7-27-5.26(A).

88. *Id.* Requirements (1) and (3) raise Dormant Commerce Clause and Privileges and Immunities Clause concerns, respectively. *See infra* Part IV.

89. *See* N.M. Film Office, New Mexico Filmography, <http://nmfilm.com/filming/filmography/> (last visited Oct. 21, 2007).

90. *Economic Development and New Mexico Tourism*, QUIPU (N.M. State Records Center & Archives, Santa Fe, N.M.), July 2004, at 2, available at http://www.nmcp.state.nm.us/pubs/quipu/quipu_july04.htm; INDIAN DAY SCHOOL (Edison Mfg. Co. 1898).

91. A sampling of these films from different decades includes *The Man from the West* (Lubin Mfg. Co. 1914); *Redskin* (Paramount Pictures 1929); *Billy the Kid* (Metro-Goldwyn-Mayer 1930); and *The Grapes of Wrath* (Twentieth Century-Fox Film Corp. 1940). Other well-known films shot in whole or in part in New Mexico in more recent decades are *Salt of the Earth* (Indep. Prod. Co. 1954); *Oklahoma!* (Magna Corp. 1955); *Journey to the Center of the Earth* (Twentieth Century-Fox 1959); *Butch Cassidy and the Sundance Kid* (Twentieth Century-Fox 1969); *Easy Rider* (Columbia Pictures Corp. 1969); *Jonathan Livingston Seagull* (JLS Partnership 1973); *Convoy* (EMI Films 1978); *Superman: The Movie* (Alexander Salkind 1978); *The Muppet Movie* (Henson Assocs. 1979); *Twins* (Universal Pictures 1988); *Indiana Jones and the Last Crusade* (Lucasfilm Ltd. 1989); *City Slickers* (Castle Rock Entm't 1991); *Natural Born Killers* (Alcor Films 1994); *Wyatt Earp* (Warner Bros. Pictures 1994); *Clockers* (40 Acres & A Mule Filmworks 1995); *Mad Love* (Touchstone Pictures 1995); *Fools Rush In* (Columbia Pictures Corp. 1996); *Independence Day* (Twentieth Century Fox 1996); *Lolita* (Guild 1997); *Armageddon* (Touchstone Pictures 1998); *Wild Wild West* (Peters Entm't 1999); *All the Pretty Horses* (Columbia Pictures Corp. 2000); *The Tao of Steve* (Good Machine 2000); *Traffic* (Bedford Falls Prods. 2000); *21 Grams* (This Is That Prods. 2003); *Brokeback Mountain* (Alberta Film Entm't 2005); *The Longest Yard* (Paramount Pictures 2005); *North Country* (Warner Bros. Pictures 2005); *Beerfest* (Adobe Pictures 2006); and *Wild Hogs* (Touchstone Pictures 2007). N.M. Film Office, *supra* note 89.

92. *Economic Development and New Mexico Tourism*, *supra* note 90, at 2.

93. *Id.*

94. *Id.*

95. Borys Kit, *New Mexico Bolstering Incentives for Film Biz*, HOLLYWOOD REP., Mar. 2, 2005, at 16.

96. CEIDR REPORT, *supra* note 3, at 65.

film commissions due to budgetary concerns.⁹⁷ A leading entertainment industry journal related that “New Mexico has led the way in film tax legislation, becoming a model for others to follow as well as a leader in fighting runaway production to Canada.”⁹⁸ Governor Bill Richardson explained the state’s bold efforts to support the film industry: “Our main objective is to become a supportive satellite of Hollywood.... We don’t want to be greedy with this, but for a state with low per capita income, it’s a way for us to attract a clean, environmentally friendly industry that leaves a positive impact.”⁹⁹

The NMFO seems to be accomplishing Richardson’s objective, billing itself as “a film office willing to jump through rings of fire.”¹⁰⁰ It does so through three major initiatives: the 25% Film Production Tax Rebate,¹⁰¹ the Film Investment Loan Program,¹⁰² and Nontaxable Transaction Certificates.¹⁰³ Each initiative has its own eligibility criteria and is designed to meet different production needs.

The 25% Film Production Tax Rebate grants a twenty-five percent refund on all direct production expenditures subject to taxation by the state of New Mexico.¹⁰⁴ This refund covers the full amount of the expenditure, not just the tax portion.¹⁰⁵ Feature films, television projects, national and regional commercials, documentaries, video games, or post-production may qualify for the rebate if they meet certain requirements.¹⁰⁶ For example, the NMFO forbids scripts from being obscene in

97. Romero, *supra* note 84, at C6.

98. Kit, *supra* note 95, at 16. New Mexico’s incentives have not gone unnoticed by film office administrators in other states. The director of the Mississippi Film Office, Ward Emling, acknowledged New Mexico as one of three states offering incentives that make it less costly to film there than in Mississippi. Nell Luter Floyd, *State Hopes to Regain Share of Filmmakers*, CLARION-LEDGER (Jackson, Miss.), Jan. 11, 2007, at 1C. Emling stated, “New Mexico has an appealing program because it deals with work-force training, which is a component of our overall program.” *Id.* at 5C. The New Mexico Film Office “offers a 50% reimbursement of wages for on-the-job training of New Mexico residents in advanced below-the-line crew positions” through the Film Crew Advancement Program. N.M. FILM OFFICE, NEW MEXICO’S FILM INCENTIVES 28 (2007), available at New Mexico State Investment Council, *New Mexico’s Film Incentives*, http://www.sic.state.nm.us/PDF%20files/NEW_MEXICO_FILM_INCENTIVES_Sept2007.pdf [hereinafter N.M. INCENTIVES]. Enrollment in this program requires a production company to submit registration and application forms. *Id.*

99. Romero, *supra* note 84, at C6. The NMFO has established a green filmmaking initiative, which is a voluntary program to encourage “environmentally sensitive film [and] television production.” N.M. Film Office, *Green Filmmaking*, <http://www.nmfilm.com/filming/green-filming/> (last visited Oct. 24, 2007). The initiative is built around three principles: educating and encouraging productions to use environmentally sensitive materials and techniques; using green materials and techniques where necessary; and providing the resources for productions to go green. *See id.*

100. N.M. INCENTIVES, *supra* note 98, at 1.

101. *Id.* at 2.

102. *Id.* at 9.

103. *Id.* at 29.

104. *Id.* at 2.

105. *Id.* For instance, if the cost of an item including tax is one hundred dollars, the rebate will be twenty-five dollars. *Id.* This offering is both comprehensive and unique, as none of New Mexico’s neighboring states offer such a generous rebate. *See supra* note 61. Utah offers a similar rebate, but it covers only fifteen percent of the expenditure. *Id.*

106. N.M. INCENTIVES, *supra* note 98, at 2. Requirements for the twenty-five percent rebate include:

- Script cannot be obscene in nature.
- Film shall contain an acknowledgement that the production was filmed in the state of New Mexico.
- Production shall agree to pay all obligations the film production company has incurred in New Mexico.
- Production shall agree to publish...notice...of the need to file creditor claims against the film production company by a specified date....

nature,¹⁰⁷ requires productions to acknowledge that they were shot in New Mexico, requires payment of all obligations incurred while in-state, and requires parties to enter into a contract binding them to the terms of the rebate program.¹⁰⁸ Types of expenditures covered by the rebate include wages and salaries for New Mexico residents (including talent, management, and labor), set construction, lighting, operations, wardrobe costs, facility and equipment rental, food and lodging, leasing of vehicles, and insurance and travel if purchased through a New Mexico-based agency.¹⁰⁹ Productions wishing to take advantage of the twenty-five percent rebate must file budget, payroll, crew, and shooting location information with the NMFO.¹¹⁰

The Film Investment Loan Program offers interest-free loans for up to fifteen million dollars per qualifying film or television project.¹¹¹ While the fifteen million can represent the total budget, the production must have a budget of at least two million dollars.¹¹² Scripts must be submitted to the NMFO for pre-approval, and may not include excessive or gratuitous violence, sexual content, hard language, drug

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- Production shall agree that outstanding obligations are not waived should a creditor fail to file by the specified date.
 - Production shall agree to delay filing of a claim for the Production Tax Rebate until the New Mexico Film Office delivers written notification to the Taxation and Revenue Department that the film production company has fulfilled all requirements for the credit.
 - Production shall agree to enter into a contract with the New Mexico Film Office...accepting the terms of the above.

Id.

107. The First Amendment prohibits Congress from abridging the freedom of speech: "Congress shall make no law...abridging the freedom of speech, or of the press." U.S. CONST. amend. I. This prohibition is applicable to the states through the Fourteenth Amendment:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court considered the validity of a state statute prohibiting the distribution of obscene matter. Although Justice Burger noted that "no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power," *id.* at 22, he made it clear that "obscene material is unprotected by the First Amendment." *Id.* at 23. While the Court recognized that "[s]tate statutes designed to regulate obscene materials must be carefully limited," *id.* at 23-24, it articulated the following test for obscenity:

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24 (citations omitted). The Court limited its holding on the permissible scope of state regulation of obscenity to works depicting or describing sexual conduct. *Id.* Thus, the NMFO's anti-obscenity requirement may not be immune from constitutional challenge if "obscenity" is defined not just in terms of sexual conduct, but vulgarity or violence. Drawing the line between obscenity and artistic expression may be difficult.

108. N.M. INCENTIVES, *supra* note 98, at 2.

109. *Id.* at 3. "Talent" refers to actors or performers. BOGNÁR, *supra* note 61, at 248.

110. N.M. INCENTIVES, *supra* note 98, at 5-8.

111. *Id.* at 9.

112. *Id.* N.M. INCENTIVES does not specify whether a film with a budget totaling a certain amount under the \$15 million limit may ultimately receive more than the amount originally budgeted through the Film Investment Loan Program. *See id.*

abuse, or culturally-sensitive material.¹¹³ In addition, the film or show needs to be “wholly or substantially shot in New Mexico,” meaning that at least eighty-five percent of principal and second unit photography must be completed in-state.¹¹⁴ Finally, the production is obligated to furnish a guarantor for the principal amount of the loan and a distribution contract from a reputable distributor and to allocate sixty percent of below-the-line payroll and body count to New Mexico residents.¹¹⁵ Two public hearings are required before funds are disbursed, the first before the Private Equity Investment Advisory Committee (PEIAC) and the second before the State Investment Council.¹¹⁶

Nontaxable Transaction Certificates (NTTCs) waive gross receipts tax (sales tax) at the point-of-sale.¹¹⁷ Nontaxable Transaction Certificates work like grocery store coupons and are primarily used by producers of local, regional, and national advertisements.¹¹⁸ When producers present an NTTC at the point-of-sale, no sales tax is charged.¹¹⁹ Direct production costs qualify for NTTCs,¹²⁰ but the certificates

113. *Id.* at 10. In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Supreme Court distinguished the advocacy of violence from actual violence. In this case, petitioner, a Ku Klux Klan leader, was convicted under Ohio’s Criminal Syndicalism statute when he invited local newsmen to film a Klan rally. *Id.* at 444–45. The rally involved speeches, a cross burning, and hooded figures brandishing firearms. *Id.* at 445. The Supreme Court overturned petitioner’s conviction because the statute was overbroad, failing to distinguish advocacy from incitement to imminent lawless action. *Id.* at 448–49. This case stands for the principle that

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

Id. at 447. Thus, unless a film or project “prepar[es] a group for violent action and steel[s] it to such action,” *id.* at 448, it is constitutionally protected speech. Therefore, New Mexico’s exclusion of excessively violent projects may, depending on the circumstances, impermissibly intrude upon First Amendment freedoms by “sweep[ing] within its condemnation speech which our Constitution has immunized from governmental control.” *See id.*

114. N.M. INCENTIVES, *supra* note 98, at 9. If a production company only makes the eighty-five percent requirement for principal shooting days, the NMFO will allow second unit photography to take place out-of-state, but the production company must then allocate sixty percent of second unit payroll to New Mexico residents. *Id.* The shooting requirement implicates Dormant Commerce Clause concerns. *See infra* Part IV.A. Principal photography refers to the phase of film production during which the movie is actually shot. Principal Photography, http://en.wikipedia.org/wiki/Principal_photography (last visited Oct. 25, 2007). Second unit footage typically includes minor shots like those to establish mood or scenery, which are filmed away from the actual set. *See BOGNÁR, supra* note 61, at 221.

115. N.M. INCENTIVES, *supra* note 98, at 9. The allocation requirement implicates Privileges and Immunities Clause concerns. *See infra* Part IV.C.

116. N.M. INCENTIVES, *supra* note 98, at 15. The Private Equity Investment Advisory Committee is composed of State Investment Officer (SIO) Gary Bland and four members appointed by the Governor. N.M. State Inv. Council, Private Equity Investment Advisory Committee, <http://www.sic.state.nm.us/peiac.htm> (last visited Oct. 21, 2007). All appointees have extensive financial and investment experience and serve the state in a fiduciary capacity. *Id.* The SIO may invest in private equity funds upon the approval of PEIAC and SIC. N.M. State Inv. Council, Private Equity Investment Program, http://www.sic.state.nm.us/private_equity.htm (last visited Oct. 21, 2007). The primary responsibility of SIC is to administer and manage New Mexico’s three permanent trust funds: the Severance Tax Permanent Fund, the Land Grant Permanent Fund, and the Tobacco Settlement Permanent Fund. N.M. State Inv. Council, Investing in New Mexico’s Children, <http://www.sic.state.nm.us/> (last visited Oct. 21, 2007). The SIO and PEIAC consider investments in private equity funds that enhance the economic development objectives of the state, provided these investments offer safety and a rate of return comparable to other currently available private equity investments. N.M. State Inv. Council, *supra*.

117. N.M. INCENTIVES, *supra* note 98, at 29.

118. *Id.*

119. *Id.*

120. *Id.* Direct production costs include payments to talent, management, and labor; editing expenses; construction, wardrobe, and lighting costs; and facility and equipment rental. *Id.*

may not be used in conjunction with the 25% Film Production Tax Rebate.¹²¹ A registration and application process is required before a production can receive the NTTCs.¹²²

The three initiatives described above are the backbone of “one of the nation’s most aggressive film incentive programs.”¹²³ New Mexico’s economically targeted program is one of “bold outreach,”¹²⁴ intended by the legislature to encourage the development of a film production industry within the state.¹²⁵ As of July 31, 2007, New Mexico’s Film Investment Program had \$166,635,189 in outstanding loans and loans in closing, with a remaining capacity of \$110,208,237.¹²⁶ These figures together represent six percent of the market value of the Severance Tax Permanent Fund (STPF).¹²⁷ As noted above, up to fifteen million dollars may be invested in any one New Mexico film project under the Severance Tax Bonding Act, provided that no one film receives more than six percent of the STPF’s market value.¹²⁸

Recent productions that have used New Mexico’s incentives include *Wildfire—The Series—Season 4*; *Bordertown*, starring Jennifer Lopez; and *Employee of the Month*, starring Jessica Simpson.¹²⁹ *Wildfire* received a \$15 million loan, spent \$15 million in New Mexico, and hired 184 New Mexican crew members.¹³⁰ *Bordertown* received a \$15 million loan, spent \$18,203,431 in New Mexico, and hired 137 New Mexican crew members.¹³¹ *Employee of the Month* received a \$13,002,694 loan, spent \$8,132,265 in New Mexico, and hired 237 New Mexican crew members.¹³² Recently released productions filmed in New Mexico using state tax incentives include *Kid Nation*, *Transformers*, *In the Valley of Elah*, and *3:10 to Yuma*.¹³³ The

121. *Id.*

122. *Id.* The application process involves filing a Film Production Company Registration form, an Application for Business Tax Identification Number, and an Application for Nontaxable Transaction Certificates with the New Mexico Film Office. *Id.* The New Mexico Taxation and Revenue Department will then send the production company a business identification number and sixteen NTTCs. *Id.*

123. Romero, *supra* note 84, at C6.

124. Goldstein, *supra* note 77, at E1.

125. See N.M. STATE INV. COUNCIL, FILM INVESTMENT PROGRAM LOAN POLICIES AND PROCEDURES 1–2 (2007), http://www.sic.state.nm.us/PDF%20files/Film_Investment_Loan_Policy_and_Procedures.pdf.

126. N.M. STATE INV. COUNCIL, *supra* note 4, at 1.

127. See *id.* The total capacity of the Film Investment Loan Program, \$276,843,426, represents six percent of the market value of the Severance Tax Permanent Fund. *Id.*

128. See *supra* notes 86–88 and accompanying text.

129. *Wildfire—The Series—Season 4* (ABC Family/Lionsgate Television 2007); *BORDERTOWN* (Mobius Entm’t Ltd. 2006); *EMPLOYEE OF THE MONTH* (Lionsgate 2006). *Bordertown* has yet to be released in the United States. Internet Movie Database, Release Dates for *BORDERTOWN*, <http://www.imdb.com/title/tt0445935/releaseinfo> (last visited Oct. 21, 2007). *Employee of the Month* was released on October 6, 2006 and grossed \$28,444,855 in the domestic box office. Box Office Mojo, *Employee of the Month*, <http://www.boxofficemojo.com/movies/?id=employeeofthemoth.htm> (last visited Oct. 21, 2007).

130. N.M. STATE INV. COUNCIL, FILM INVESTMENT PROGRAM ECONOMIC IMPACT AS OF JULY 31, 2007 (2007), http://www.sic.state.nm.us/PDF%20files/NM_Film_Investment_Program_7.31.07_Final.pdf.

131. *Id.*

132. *Id.*

133. *Kid Nation* (Tom Forman Productions 2007); *TRANSFORMERS* (DreamWorks SKG 2007); *IN THE VALLEY OF ELAH* (Warner Independent Pictures 2007); *3:10 TO YUMA* (Lionsgate Films 2007). N.M. Film Office, New Mexico Filmography, *supra* note 89. *Kid Nation* was shot near Santa Fe and premiered on CBS on September 26, 2007. Polly Summar, *New Law Keeps Entertainment Industry from Working N.M. Kids Too Hard*, ALBUQUERQUE J., July 18, 2007, available at http://www.abqjournal.com/santafe/579117north_news07-18-07.htm. *Kid Nation* has recently sparked controversy in New Mexico for the treatment of children on set. *Id.* The premise of the show is forty kids building a new world out of a nineteenth-century ghost town without adults or modern

New Mexico Film Incentive Program has generated more than \$725 million in activity for the state since Governor Richardson took office in 2003.¹³⁴

New Mexico's Film Incentive Program is a positive example of how a state can fight against runaway production, stimulate economic growth, and create jobs on a local level.¹³⁵ However, constitutional challenges to state tax incentives that have arisen in other industries are potential nails in the coffin for the program.¹³⁶ The next section examines the legality of offering tax incentives for economic development and the implications for New Mexico's fledgling film industry.

IV. THE CONSTITUTIONALITY OF THE NEW MEXICO FILM INCENTIVE PROGRAM

New Mexico's model works because when locally produced shows and movies make money, the state is a profit participant.¹³⁷ Even if the state does not make much of a profit, however, it still wins through significant job creation and in-state spending.¹³⁸ The fact that the state has "a big rooting interest in [a project's] success" demonstrates New Mexico's film-friendliness, which serves to "smooth[] over the bureaucratic hurdles that often beset filmmakers in less welcoming environs."¹³⁹ Producer Todd Hallowell stated, "'if other states start emulating what New Mexico is doing, it could be another nail in the coffin for keeping filmmaking in Los Angeles.'"¹⁴⁰

conveniences. *Id.* New Mexico passed new legislation specifying rules for the treatment of minors working on television, film, and theatrical productions after receiving word that children on the show "were working 24 hours in some cases" and were not provided set teachers. *Id.* The legislation can be found at Act of April 2, 2007, ch. 257 (S.B. No. 175), 2007 N.M. Laws (revising child labor provisions to include the film industry).

134. "3:10 to Yuma" Remake Being Shot in N.M., *supra* note 83, at E1.

135. *See supra* Part II.

136. *See infra* Part IV.A, C.

137. *See* Goldstein, *supra* note 77, at E1.

138. *See id.*

139. *Id.*

140. *Id.* Hallowell was Line Producer on *The Missing*, which was filmed in New Mexico in the spring of 2003. *Id.* Pacifica Ventures has sought to support filmmaking in New Mexico by founding Albuquerque Studios, a production facility slated for phase-one completion in early 2007. Bashirah Muttalib, *New Mexico Heating Up*, VARIETY, Sept. 17, 2006, available at <http://www.variety.com/article/VR1117950275.html>. The studios will consist of a \$74 million, twenty-eight acre complex in the Mesa Del Sol area, five minutes south of the Albuquerque International Sunport. *Id.* The complex will feature eight soundstages; retail, office, backlot, mill storage and construction space; post-production suites; and production support services. *Id.* Hal Katersky, Chairman and Chief Financial Officer of Pacifica Ventures, believes that New Mexico's city and state government, in addition to its unique incentives, allowed the project to remain viable. *Id.* Nick Smerigan, Vice-President of Albuquerque Studios, confirmed that "[e]very conceivable production that could be done on a soundstage in L.A. could be done here." *Id.* On November 15, 2007, the Sandoval County Commission approved a zoning change that will allow Traditions! Marketplace off the Budhagers exit on Interstate 25 north of Albuquerque to transform itself from retail space to a new film studio, New Mexico Film Studios. Susan Stüger, *Studio in the Works for State*, ALBUQUERQUE J., Nov. 16, 2007, available at <http://www.abqjournal.com/news/state/262317nm11-16-07.htm>. Los Angeles-based Creative Capital Group is arranging the financing for the project. *Id.* The studios will feature four soundstages and groundbreaking is slated for January 1, 2008. *Id.* Production may begin as early as May 1, 2008. *Id.* In the initial stages, the studios expect to create hundreds of new jobs, ranging from lower-wage jobs in food preparation and security to higher-paying positions in high-tech production. *Id.* A few industry terms used in the articles mentioned above are worth defining here. A "soundstage" is an "acoustically and climatically-controlled studio or building where sound recording and sound filming" take place. BOGNÁR, *supra* note 61, at 234. "Post-production" is work or activity following the filming process, such as picture and sound editing, music, special effects, printing, and other arrangements used to complete the program or film. *Id.* at 191-92.

While the success of the New Mexico Film Incentive Program is laudable, lawmakers and program administrators must be aware that the Dormant Commerce and Privileges and Immunities Clauses of the federal constitution could limit the program's parameters and serve as a check on its future expansion. While entertainment-related tax incentives have yet to be challenged in any federal or state court, other industries that provide tax incentives for economic development have been attacked on these grounds.¹⁴¹ Generally, these incentives raise constitutional concerns because they place discriminatory burdens on commerce with sister states and subject non-residents of a state to disparate treatment when compared with state residents.¹⁴²

The Commerce Clause and the Article IV Privileges and Immunities Clause feature a unique interplay. They have a "mutually reinforcing relationship" that stems from their shared history.¹⁴³ Both clauses originate in the Fourth Article of the Articles of Confederation and express similar visions of federalism.¹⁴⁴ The Commerce Clause restricts a State's ability to favor its own citizens in the utilization of natural resources found within its borders but destined for interstate commerce.¹⁴⁵ The Privileges and Immunities Clause bars discrimination against citizens of other states when there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other states.¹⁴⁶ Together, the Clauses limit the extent to which a state can justify economic discrimination in favor of residents on the basis of its purported ownership of certain resources.¹⁴⁷ Both Clauses could potentially place constitutional limitations on New Mexico's Film Incentive Program.

141. Entertainment incentives may not have been challenged yet due to the widespread use of arbitration to resolve disputes within the industry. Other industries whose tax incentives have been attacked include the energy, alcohol, manufacturing, finance, and agricultural industries. *See, e.g.*, *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (energy); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (alcohol); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (manufacturing); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (finance); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (agriculture).

142. *See, e.g.*, *Boston Stock Exch.*, 429 U.S. 318; *Toomer v. Witsell*, 334 U.S. 385 (1948).

143. *Hicklin v. Orbeck*, 437 U.S. 518, 531-32 (1978).

144. *Id.* at 532. The Fourth Article of the Articles of Confederation provided:

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 restrictions 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; provided also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

Id. at 533 n.16 (quoting 9 JOURNAL OF THE CONTINENTAL CONGRESS 908-09 (Library of Congress ed. 1907) (1777)).

145. *Id.* at 533.

146. *Toomer*, 334 U.S. at 396.

147. *See Hicklin*, 437 U.S. at 533.

A. Dormant Commerce Clause Limitations to the New Mexico Film Incentive Program

State tax incentives to stimulate industrial development have long been a feature of American political and economic life.¹⁴⁸ These incentives, whether in the form of credits, subsidies, or abatements, typically fall within the “universe of state action” regulated by the Commerce Clause of the U.S. Constitution.¹⁴⁹ The affirmative commerce power, articulated in Article I, section 8, clause 3 of the Constitution, grants Congress the authority “[t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes.”¹⁵⁰ In the landmark case of *Gibbons v. Ogden*,¹⁵¹ Justice Marshall defined commerce as “every species of commercial intercourse...which concerns more States than one.”¹⁵² By this definition, Congress has the power to regulate commercial activity only when it reaches more than one state.

The Commerce Clause serves as both a source of federal power and a limit on state power.¹⁵³ Congress may regulate any local or interstate activity that, alone or in combination, has a substantial economic effect upon interstate commerce.¹⁵⁴ Even in the absence of federal legislation, states are prohibited from discriminating against interstate commerce by the negative or dormant implications of the Commerce Clause.¹⁵⁵ The Dormant Commerce Clause framework allows state governments to regulate local aspects of interstate commerce, provided the regulation is not unduly burdensome and does not discriminate against out-of-state competition to benefit local economic interests.¹⁵⁶ In other words, the burden on interstate commerce must not outweigh the promotion of legitimate local benefits.¹⁵⁷

State tax incentives, regardless of their form, typically possess two features that render them suspect under the doctrine barring discrimination against interstate commerce.¹⁵⁸ First, these incentives single out activities occurring within the taxing state for favorable treatment.¹⁵⁹ Second, states use their “coercive machinery”¹⁶⁰ to give the tax incentives their “bite.”¹⁶¹

The challenge here is almost paradoxical—to distinguish constitutionally benign incentives designed to attract business from unconstitutionally discriminatory ones

148. Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790 (1996).

149. *Id.* at 793–94.

150. U.S. CONST. art. I, § 8, cl. 3.

151. 22 U.S. (9 Wheat.) 1 (1824).

152. *Id.* at 193–94.

153. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 281 (5th ed. 1995).

154. See *id.* at 288–89.

155. Philip M. Tatarowicz & Rebecca F. Mims-Velarde, *An Analytical Approach to State Tax Discrimination Under the Commerce Clause*, 39 VAND. L. REV. 879, 882 (1986).

156. See NOWAK & ROTUNDA, *supra* note 153, at 288–89.

157. See *id.*

158. Hellerstein & Coenen, *supra* note 148, at 793.

159. *Id.*

160. *Id.* at 794.

161. *Id.* at 806. This has often resulted in taxpayers paying higher taxes unless they engaged in in-state sales. See, e.g., *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (ethanol sales); *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263 (1984) (alcohol sales); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977) (securities sales).

intended to do the same thing.¹⁶² This inquiry reflects the “palpable tension” found within the Supreme Court’s decisions concerning state tax schemes over the past three decades.¹⁶³ While the Court has allowed states to structure their tax systems to promote the growth and development of intrastate commerce and industry,¹⁶⁴ it has also invalidated state tax incentives adopted to stimulate local business and promote local products.¹⁶⁵

The five cases discussed below each involve a state’s attempt to encourage economic activity within its borders.¹⁶⁶ In each case, the Supreme Court struck down the initiatives “with rhetoric so sweeping as to cast a constitutional cloud over all state tax incentives.”¹⁶⁷ Examining the rationale used to condemn these tax incentives provides insight into potential Commerce Clause limitations that could threaten the New Mexico Film Incentive Program.¹⁶⁸

1. *Pike v. Bruce Church, Inc.*: Evenhanded Statutes with Incidental Effects on Commerce Are Upheld

*Pike v. Bruce Church, Inc.*¹⁶⁹ articulates the modern test used to decide when a state regulation that affords local industry economic advantages at the expense of

162. Hellerstein & Coenen, *supra* note 148, at 791.

163. *Id.*

164. *See, e.g., Boston Stock Exch.*, 429 U.S. at 336.

165. *See, e.g., Bacchus Imps., Ltd.*, 468 U.S. at 273.

166. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (packaging requirement); *Boston Stock Exch.*, 429 U.S. 318 (transaction tax); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984) (DISC tax); *Bacchus Imps., Ltd.*, 486 U.S. 263 (liquor excise tax); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269 (1988) (ethanol tax).

167. Hellerstein & Coenen, *supra* note 148, at 794.

168. *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006), decided in May 2006, is the Supreme Court’s latest word on the constitutionality of state tax incentives. Although the case involved a Dormant Commerce Clause challenge to state tax incentives, it was not decided on the merits and thus will not be included in the discussion of constitutional limitations to New Mexico’s Film Incentive Program. In this case, the city of Toledo contracted with DaimlerChrysler to expand its Jeep assembly plant in exchange for a property tax waiver. *Id.* at 1859. DaimlerChrysler also received a credit against the state franchise tax when it purchased and installed new manufacturing machinery and equipment, which was a state benefit given for new investment. *Id.* Plaintiffs, who were city and state taxpayers, sued, alleging that the tax breaks DaimlerChrysler received violated the Commerce Clause and increased their state and local tax burdens. *Id.* Defendant DaimlerChrysler removed the action to the U.S. District Court for the Northern District of Ohio. *Id.* at 1860. The District Court denied plaintiffs’ motion to remand the matter to state court and on the merits found that the tax benefits did not violate the Commerce Clause. *Id.* The U.S. Court of Appeals for the Sixth Circuit agreed that the state franchise tax credit violated the Commerce Clause, but found that the municipal property tax exemption did not. *Id.* Defendants petitioned the Supreme Court for certiorari to review the Sixth Circuit’s invalidation of the franchise tax credit, and plaintiffs sought review of the Sixth Circuit’s upholding of the property tax exemption. *Id.* The taxpayers asserted that they were injured by DaimlerChrysler’s tax breaks because the tax breaks diminished funds available to the city and state, thus imposing a “disproportionate burden” on taxpayers. *Id.* at 1859. They claimed they had standing to challenge the franchise tax credit by virtue of their status as Ohio taxpayers. *Id.* at 1860, 1862. The Supreme Court disagreed, holding that the taxpayers lacked standing under Article III of the Constitution to challenge state tax or spending decisions simply because of their status as taxpayers. *Id.* at 1864. The taxpayers’ claims that DaimlerChrysler’s tax credit depleted the Ohio treasury and imposed disproportionate burdens on them were no different from similar claims previously rejected under Article III as insufficient to establish standing. *Id.* at 1863. Here, plaintiffs could not demonstrate that they sustained a direct injury, only that they “suffer[ed] in some indefinite way in common with people generally.” *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)). Therefore, the case was not decided on the merits because the taxpayers were unable to challenge Ohio’s spending decisions simply by virtue of their status as taxpayers. *Id.* at 1864.

169. 397 U.S. 137.

the national market should be upheld.¹⁷⁰ At issue here was the Arizona Fruit and Vegetable Standardization Act (Arizona Act).¹⁷¹ The Arizona Act required all cantaloupes grown in Arizona and offered for sale to be packed in approved closed containers.¹⁷² Appellant Pike, the official charged with enforcing the Arizona Act, issued an order prohibiting appellee, a commercial farm company, from transporting uncrated cantaloupes from its ranch in Arizona to a nearby California packing facility.¹⁷³ Appellee brought an action in federal court to enjoin the order as unconstitutional.¹⁷⁴ The three-judge tribunal granted a permanent injunction on the ground that the order appellant issued was an unlawful burden upon interstate commerce.¹⁷⁵ On appeal, the U.S. Supreme Court affirmed the lower court's judgment.¹⁷⁶

The Supreme Court held that the Arizona Act unconstitutionally burdened interstate commerce because its practical effect would have compelled the farm company to build packing facilities in Arizona at an approximate cost of \$200,000.¹⁷⁷ The Court articulated the following test for determining the validity of state statutes that affect interstate commerce:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of "direct" and "indirect" effects and burdens.¹⁷⁸

The state of Arizona stipulated that the primary purpose of the Arizona Act was to promote and preserve the reputation of state growers by prohibiting deceptive packaging.¹⁷⁹ While the Court acknowledged that this was a legitimate state interest, it could not constitutionally justify the requirement that the appellee "build and operate an unneeded \$200,000 packing plant in the State."¹⁸⁰

The Court stressed that it views state statutes that require business operations to be performed in the home state when they could be performed more efficiently elsewhere with particular suspicion.¹⁸¹ Even where a state is pursuing a clearly legitimate local interest, the Court declared this particular burden on commerce to

170. See NOWAK & ROTUNDA, *supra* note 153, at 308-09.

171. *Pike*, 397 U.S. at 138.

172. *Id.*

173. *Id.* The packing facility was located in Blythe, California, thirty-one miles away from appellee's ranch in Parker, Arizona. *Id.* at 139.

174. *Id.* at 138.

175. *Id.*

176. *Id.* at 146.

177. *Id.* at 140.

178. *Id.* at 142 (citations omitted).

179. *Id.* at 143.

180. *Id.* at 145.

181. *Id.*

be virtually *per se* illegal.¹⁸² Because the Arizona statute in question imposed a “straightjacket” on the farm company with respect to allocation of its interstate resources and because the state offered no compelling interest for the packing requirement,¹⁸³ the Court held that the Arizona Act violated the Commerce Clause.¹⁸⁴

2. *Boston Stock Exchange v. State Tax Commission*: Discriminatory Taxation of Out-of-State Products and Business Operations Prohibited in Competition for Commerce

At issue in *Boston Stock Exchange v. State Tax Commission*¹⁸⁵ was the constitutionality of an amendment to New York’s longstanding tax on securities transactions.¹⁸⁶ Since 1905, New York imposed a transfer tax on securities transactions if part of the transaction occurred within the state.¹⁸⁷ Concerned about the competitive disadvantage to New York trading,¹⁸⁸ the state legislature amended the transfer tax statute in 1968 so that transactions involving out-of-state sales were taxed more heavily than most transactions involving in-state sales.¹⁸⁹ Appellants, six regional stock exchanges, filed an action in state court against the State Tax Commission.¹⁹⁰ They alleged that the 1968 amendment unconstitutionally discriminated against interstate commerce by imposing a greater tax burden on the out-of-state sale of securities than on in-state transactions of the same magnitude.¹⁹¹

The Supreme Court held that New York’s amendment discriminated against interstate commerce in violation of the Commerce Clause.¹⁹² The amendment was unconstitutional because it extended a financial advantage to sales on the New York exchanges at the expense of the regional exchanges.¹⁹³ It “foreclose[d] tax-neutral decisions” and discriminatorily burdened sister states’ commerce because sellers could substantially reduce their tax liability by selling in-state.¹⁹⁴ An individual faced with the choice of an in-state or out-of-state purchase would be hard-pressed to make that choice without regard to the tax consequences.¹⁹⁵ By imposing a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell short of the “substantially evenhanded treatment” required by the Commerce Clause.¹⁹⁶

182. *Id.* For more on local interests burdening commerce being declared *per se* illegal, see, for example, *Toomer v. Witsell*, 334 U.S. 385 (1948) (commercial shrimping); *Johnson v. Haydel*, 278 U.S. 16 (1928) (oyster harvesting); and *Foster-Fountain Packing Co.*, 278 U.S. 1 (1928) (shrimping).

183. The Court noted that the state’s interest here, enhancing the reputation of its growers, was “certainly less substantial than a State’s interest in securing employment for its people.” *Pike*, 397 U.S. at 146.

184. *Id.*

185. 429 U.S. 318 (1977).

186. *Id.* at 319.

187. *Id.*

188. *Id.* at 323.

189. *Id.* at 319.

190. *Id.* at 319–20.

191. *Id.* at 320.

192. *Id.* at 337.

193. *Id.* at 331.

194. *Id.*

195. *Id.* at 332.

196. *Id.*

In reaching its decision, the Court articulated a fundamental principle of Commerce Clause jurisprudence dispositive in the case: "No State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce...by providing a direct commercial advantage to local business.'"¹⁹⁷ This prohibition against discriminatory treatment of interstate commerce flowed from the basic purpose of the Commerce Clause—to create an area of free trade among the states.¹⁹⁸

The majority explained that despite the Court's decision, states are not precluded from structuring their tax systems to encourage the development of industry, nor are they prohibited from competing with other states for a share of interstate commerce.¹⁹⁹ However, in the process of competition, no state may discriminatorily tax products manufactured or business operations performed in another state.²⁰⁰

3. *Westinghouse Electric Corp. v. Tully*:²⁰¹ Tax Schemes Foreclosing Tax-Neutral Decisions Offend the Commerce Clause

New York was back at the Court six years later in a challenge surrounding a congressional act that provided U.S. firms with tax incentives to increase their exports through the creation of specially recognized Domestic International Sales Corporations (DISCs).²⁰² A corporation was recognized as a DISC if substantially all its assets and gross receipts were export-related.²⁰³ DISC legislation concerned New York,²⁰⁴ which stood to lose millions of dollars if no provisions were made to tax DISCs, even if taxation might discourage their formation.²⁰⁵ The State addressed its concern by granting a DISC tax credit when exports shipped from a taxpayer's regular place of business within New York.²⁰⁶ Appellant Westinghouse was a Pennsylvania corporation engaged in the manufacture and sale of electrical parts and appliances.²⁰⁷ Westinghouse Electrical Export Corporation, one of its subsidiaries, was a Delaware corporation that qualified as a federally tax-exempt DISC.²⁰⁸

At the Supreme Court, Westinghouse argued that requiring it to compute its franchise tax liability on a consolidated basis with Westinghouse Export and limiting the tax benefit of the DISC export credit to gross receipts shipped from New York violated the Commerce Clause.²⁰⁹ The Court held that New York's actions allowing corporations a tax credit on the accumulated income of their subsidiary DISCs discriminated against export shipping from other states and violated the

197. *Id.* at 329 (quoting *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)).

198. *Id.*

199. *Id.* at 336–37.

200. *Id.* at 337.

201. 466 U.S. 388 (1984).

202. *Id.* at 390.

203. *Id.* at 390–91. Gross receipts are "[t]he total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a year, before deductions." BLACK'S LAW DICTIONARY 564 (8th ed. 2004).

204. *Westinghouse*, 466 U.S. at 392–93.

205. *Id.*

206. *Id.* at 393.

207. *Id.* at 394.

208. *Id.*

209. *Id.* at 395–96.

Commerce Clause.²¹⁰ The DISC credit was awarded in a discriminatory fashion, as it was based on the percentage of a DISC's shipping conducted from within the state of New York.²¹¹

The Court revisited *Boston Stock Exchange*, reiterating that a state may not impose a tax that discriminates against interstate commerce by providing a direct commercial advantage to local business.²¹² Here, it was not the provision of the tax credit that offended the Commerce Clause, but that New York impermissibly tied the percentage of business conducted in-state to the credit in its competition for business with other states.²¹³ The Court articulated the principle that regardless of "[w]hether [a] discriminatory tax diverts new business into the state or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that 'forecloses tax-neutral decisions.'"²¹⁴ In *Westinghouse*, New York's tax credit was struck down because it created an advantage for in-state companies by placing a discriminatory burden on commerce to its sister states.²¹⁵

4. *Bacchus Imports, Ltd. v. Dias*: Facially Discriminatory Statutes Favoring Local Business Are Unconstitutional

The Supreme Court considered a constitutional challenge to the Hawaii liquor tax in *Bacchus Imports, Ltd. v. Dias*.²¹⁶ The tax, a twenty-percent excise tax imposed on wholesale liquor sales, was enacted to defray the costs of police and governmental services arising from liquor consumption.²¹⁷ The Hawaii state legislature exempted okolehao and pineapple wine from the tax to encourage the development of the Hawaiian liquor industry.²¹⁸

Appellant Bacchus Imports, a liquor wholesaler, disputed the tax on Commerce Clause grounds.²¹⁹ It paid the tax under protest and commenced an action in the Tax Appeal Court for a refund.²²⁰ The Tax Appeal Court rejected Bacchus's constitutional claim.²²¹ On appeal, the Supreme Court of Hawaii affirmed the decision of the Tax Appeal Court.²²² The U.S. Supreme Court reversed.²²³

Again relying on *Boston Stock Exchange*, the Court held that the Hawaii liquor tax exemption for okolehao and pineapple wine violated the Commerce Clause because it had the purpose and effect of discriminating against interstate commerce

210. *Id.* at 407.

211. *Id.* at 401.

212. *Id.* at 403.

213. *Id.* at 407.

214. *Id.* at 406 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 331 (1977)).

215. *Id.*

216. 468 U.S. 263 (1984).

217. *Id.* at 265. An excise tax is a "tax imposed on the manufacture, sale, or use of goods..., or on an occupation or activity." BLACK'S LAW DICTIONARY 464 (8th ed. 2004).

218. *Bacchus*, 486 U.S. at 265. Okolehao is a brandy distilled from the ti plant, an indigenous Hawaiian shrub.

Id.

219. *Id.* at 266.

220. *Id.*

221. *Id.* at 267.

222. *Id.*

223. *Id.* at 277.

in favor of local products.²²⁴ The Court found that the tax exemption was facially discriminatory.²²⁵ It bestowed a commercial advantage on local products, fostering the local liquor industry by encouraging increased consumption of its products.²²⁶ Appellee, Director of Taxation of Hawaii, argued that the small volume of sales of exempted liquor did not constitute a competitive threat to other non-exempted liquors.²²⁷ However, the Court declared that it was unnecessary to determine “‘how unequal [a] Tax is before concluding that it unconstitutionally discriminates.’”²²⁸

The legislation at issue in *Bacchus* was tantamount to economic protectionism, whereby Hawaii unconstitutionally promoted domestic commerce by burdening other states’ industry and business in an unequal and oppressive manner.²²⁹ Because the Commerce Clause furthers federal interests through the prevention of economic Balkanization, it was irrelevant that the state legislature did not intend to discriminate by enacting the tax exemption.²³⁰ Therefore, the determination of constitutionality does not depend on whether one focuses on the benefited or burdened party,²³¹ but on the rule that states may not favor local businesses over out-of-state businesses in their tax transactions.²³²

5. *New Energy Co. of Indiana v. Limbach*: Discriminatory Statutes May Be Upheld If They Advance a Legitimate Local Purpose

At issue in *New Energy Co. of Indiana v. Limbach*²³³ was an Ohio tax credit awarded for each gallon of ethanol sold by fuel dealers.²³⁴ The Ohio credit was originally available without regard to the source of the ethanol, but a 1984 statutory amendment denied the credit to ethanol coming from a state that did not grant a tax credit to Ohio ethanol.²³⁵ If a state granted a smaller tax advantage than Ohio’s, Ohio granted only an equivalent credit to ethanol from that state.²³⁶

Appellant New Energy Company was an Indiana limited partnership that manufactured ethanol in Indiana for sale in several states, including Ohio.²³⁷ By reason of Ohio’s reciprocity provision, the ethanol New Energy sold in Ohio became ineligible for the Ohio tax credit.²³⁸ New Energy sought declaratory and injunctive

224. *Id.* at 272–73.

225. *Id.* at 268.

226. *Id.* at 269.

227. *Id.* at 268–69.

228. *Id.* at 269 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981)).

229. *Id.* at 272.

230. *Id.* at 273.

231. *Id.*

232. *Id.* at 272.

233. 486 U.S. 269 (1988).

234. *Id.* at 271. The interest in ethanol emerged in reaction to the oil embargos of the 1970s, and the product was first federally subsidized in 1978. *Id.* Many states in grain-producing areas of the country enacted their own ethanol subsidies shortly thereafter. *Id.* at 272. Ohio was one such state and initiated its first ethanol subsidy in 1981. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 273.

relief. The Ohio Supreme Court found that the amendment was not protectionist or unnecessarily burdensome.²³⁹

The U.S. Supreme Court reversed this judgment, holding that the health and commerce justifications presented for the statute did not validate the "plain discrimination" against products manufactured out-of-state.²⁴⁰ The Court held that the Ohio provision explicitly deprived certain products of generally available beneficial tax treatment because they were made in other states, thus facially violating the cardinal Commerce Clause requirement of nondiscrimination.²⁴¹ The Court explained that the Dormant Commerce Clause prohibits economic protectionism in the form of "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."²⁴² Statutes that discriminate against interstate commerce are routinely struck down unless "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."²⁴³

In *New Energy*, the Court held that the state of Ohio could not use the threat of economic isolation as a weapon to force sister state Indiana to enter into a desirable reciprocity agreement.²⁴⁴ The threat used to procure Indiana's acceptance was taxing a product made by its manufacturers at a higher rate than the same product made by Ohio manufacturers without justification.²⁴⁵ The effect of refusal was that "the out-of-state product [was] placed at a substantial commercial disadvantage through discriminatory tax treatment."²⁴⁶ The Ohio provision imposed an economic disadvantage on out-of-state sellers, and the promise to remove that disadvantage if reciprocity was accepted could not justify the disparity of treatment.²⁴⁷

The Supreme Court invalidated the Ohio ethanol subsidy because it constituted discriminatory taxation against an out-of-state manufacturer rather than direct subsidization of domestic industry, which does not regularly run afoul of the Commerce Clause.²⁴⁸ This case left open the possibility that a state may validly enact a statute that "discriminates against interstate commerce by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."²⁴⁹

B. Dormant Commerce Clause Analysis of the New Mexico Film Incentive Program

To reiterate, New Mexico's Severance Tax Bonding Act (Act) regulates the investment in films to be produced in the state.²⁵⁰ Under the Act, up to \$15 million

239. *Id.*

240. *Id.* at 280.

241. *Id.* at 274.

242. *Id.* at 273.

243. *Id.* at 274.

244. *See id.* (quoting *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 379 (1976)).

245. *Id.* at 276.

246. *Id.* at 275.

247. *Id.*

248. *Id.* at 278.

249. *Id.*

250. Severance Tax Bonding Act, NMSA 1978, § 7-27-5.26 (2007).

may be invested in any one New Mexico film project, provided it is no more than six percent of the market value of the Severance Tax Permanent Fund (STPF).²⁵¹ The State Investment Officer and the State Investment Council are to invest only in projects that (1) are filmed wholly or substantially in New Mexico, (2) possess a distribution contract with a reputable distribution company, (3) employ a majority of New Mexicans on their production crews, (4) have posted a completion bond, and (5) have obtained a full guarantee of repayment of the invested amount in favor of the STPF.²⁵²

Requirement one implicates the Dormant Commerce Clause, as filmmakers who take advantage of New Mexico's Film Investment Loan Program must complete at least eighty-five percent of principal and second unit photography within the state.²⁵³ As previously discussed, the Dormant Commerce Clause allows state governments to regulate local aspects of interstate commerce as long as the regulation does not discriminate against out-of-state competition for the benefit of local economic interests.²⁵⁴ While there is evidence that the New Mexico Severance Tax Bonding Act and the New Mexico Film Incentive Program violate the Dormant Commerce Clause's cardinal nondiscrimination requirement, an equally valid claim can be made that they are constitutional.

In *Pike v. Bruce Church, Inc.*, the Supreme Court described a balancing test used to determine when a statute burdening interstate commerce may be upheld.²⁵⁵ The *Pike* test only applies to a statute that even-handedly regulates to effectuate a legitimate local public interest whose effects on interstate commerce are incidental.²⁵⁶ However, this test cannot apply to the Act because the Act is not an even-handed regulation.

The statute in *Pike* was even-handed because it imposed the uniform requirement that all cantaloupes grown in Arizona and offered for sale be packed in closed containers.²⁵⁷ But the Severance Tax Bonding Act states that film investments must be wholly or substantially shot in New Mexico,²⁵⁸ therefore applying to recipients of the Film Investment Loan Program.²⁵⁹ In contrast, neither the 25% Film Production Tax Rebate nor the Nontaxable Transaction Certificates require that eighty-five percent of principal and second unit photography occur in New

251. *Id.* § 7-27-5.26(A)–(B).

252. *Id.* § 7-27-5.26(C)(1)–(5).

253. N.M. INCENTIVES, *supra* note 98, at 9.

254. See NOWAK & ROTUNDA, *supra* note 153, at 288–89.

255. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* majority stated, "Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens." *Id.* at 142 (citations omitted). However, Nowak & Rotunda cite *Pike* as an example of the viability of Justice Stone's original balancing doctrine as applied to outgoing commerce. NOWAK & ROTUNDA, *supra* note 153, at 304. They comment that the Court "usually looks at what is really happening economically, and then applies Stone's balancing test. Each case turns on a weighing of all the relevant circumstances rather than the application of mechanical tests...." *Id.* Justice Stone wrote the majority opinion for several Supreme Court cases involving the Dormant Commerce Clause during the first half of the twentieth century. See *id.* at 301.

256. *Pike*, 397 U.S. at 142.

257. *Id.* at 142–43.

258. Severance Tax Bonding Act, NMSA 1978, § 7-27-5.26(C)(1) (2007).

259. N.M. INCENTIVES, *supra* note 98, at 9.

Mexico.²⁶⁰ Thus, because users of those incentives do not fall within the purview of the Severance Tax Bonding Act, it cannot be said to regulate even-handedly. Therefore, the *Pike* test is inapposite, and an alternative framework must be used.

The eighty-five percent quota that the New Mexico Film Incentive Program imposes and the Severance Tax Bonding Act validates is constitutionally flawed for two reasons. First, the Act is facially discriminatory. It precludes investment in film projects not wholly or substantially shot within the state of New Mexico. This parallels the liquor tax exemption in *Bacchus* and the ethanol subsidy in *New Energy*, which were facially discriminatory because they bestowed an outright commercial advantage on locally-produced products.²⁶¹ In *New Energy*, the majority asserted that the standards to justify facial discrimination are high and that facial discrimination at minimum “invokes the strictest scrutiny.”²⁶²

A facially discriminatory statute seems to invite a charge of economic protectionism, where states enact regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.²⁶³ The Severance Tax Bonding Act is designed to provide New Mexico with financial benefits in the form of positive investment returns²⁶⁴ and social benefits in the form of a vibrant film industry.²⁶⁵ Out-of-state competitors may be burdened by the requirement that eighty-five percent of principal and second unit photography must be completed in New Mexico, thus limiting their ability to serve as filming locations.

The second reason why the Severance Tax Bonding Act is constitutionally flawed is because it ties a percentage of business conducted in the state to the receipt of an interest-free loan. Similarly, in *Westinghouse*, DISC credits were awarded based on the percentage of DISC shipping conducted from New York.²⁶⁶ The Court found that it was not the provision of the credit that violated the Commerce Clause, “but the fact that it [was] allowed on an impermissible basis, i.e. the percentage of a specific segment of the corporation’s business that [was] conducted in New York.”²⁶⁷ Here, New Mexico is awarding significant incentives to productions that are filmed in the state in whole or in substantial part.²⁶⁸ Like the DISC credits in *Westinghouse*, this functions to divert new business into the state and prevent current business from being diverted elsewhere.²⁶⁹ For example, New Mexico’s Film Incentive Program has generated \$725 million in business²⁷⁰ and hosted ninety-four projects since its

260. *Id.* at 2, 27.

261. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 268 (1984); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988).

262. *New Energy*, 486 U.S. at 279 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)).

263. *See, e.g., New Energy*, 486 U.S. at 273; *Bacchus Imps.*, 468 U.S. at 272.

264. *See supra* notes 80–84 and accompanying text.

265. *See supra* notes 98–99 and accompanying text.

266. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 401 (1984).

267. *Id.* at 407.

268. The Film Investment Loan Program is a significant incentive because it offers an interest-free loan of up to \$15 million for projects meeting the eligibility criteria, including the requirement that the film be wholly or substantially shot in New Mexico. Additionally, the \$15 million can represent one hundred percent of the production budget. N.M. INCENTIVES, *supra* note 98, at 9.

269. *Westinghouse*, 466 U.S. at 406.

270. *See supra* note 83 and accompanying text.

inception in 2002.²⁷¹ The Program has received national recognition for its success²⁷² and is fighting runaway production to Canada by encouraging projects to shoot in the United States.²⁷³

These factors indicate that New Mexico's Film Incentive Program has discriminatory effects on commerce to its sister states. The *Westinghouse* Court stated that regardless of "[w]hether [a] discriminatory tax diverts new business into [a] State or merely prevents current business from being diverted elsewhere, it is still a discriminatory tax that 'forecloses tax-neutral decisions.'"²⁷⁴ While a tax incentive and not an actual tax is at issue here, this distinction is irrelevant.²⁷⁵

Case law leaves open the possibility that a statute discriminating against interstate commerce may be upheld if a state can show that it advances a legitimate local purpose that cannot be served by reasonable nondiscriminatory alternatives.²⁷⁶ Because the Supreme Court jurisprudence is very strict and tends to disfavor tax incentives,²⁷⁷ this may be a way that New Mexico can justify its film incentive program. If the program ever comes under fire, New Mexico can argue that the incentive advances the legitimate local purposes of establishing a new industry and creating jobs in a state with a low per-capita income.²⁷⁸ While incentives are not the only tool to attract the film industry to a particular place, they are a very effective one.²⁷⁹ Also, a state-based incentive program is inherently discriminatory because it favors activity within the granting state. Therefore, arguably, such discriminatory means are the only means by which an incentive program can be fostered. Thus, New Mexico can take the position that these means are legitimate because they are the only ones available.

While New Mexico's tax incentives may appear to be unconstitutionally burdensome, the state can defend the Film Incentive Program by characterizing it as a permissible competitive measure designed to spark industrial growth. *Boston Stock Exchange* made it clear that states can encourage the growth of intrastate commerce and industry and can compete with other states for a share of interstate commerce.²⁸⁰ The primary purpose of the Severance Tax Bonding Act and the New Mexico Film Incentive Program is to develop a film industry within the state.²⁸¹ And unlike the statutes in *Boston Stock Exchange*,²⁸² *Westinghouse*,²⁸³ and *New*

271. See N.M. Film Office, *supra* note 89.

272. See *supra* note 78 and accompanying text.

273. See *supra* notes 95–98 and accompanying text.

274. *Westinghouse*, 466 U.S. at 406 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 331 (1977)).

275. Although imposing a tax is an affirmative, punitive act and an incentive is not punitive, the effect of disallowing an incentive may be the same as charging a tax. In *Westinghouse*, the Court observed, "Nor is it relevant that New York discriminates against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax. The discriminatory economic effect of these two measures would be identical." *Id.* at 404.

276. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

277. See *supra* note 167 and accompanying text.

278. See *supra* notes 98–99, 134–138 and accompanying text.

279. See *supra* Parts II & III.

280. *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336–37 (1977).

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

282. 429 U.S. 318.

283. *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984).

Energy,²⁸⁴ where out-of-state services or products were taxed, the Act is not meant to be punitive to out-of-state productions. The Act does not impose outright taxes on producers whose projects fall short of the eighty-five percent filming quota, but simply denies them participation in the Film Investment Loan Program, which is but one incentive provided by the Act. Also, the existence of the program does not automatically divert business from elsewhere. A registration, application, and approval process is involved before funds are disbursed,²⁸⁵ implying that not every project interested in a film investment loan will receive one.

New Mexico's Film Incentive Program is best viewed as a competitive way to spark economic development, rather than a protectionist attempt to shelter an in-state business. The Program does not seem to impose an unacceptable burden at the expense of other states, considering that each of New Mexico's neighbors also offer film incentives.²⁸⁶ In fact, two of these states, Utah and Texas, were ranked among the top ten places to shoot in the country for their film-friendliness.²⁸⁷ The New Mexico program does not "foreclose[] tax-neutral decisions" like the statute in *Westinghouse*²⁸⁸ because producers can choose whether to transport their projects to New Mexico regardless of the tax consequences. Film incentives are but one factor in selecting a filming location for a project.²⁸⁹

New Mexico's Severance Tax Bonding Act and Film Incentive Program walk a fine line between constitutionality and violating the Dormant Commerce Clause. According to case law, a statute discriminating against interstate commerce may be upheld if a state can show that it advances a legitimate local purpose that cannot be served by reasonable nondiscriminatory alternatives. Thus, if the program and statute ever come under fire, New Mexico should have in its arsenal convincing arguments that show how it is competitively encouraging interstate commerce rather than discriminatorily burdening it.

C. Privileges and Immunities Clause Limitations to the New Mexico Film Incentive Program

Two Constitutional clauses preclude the government from denying selected privileges to United States citizens.²⁹⁰ The Fourteenth Amendment Privileges or Immunities Clause states that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."²⁹¹ In the *Slaughter-House Cases*, the Supreme Court determined that this clause does not protect rights associated with state citizenship; it only addresses federal rights.²⁹² These rights include the right to petition Congress, the right to vote in federal elections, the right to interstate travel or commerce, the right to enter federal lands,

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

285. N.M. INCENTIVES, *supra* note 98, at 9-14.

286. *See supra* note 61.

287. *See supra* note 76.

288. *Westinghouse*, 466 U.S. at 406 (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 331 (1977)).

289. *See supra* notes 61, 76.

290. NOWAK & ROTUNDA, *supra* note 153, at 343.

291. U.S. CONST. amend. XIV, § 1.

292. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872).

or rights while in the custody of federal officers.²⁹³ Commentators have noted that the Fourteenth Amendment Privileges or Immunities Clause actually protects very few rights because it “neither incorporate[s] any of the Bill of Rights nor protect[s] all rights of individual citizens.”²⁹⁴

This Comment focuses on the Article IV Privileges and Immunities Clause, which reads, “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”²⁹⁵ This provision is also referred to as the comity clause.²⁹⁶ It offers a specialized type of equal protection by preventing unreasonable legal distinctions between citizens of one state and citizens of another.²⁹⁷ Any classification burdening people who are not citizens of a particular state must reasonably relate to legitimate state or local interests.²⁹⁸

The Article IV Privileges and Immunities Clause applies to citizenship or residency restrictions established by both state and local governments.²⁹⁹ To determine whether such a law is valid under the Clause, the Court uses a two-part test.³⁰⁰ First, it considers whether the benefit or activity is one of the “privileges and immunities” covered by the clause.³⁰¹ Second, it decides whether a substantial state interest justifies the disparate treatment of nonresidents.³⁰² It is important to recognize that the Article IV Clause does not protect all benefits or activities.³⁰³ It only requires equal treatment of residents and nonresidents when those privileges and immunities “bearing upon the vitality of the Nation as a single entity” are involved.³⁰⁴ Private sector employment is considered a fundamental right under Article IV analysis because it is essential to the economic vitality of the nation.³⁰⁵

The five cases discussed below each involve residence and delineate when and in what manner state statutes may discriminate against nonresidents in favor of residents.³⁰⁶ These cases are instructive when analyzing Privileges and Immunities

293. *Id.* at 79–81.

294. NOWAK & ROTUNDA, *supra* note 153, at 343.

295. U.S. CONST. art. IV, § 2, cl. 1.

296. NOWAK & ROTUNDA, *supra* note 153, at 343. *Paul v. Virginia* describes the purpose of the comity clause:

[T]o place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

75 U.S. (8 Wall.) 168, 180 (1868) (footnote omitted), *overruled in part on other grounds by* United States v. South-Eastern Underwriters Ass’n, 322 U.S. 533 (1944).

297. NOWAK & ROTUNDA, *supra* note 153, at 343.

298. *Id.*

299. *Id.* at 329.

300. *Id.* at 330.

301. *Id.*

302. *Id.*

303. *Id.*

304. *Baldwin v. Fish & Game Comm’n of Mont.*, 436 U.S. 371, 383 (1978).

305. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 221–22 (1984).

306. *Toomer v. Witsell*, 334 U.S. 385 (1948) (commercial shrimping); *McCarthy v. Phila. Civil Serv.*

Clause limitations to the state residency requirements imposed by New Mexico Film Incentive Program.

1. *Toomer v. Witsell*: Discrimination Against Nonresidents Barred Without Substantial Reasons

*Toomer v. Witsell*³⁰⁷ has been called “the leading modern exposition of the limitations the [Privileges and Immunities] Clause places on a State’s power to bias employment opportunities in favor of its own residents.”³⁰⁸ In *Toomer*, a suit was brought to enjoin as unconstitutional the enforcement of several South Carolina statutes regarding commercial shrimping off the coast of that state.³⁰⁹

The fishery at the center of this litigation extended across state lines from North Carolina to Florida.³¹⁰ It was not federally regulated, but effectively partitioned at state lines.³¹¹ Many individual commercial shrimpers, including appellants, wished to trawl off the Carolinas in the summer, following the shrimp down the coast to Florida.³¹² However, each state involved was concerned with channeling to its own residents the business derived from local waters.³¹³ Official bilateral bargaining was the only method by which states could obtain for their citizens the right to shrimp in waters adjacent to other states.³¹⁴

Although South Carolina enacted several statutes governing shrimping during open fishing season in the three-mile maritime belt off its coast, appellants focused their attack on a provision that required nonresidents to pay shrimp boat license fees one hundred times greater than the fee that residents had to pay.³¹⁵ Appellants argued that the purpose and effect of this statute was not to conserve shrimp, but to exclude nonresidents and create a commercial monopoly on the resource for state residents.³¹⁶

The Supreme Court held the South Carolina provision unconstitutional.³¹⁷ The Court explained that the Privileges and Immunities Clause was originally designed to guarantee that a citizen of one state would enjoy the same privileges as citizens of another state when that citizen ventures into the other state.³¹⁸ One such privilege guaranteed by the Clause is that citizens of State A can do business in State B “on terms of substantial equality with the citizens of that State.”³¹⁹

Comm’n, 424 U.S. 645 (1976) (continuing residency); *Baldwin*, 436 U.S. 371 (recreational hunting); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (flat employment preference); *United Bldg. & Constr. Trades Council*, 465 U.S. 208 (municipal residency).

307. 334 U.S. 385 (1948).

308. *Hicklin*, 437 U.S. at 525.

309. *Toomer*, 334 U.S. at 387.

310. *Id.*

311. *Id.* at 388.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.* at 395 (citing S.C. CODE ANN. § 3379). Residents were required to pay twenty-five dollars to license a shrimp boat, while nonresidents were charged \$2,500. *Id.* at 389.

316. *Id.* at 395.

317. *Id.* at 403.

318. *Id.* at 395.

319. *Id.* at 396.

However, the Court cautioned that the Privileges and Immunities Clause is not absolute.³²⁰ It bars discrimination against citizens of other states when there is no substantial reason for it beyond the fact that they are citizens of other states.³²¹ But it does not preclude disparity of treatment when there are valid independent reasons for the disparity.³²² The inquiry in each case involves considering (1) whether independent reasons exist, (2) whether the degree of discrimination is closely related to the reasons for it, and (3) states' considerable leeway to "analyz[e] local evils and...prescrib[e] appropriate cures."³²³

The Court found that the South Carolina provision plainly discriminated against nonresidents such that its practical effect was to exclude.³²⁴ The Court declared that the state's argument that the statute's purpose was to conserve the state's shrimp supply by preventing excessive trawling overlooked the purpose of the Privileges and Immunities Clause.³²⁵ The Clause outlaws classifications based on noncitizenship unless noncitizens "constitute a peculiar source of the evil at which the statute is aimed."³²⁶

Nothing in the record indicated that nonresidents used bigger boats or different fishing methods that justified the discrimination practiced against them.³²⁷ Thus, the Court concluded that no reasonable relationship existed between the danger represented by noncitizens as a class and the severe discrimination they were subject to in the form of near-exclusion.³²⁸ As a result, the Court struck down the South Carolina provision under the Privileges and Immunities Clause.³²⁹

2. *McCarthy v. Philadelphia Civil Service Commission*: Bona Fide Continuing Residency Requirements are Constitutional

*McCarthy v. Philadelphia Civil Service Commission*³³⁰ is a two-page per curiam opinion involving a continuing Pennsylvania residency requirement. Appellant, a sixteen-year employee of the Philadelphia Fire Department, was terminated after moving his permanent residence from Philadelphia to New Jersey.³³¹ He did so in

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 396–97.

325. *Id.* at 397–98.

326. *Id.*

327. *Id.* at 398–99.

328. *Id.* at 399.

329. *Id.* at 403.

330. 424 U.S. 645 (1976). Please note that this case implicates the Fourteenth Amendment Privileges or Immunities Clause rather than the Article IV Privileges and Immunities Clause. I have included it here because, although the case involved an equal protection challenge to a municipal residency requirement, it did not settle the Article IV issue regarding whether public employers could delineate such residency requirements. See NOWAK & ROTUNDA, *supra* note 153, at 330. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219, discussed *infra*, found that private sector economic activity was protected by Article IV. The *United Building* court cited *McCarthy* with approval, noting that there is no fundamental right to government employment for purposes of the Equal Protection Clause. *United Building*, 465 U.S. at 219; NOWAK & ROTUNDA, *supra* note 153, at 330.

331. *McCarthy*, 424 U.S. at 645.

contravention of a municipal regulation obligating Philadelphia city employees to be city residents.³³²

Appellant challenged the constitutionality of the regulation as violative of his federally protected right of interstate travel.³³³ The Supreme Court noted that in previous cases, it held that residence ordinances similar to Philadelphia's were "not irrational."³³⁴ However, the Court had never specifically addressed appellant's contention that he had a constitutional right to be employed by the city of Philadelphia while living elsewhere.³³⁵ The Court stated that there was no precedent in support of such a claim and sustained the city's regulation.³³⁶

The Supreme Court differentiated between a continuing residency requirement and a requirement of prior residency of a given duration.³³⁷ It did not question either the validity of the condition placed upon municipal employment that a person be a resident at the time of his application, or of "appropriately defined and uniformly applied bona fide residence requirements."³³⁸ Thus, Philadelphia's regulation was upheld as a bona fide continuing residence requirement.³³⁹

3. *Baldwin v. Fish & Game Commission of Montana*: Fundamental Rights Require Equal Treatment of Residents and Nonresidents

*Baldwin v. Fish & Game Commission of Montana*³⁴⁰ questioned the disparate treatment of nonresidents within the state of Montana's hunting license system.³⁴¹ At the time of the suit, Montana maintained a significant population of big game, and its elk population was one of the largest in the country.³⁴² The Montana Supreme Court characterized big game hunting as a sport; in fact, elk were not hunted commercially in the state.³⁴³ Elk management was expensive because more of the Fish and Game Commission's personnel time was spent on elk than on any other species of big game.³⁴⁴

Appellants, a Montana hunting guide and four nonresident big game hunters, instituted a federal suit for declaratory and injunctive relief and for partial reimbursement of hunting fees already paid.³⁴⁵ Appellants were disturbed by the policy that nonresidents were obligated to purchase a combination of hunting licenses that cost seven-and-a-half times more than what state residents were

332. *Id.*

333. *Id.*

334. *Id.* at 646 (citing *Hicks v. Miranda*, 422 U.S. 332 (1975); *Detroit Police Officers Ass'n v. City of Detroit*, 405 U.S. 950 (1972)).

335. *Id.* at 646-47.

336. *Id.* at 647.

337. *Id.*

338. *Id.* (quoting *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 255 (1974)).

339. *Id.*

340. 436 U.S. 371 (1978).

341. *Id.* at 372.

342. *Id.* at 374.

343. *Id.* at 375 & n.11.

344. *Id.* at 376.

345. *Id.* at 372.

charged.³⁴⁶ The Montana District Court denied appellants all relief,³⁴⁷ and the U.S. Supreme Court affirmed the judgment of the district court.³⁴⁸

The Supreme Court quoted the district court's finding that there was no nexus between nonresidents' right to engage in recreational hunting and fundamental rights such as the right to vote, the right to travel, or the right to pursue a calling.³⁴⁹ The majority instructed that the state must treat all citizens equally regardless of residency status only with respect to those privileges and immunities "bearing upon the vitality of the Nation as a single entity."³⁵⁰ The distinction Montana made between residents and nonresidents in establishing access to elk hunting did not fall within the parameters of the Privileges and Immunities Clause because equality of access to Montana elk was not "basic to the maintenance or well-being of the Union."³⁵¹

The Court reasoned that the distinction the Montana legislature drew between residents and nonresidents in terms of licensing fees was rationally related to the end of preserving the elk herd, a finite resource.³⁵² A statutory scheme that does not infringe upon a fundamental interest does not need to precisely fit the legitimate purposes behind it; rationality is sufficient.³⁵³ The Court asserted that protection of the wildlife in this case was peculiarly within the state of Montana's police power, and the state had great latitude in shaping the means appropriate for its protection.³⁵⁴ Therefore, the statute was upheld.

4. *Hicklin v. Orbeck*: Flat Employment Preferences are Problematic

*Hicklin v. Orbeck*³⁵⁵ dealt with an employment preference statute known as "Alaska Hire."³⁵⁶ Alaska Hire required all oil and gas leases, easements, or agreements to contain a provision mandating the employment of qualified Alaska residents in preference to nonresidents.³⁵⁷ The Act was designed to remedy Alaska's uniquely high unemployment rate.³⁵⁸ It was administered by issuing "resident cards" to persons meeting residency requirements, who could then present the cards to employers covered by the Act as proof of residency.³⁵⁹

346. *Id.* at 373-74. During the 1976 hunting season, a Montana resident could purchase an elk-only hunting license for nine dollars. *Id.* at 373. A nonresident wishing to hunt elk, however, had to purchase a \$225 combination license that also allowed him to hunt deer, bears, birds, and fish. *Id.* A resident was not required to buy this combination license, but if he did, it cost him just thirty dollars. *Id.* at 374. Thus, the nonresident paid seven-and-a-half times as much as the resident. *Id.* If the nonresident wished to hunt only elk, he paid twenty-five times as much as the resident. *Id.*

347. *Id.* at 373.

348. *Id.* at 392.

349. *Id.* at 378.

350. *Id.* at 383.

351. *Id.* at 388.

352. *Id.* at 390.

353. *Id.*

354. *Id.* at 391.

355. 437 U.S. 518 (1978).

356. *Id.* at 520.

357. *Id.*

358. *Id.* at 526.

359. *Id.* at 520.

Appellants were individuals who wished to secure jobs on the Trans-Alaska Pipeline but could not qualify for the necessary residence cards.³⁶⁰ They sued the Alaska Department of Labor for declaratory and injunctive relief after the commissioner of the department issued a cease-and-desist order to all unions supplying pipeline workers.³⁶¹ The order enjoined the unions to dispatch all qualified Alaska residents to work before any nonresidents were dispatched.³⁶²

Appellants' principal challenge to Alaska Hire was that it violated the Article IV Privileges and Immunities Clause.³⁶³ The Supreme Court determined that their appeal to the protection of the Clause was strongly supported by prior decisions "holding violative of the Clause state discrimination against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State."³⁶⁴

The Court relied upon *Toomer v. Witsell*³⁶⁵ to analyze the constitutionality of Alaska Hire's discrimination against nonresidents.³⁶⁶ There was no showing in the record that nonresidents were "a 'peculiar source of the evil'" the statute sought to remedy—namely, high unemployment.³⁶⁷ The evidence actually indicated that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but the geographical remoteness and lack of education and training of a substantial number of the state's jobless residents.³⁶⁸

Alaska Hire granted all Alaskans a flat employment preference for all jobs covered by the Act "regardless of their employment status, education, or training."³⁶⁹ It extended broadly, covering employers who had no connection to the state's oil and gas industry, performed no work on state land, had no contractual relationship with the state, or received no payments from the state.³⁷⁰ The Court saw this as Alaska's wrongful attempt to force virtually all businesses that benefited even remotely from the economic ripple effect of oil and gas development to bias employment practices in favor of state residents.³⁷¹

The Court asserted that a state's ownership of the property with which a statute is concerned is a factor to be considered in evaluating whether the statute's discrimination against noncitizens violates the Privileges and Immunities Clause.³⁷² However, Alaska's ownership of the oil and gas that was the subject matter of Alaska Hire was deemed to be insufficient justification for the pervasive discrimination the Act facilitated against nonresidents.³⁷³ Alaska's attempt to ease its unemployment problem by forcing employers to discriminate against

360. *Id.* at 521.

361. *Id.*

362. *Id.*

363. *Id.* at 523.

364. *Id.* at 524.

365. 334 U.S. 385 (1948).

366. *Hicklin*, 437 U.S. at 526.

367. *Id.* (quoting *Toomer*, 334 U.S. at 398).

368. *Id.* at 526–27.

369. *Id.* at 527.

370. *Id.* at 530.

371. *Id.* at 531.

372. *Id.* at 529.

373. *Id.* at 531.

nonresidents could not pass constitutional muster because it was not closely tailored enough to aid the unemployed that Alaska Hire was intended to benefit.³⁷⁴

Although the oil and gas upon which Alaska based its discrimination against nonresidents was of great national importance, the breadth of the discrimination Alaska Hire mandated went far beyond the degree of resident bias that Alaska's ownership of the resources could justifiably support.³⁷⁵ Because discrimination against nonresidents did not bear a substantial relationship to the "particular 'evil'" they were said to represent,³⁷⁶ Alaska Hire failed both the *Toomer* test and constitutional scrutiny.

5. *United Building & Construction Trades Council v. Mayor & Council of Camden*: The Degree of Discrimination Against a Protected Privilege Must Bear a Close Relation to the Reasons for It

At issue in *United Building & Construction Trades Council v. Mayor & Council of Camden*³⁷⁷ was a Camden, New Jersey municipal ordinance that required at least forty percent of the employees of contractors and subcontractors working on city construction projects to be Camden residents.³⁷⁸ The ordinance was submitted to the New Jersey Treasury Department and was designated a state-approved affirmative-action construction program.³⁷⁹ Appellant United Building and Construction Trades Council, an association of labor organizations,³⁸⁰ challenged the Camden plan in state court.³⁸¹ The New Jersey Supreme Court rejected appellants' attack, declining to apply the Privileges and Immunities Clause to a municipal ordinance because it discriminated on the basis of municipal, not state, residency.³⁸² The U.S. Supreme Court reversed this decision, holding the challenged ordinance properly subject to the strictures of the Privileges and Immunities Clause.³⁸³

The Court acknowledged that the fact that the ordinance in question was a municipal rather than a state law did not place it outside the scope of the Privileges and Immunities Clause for several reasons.³⁸⁴ First, it was difficult to distinguish municipal from state action in this case because the municipal ordinance would not have gone into effect without approval by the State Treasurer.³⁸⁵ Second, the constitutional challenge to Camden's resident hiring preference was a challenge to the State Treasurer's power to adopt such a preference.³⁸⁶ Finally and most fundamentally, "a municipality is merely a political subdivision of the State from which its authority derives."³⁸⁷ The Court explained that while the Privileges and

374. *Id.* at 528.

375. *Id.* at 533-34.

376. *Id.* at 527.

377. 465 U.S. 208 (1984).

378. *Id.* at 210.

379. *Id.* at 212.

380. *Id.*

381. *Id.*

382. *Id.* at 210.

383. *Id.*

384. *Id.* at 214.

385. *Id.*

386. *Id.* at 215.

387. *Id.*

Immunities Clause is phrased in terms of state citizenship and was designed to place citizens of different states upon equal footing, it had never been read so literally as to apply only to distinctions based on state citizenship.³⁸⁸

Next, the Court engaged in a two-step inquiry to determine whether the Camden ordinance's discrimination against nonresidents was constitutionally suspect.³⁸⁹ It determined that a nonresident's interest in employment on public works contracts in another state was analogous to the pursuit of a common calling, a "basic and essential activity" that is "one of the most fundamental of those privileges protected by the Clause."³⁹⁰ The Court reasoned that the opportunity to seek employment with private employers such as contractors or subcontractors was "sufficiently basic to the livelihood of the Nation" as to fall within the purview of the Privileges and Immunities Clause, even though the private employers here were engaged in projects funded by a municipality.³⁹¹

Baldwin v. Fish & Game Commission of Montana asserted that a state's ownership of the property with which the statute in question is concerned is a factor to be considered in evaluating whether the statute's discrimination against noncitizens violates the Privileges and Immunities Clause.³⁹² The *United Building* Court believed that the same analysis was appropriate in this case, where a city attempted to bias private employment decisions in favor of its residents on publicly funded construction projects.³⁹³

Thus, the Court found that the city of Camden's ordinance discriminated against a protected privilege.³⁹⁴ This led to the second part of the inquiry: whether the degree of discrimination bore a close relation to the reason for it—namely, that nonresidents constituted a peculiar source of evil at which the statute was aimed.³⁹⁵ While the city of Camden claimed that its ordinance was necessary to alleviate grave economic and social ills such as unemployment and middle-class flight, the Court required more findings of fact before it would proceed.³⁹⁶ As a result, it remanded the case to the New Jersey Supreme Court to determine whether the ordinance was an appropriate cure for Camden's problems.³⁹⁷ No further record exists in this case, so it likely settled before the lower court could rule on the merits on remand.

D. Privileges and Immunities Clause Analysis of the New Mexico Film Incentive Program

To reiterate, New Mexico's Severance Tax Bonding Act (Act) regulates the investment in films to be produced in the state.³⁹⁸ Under the Act, up to \$15 million

388. *Id.* at 215–16.

389. *Id.* at 218. The two-step inquiry first required the Court to decide whether the statute violated a protected privilege under the Clause, *id.*, then whether the degree of discrimination against nonresidents was closely tailored to the reasons for it. *Id.* at 222.

390. *Id.* at 219.

391. *Id.* at 221–22 (quoting *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 388 (1978)).

392. *Id.* at 221 (citing *Baldwin*, 436 U.S. at 385).

393. *Id.*

394. *Id.* at 222.

395. *Id.*

396. *Id.* at 222–23.

397. *Id.*

398. Severance Tax Bonding Act, NMSA 1978, § 7-27-5.26 (2007).

may be invested in any one New Mexico film project, provided it is no more than six percent of the market value of the Severance Tax Permanent Fund (STPF).³⁹⁹ The State Investment Officer and the State Investment Council are to invest only in projects that (1) are filmed wholly or substantially in New Mexico, (2) possess a distribution contract with a reputable distribution company, (3) employ a majority of New Mexicans on their production crews, (4) have posted a completion bond, and (5) have obtained a full guarantee of repayment of the invested amount in favor of the STPF.⁴⁰⁰

Requirement three implicates the Privileges and Immunities Clause, as filmmakers who take advantage of New Mexico's Film Investment Loan Program must allocate at least sixty percent of below-the-line payroll and body count to New Mexico residents.⁴⁰¹ As previously discussed, the Privileges and Immunities Clause prevents unreasonable legal distinctions between citizens of one state and citizens of another when fundamental privileges are involved.⁴⁰²

The New Mexico Severance Tax Bonding Act and the New Mexico Film Incentive Program do not violate the Article IV Privileges and Immunities Clause because they involve a protected privilege, and discrimination against nonresidents is narrowly tailored to the reasons for it. In *United Building*, the Supreme Court set forth a two-part inquiry to determine whether the Privileges and Immunities Clause applied to a particular instance of discrimination against nonresidents.⁴⁰³ First, the Court must decide whether the ordinance burdens one of those privileges and immunities protected by the Clause.⁴⁰⁴ Second, it must determine whether there are substantial reasons for the difference in treatment between residents and nonresidents and whether the degree of discrimination bears a close relation to these reasons.⁴⁰⁵

The opportunity to pursue employment with private employers is a fundamental right that the Privileges and Immunities Clause protects.⁴⁰⁶ At issue in New Mexico is not the sport or recreation involved in *Baldwin*,⁴⁰⁷ but a legitimate, essential right. State statutes that discriminated against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling were struck down in *Toomer*⁴⁰⁸ and *Hicklin*⁴⁰⁹ because they interfered with employment rights. The statute in *Toomer* made it prohibitively expensive for nonresident commercial fishermen to ply their trade, to the point of near-exclusion from it.⁴¹⁰ In *Hicklin*,

399. *Id.* § 7-27-5.26(A)-(B).

400. *Id.* § 7-27-5.26(C)(1)-(5).

401. N.M. INCENTIVES, *supra* note 98, at 9.

402. *See, e.g.*, *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984) (employment); *Hicklin v. Orbeck*, 437 U.S. 518 (1978) (employment); *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371 (1978) (recreational hunting); *Toomer v. Witsell*, 334 U.S. 385 (1948) (plying a Trade).

403. *United Bldg. & Constr. Trades Council*, 465 U.S. at 218-19.

404. *Id.* at 218.

405. *Id.* at 222.

406. *See, e.g., id.* at 221.

407. *Baldwin*, 436 U.S. 371.

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

409. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

410. *Toomer*, 334 U.S. at 396-97.

Alaska Hire granted an across-the-board employment preference to state residents that excluded more qualified nonresidents.⁴¹¹

Unlike the statutes in these cases, New Mexico's Act does not have such a broad discriminatory effect. Out of New Mexico's three incentive packages, the Film Investment Loan Program is the only one that requires sixty percent of below-the-line payroll and body count to be allocated to New Mexico residents.⁴¹² Doing so complies with the Act's requirement that a majority of New Mexicans be employed on the production crews of projects receiving the incentive.⁴¹³

Feature films and television shows are the only types of projects that qualify for the Film Investment Loan Program, leaving other genres such as documentaries, advertisements, and video games open to quota-free nonresident employment.⁴¹⁴ Also, the Act's parameters are limited to below-the-line workers. Their very name implies their lower status on the production food chain, as above-the-line workers are individuals with more of a creative or financial stake in a project, such as writers, directors, talent, and producers.⁴¹⁵

The Severance Tax Bonding Act's residency requirement is not unduly burdensome because it is appropriately defined and uniformly applied. The *McCarthy* Court upheld such a municipal residency requirement, which obligated all Philadelphia city employees to live in the city.⁴¹⁶ The Act parallels the *McCarthy* ordinance, as it defines the requirement that a majority of crew members be New Mexico residents.⁴¹⁷ This requirement uniformly applies to those who use the Film Investment Loan Program, as they must hire a majority of New Mexicans on their production crews, allocating sixty percent of below-the-line payroll and body count to them.⁴¹⁸ New Mexico's situation differs from *McCarthy* because it entails a state regulation burdening private sector employers through a residency requirement, rather than a municipal regulation targeting municipal employment. But because there are valid reasons for the Act's discrimination against nonresidents, as discussed below, it still passes constitutional muster.

Thus, the right to pursue private sector employment with production companies that shoot their projects in New Mexico is a fundamental privilege "bearing upon the vitality of the Nation as a single entity."⁴¹⁹ The inquiry does not end there, however. The next step is to determine whether there are substantial reasons for the difference in treatment between residents and nonresidents under the Severance Tax Bonding Act and whether the degree of discrimination bears a close relation to these reasons.

The Act's discrimination against nonresidents survives Privileges and Immunities Clause scrutiny because valid independent reasons exist for the disparity in treatment between residents and nonresidents that are closely related to the

411. *Hicklin*, 437 U.S. at 527.

412. N.M. INCENTIVES, *supra* note 98, at 9.

413. Severance Tax Bonding Act, NMSA 1978, § 7-27-5.26 (2007).

414. *Id.*; N.M. INCENTIVES, *supra* note 98, at 9.

415. *See* BOGNÁR, *supra* note 61, at 1.

416. *McCarthy v. Phila. Civil Serv. Comm'n*, 424 U.S. 645, 645 (1976).

417. Severance Tax Bonding Act, NMSA § 7-27-5.26 (2007).

418. *Id.* § 7-27-5.26(C)(3); N.M. INCENTIVES, *supra* note 98, at 9.

419. *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371, 383 (1978).

discrimination. In *Toomer*, the statute had a discriminatory purpose and effect because nonresidents were discriminated against for no substantial reason.⁴²⁰ New Mexico, however, has substantial reasons for discriminating against nonresidents. First, as reflected in Governor Richardson's comments, the state has a low per capita income and is looking to attract environmentally friendly industries.⁴²¹ Second, the state wants to become a supportive satellite of Hollywood.⁴²² Third, a crucial aspect of the New Mexico Film Incentive Program is workforce training.⁴²³

The discrimination nonresidents face under the Severance Tax Bonding Act is minimal. The sixty-percent quota only applies to one of the triumvirate of incentives offered by New Mexico's Film Incentive Program, the Film Investment Loan Program.⁴²⁴ It also only applies to below-the-line personnel.⁴²⁵ This implies that forty percent of below-the-line crew could come from elsewhere, as well as one hundred percent of above-the-line personnel. Practically, this makes sense because most of the crew, including unit production managers, script supervisors, gaffers, electricians, and make-up artists, are needed on-location.⁴²⁶

Additionally, New Mexico's requirement is not unique. Colorado, one of New Mexico's bordering states, features a similar quota in its film incentive program.⁴²⁷ A final measure of the limited severity of the discrimination fostered by the Act is that in its first two years of existence, the New Mexico Film Incentive Program went from hosting zero to twenty-five projects.⁴²⁸ Since its inception, the program has hosted ninety-four projects.⁴²⁹ This hardly suggests that the program has a *Toomer*-like exclusionary effect on out-of-staters.

The Severance Tax Bonding Act is not aimed at excluding nonresidents. In fact, out-of-state production companies constitute the vast majority of incentive recipients.⁴³⁰ This differs from the statute in *Hicklin*, which granted state residents an across-the-board employment preference.⁴³¹ The New Mexico statute is more narrowly tailored in its limitation to below-the-line workers.⁴³² The fact that New Mexico owns the property with which the statute is concerned is also a factor in the analysis.⁴³³ As in *United Building*, public funds are behind New Mexico's effort to bias private employment decisions in favor of its residents.⁴³⁴ However, both the

420. *Toomer v. Witsell*, 334 U.S. 385, 397-98 (1948).

421. See *supra* note 99 and accompanying text.

422. See *supra* note 99 and accompanying text.

423. See *supra* note 98.

424. N.M. INCENTIVES, *supra* note 98, at 9.

425. *Id.*

426. The "unit production manager" is the individual responsible for coordinating the technical units, budgeting, shooting schedule, and location arrangements during a television or film production. BOGNÁR, *supra* note 61, at 270. The "script supervisor" is the director's assistant and recordkeeper of all preparations, changes, shots, and takes in connection with the script. *Id.* at 220. The "gaffer" is the chief electrician on set, who reports to the director of photography. *Id.* at 106.

427. See *supra* note 61.

428. See *supra* note 96 and accompanying text.

429. See *supra* note 271 and accompanying text.

430. See *supra* note 91.

431. *Hicklin v. Orbeck*, 437 U.S. 518, 530 (1978).

432. N.M. INCENTIVES, *supra* note 98, at 9.

433. The property is the loan funds. See *Baldwin v. Fish & Game Comm'n of Mont.*, 436 U.S. 371 (1978); *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

434. *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 221 (1984).

statute in *United Building* and the New Mexico Act lack the “ripple effect” of the *Hicklin* ordinance, where virtually all businesses that benefited in some way from oil and gas development were forced to base their employment practices on state residency.⁴³⁵ The *United Building* statute only applied to employees on city public works projects,⁴³⁶ and the Act applies only to New Mexico residents employed as below-the-line personnel on film or television projects using the Film Investment Loan Program.⁴³⁷

New Mexico’s Severance Tax Bonding Act and Film Incentive Program do not violate the Privileges and Immunities Clause because private sector employment is a protected privilege under the Clause, and discrimination against nonresidents is narrowly tailored to the reasons for it. According to case law, states are empowered to analyze local evils and prescribe cures.⁴³⁸ Thus, the Act and program can be considered legitimate cures for the state’s lack of clean industry and low per-capita income.

V. CONCLUSION

The plague of runaway production negatively impacts both the United States entertainment industry and the national economy. New Mexico offers a local solution to this national problem through the New Mexico Film Incentive Program. The program has successfully sparked economic development in the state, which is increasing as more productions choose New Mexico as a filming destination. While the constitutionality of state tax incentives in other industries has come under fire over the past three decades, entertainment-related tax incentives have yet to be challenged in any federal or state court. However, this does not guarantee that the New Mexico Film Incentive Program will be immune from attack in the future.

A Dormant Commerce Clause and Privileges and Immunities Clause analysis of the program as it stands today reveals that it is arguably safe from attack. New Mexico’s Severance Tax Bonding Act and Film Incentive Program walk a fine line between constitutionality and violating the Dormant Commerce Clause. According to case law, a statute discriminating against interstate commerce may be upheld if a state can show that it advances a legitimate local purpose that cannot be served by reasonable nondiscriminatory alternatives. Thus, New Mexico’s Film Incentive Program is best viewed as a competitive way to spark economic development, rather than a protectionist attempt to shelter in-state business.

The Severance Tax Bonding Act and Film Incentive Program do not violate the Privileges and Immunities Clause because private sector employment is a protected privilege under the Clause, and discrimination against nonresidents is narrowly tailored to the reasons for it. New Mexico state officials should use the Dormant Commerce and Privileges and Immunities Clauses as their guide should they ever decide to change the New Mexico Film Incentive Program, always adhering to the principle that no tax incentive may discriminate against out-of-state competition or nonresidents in an unduly burdensome manner.

435. *Id.* at 223 (quoting *Hicklin*, 437 U.S. at 531).

436. *Id.*

437. *See supra* note 412 and accompanying text.

438. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).