

DISCRIMINATION AGAINST NONRESIDENTS AND  
THE PRIVILEGES AND IMMUNITIES CLAUSE  
OF ARTICLE IV

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Since its initial attempts in the mid-to-late 1800s to interpret the privileges and immunities clause of article IV—"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"<sup>1</sup>—the Supreme Court has modified materially its express method of analyzing claims arising under the clause. Its operative method, however, has remained relatively unchanged.

Through the early part of the twentieth century, the Court expressly treated as critical a question framed and assigned overriding importance in *Corfield v. Coryell*,<sup>2</sup> a leading circuit court decision of 1823: is the privilege or immunity at issue one of "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments"?<sup>3</sup> Thus, according to the Court, laws were unconstitutional that dis-

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<sup>1</sup> U.S. CONST. art. IV, § 2, cl. 1. The privileges and immunities clause of article IV should not be confused with the privileges or immunities clause of the fourteenth amendment, U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."). While the former provision deals with discrimination as to rights recognized by state law, the latter addresses deprivations of rights national in origin. For discussion of the privileges or immunities clause, see Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last"?*, 1972 WASH. U. L.Q. 405; McGovney, *Privileges or Immunities Clause, Fourteenth Amendment*, 4 IOWA L. BULL. 219 (1918).

<sup>2</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>3</sup> *Id.* 551. Although the court in *Corfield* listed freedom from discriminatory taxation as a fundamental right, *id.* 552, it generally appeared to attach no significance to whether or not the state *discriminated* against nonresidents with respect to fundamental rights. Under the court's thinking, if the state interfered with nonresidents' enjoyment of a fundamental right, it violated the privileges and immunities clause even if it interfered equally with residents' enjoyment of the particular right. See *id.* 551-52; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-32, at 405-06 (1978) (identifying this ingredient of the *Corfield* court's approach and explaining it as an attempt to constitutionalize a natural rights philosophy). At the outset, the Supreme Court made clear its contrary understanding: that the threshold issue in any privileges and immunities case is whether or not the state disadvantages nonresidents relative to residents. See, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); *Conner v. Elliott*, 59 U.S. (18 How.) 591, 594 (1856).

advantaged persons who make their home in other states as to acquiring property,<sup>4</sup> making contracts,<sup>5</sup> or exercising other "fundamental" rights;<sup>6</sup> laws were valid that disadvantaged out-of-staters as to engaging in occupations intimately related to the public's well-being,<sup>7</sup> sharing in various natural resources,<sup>8</sup> or exercising other "nonfundamental" rights.<sup>9</sup> In practice, however, the Court did not adhere strictly to its announced approach. By subterfuges of several kinds, it avoided striking down a number of classifications that disadvantaged nonresidents<sup>10</sup> with regard to fundamental rights but served lawful state goals with reasonable precision.<sup>11</sup>

<sup>4</sup> See, e.g., *Blake v. McClung*, 172 U.S. 239 (1898).

<sup>5</sup> See, e.g., *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871).

<sup>6</sup> See R. HOWELL, *THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP* 33-61 (1918); Meyers, *The Privileges and Immunities of Citizens in the Several States* (pt. 2), 1 MICH. L. REV. 364 (1903). The group of rights held fundamental under the privileges and immunities clause differs from the group held fundamental under the equal protection clause, U.S. CONST. amend. XIV, § 1. The Court's criterion for fundamentality under the equal protection clause is not the one stated in *Corfield*, see text accompanying note 3 *supra*. Rather, it is whether or not the particular individual interest is expressly or implicitly protected by the Constitution. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). For a list of the rights declared fundamental under the equal protection clause, see Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 STAN. L. REV. 663, 710 n.223 (1977).

<sup>7</sup> See, e.g., *Crowley v. Christensen*, 137 U.S. 86 (1890) (selling liquor).

<sup>8</sup> See, e.g., *McCready v. Virginia*, 94 U.S. 391 (1877) (oysters).

<sup>9</sup> See R. HOWELL, *supra* note 6, at 62-79; Meyers, *The Privileges and Immunities of Citizens in the Several States* (pt. 1), 1 MICH. L. REV. 286 (1903).

<sup>10</sup> Throughout this Article, I use state "residence" synonymously with "citizenship" or "domicile," words which traditionally have been used to indicate the state in which one makes his or her home or, more specifically, the state either in which one lives and intends to remain indefinitely or in which one most recently has lived with this kind of intent. See *Blake v. McClung*, 172 U.S. 239, 247 (1898); *Morris v. Gilmer*, 129 U.S. 315, 328-29 (1889); *Mitchell v. United States*, 88 U.S. (21 Wall.) 350, 352-53 (1874); R. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* 8-13 (1971). Also, I generally speak in terms of "residence" rather than "citizenship" or "domicile" because laws discriminating against out-of-staters typically are phrased in terms of "residence." See Knox, *Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution*, 43 MO. L. REV. 1, 9 & n.54 (1978).

I assume for present purposes the validity of the Supreme Court's view that the nonresidents protected by the privileges and immunities clause do not include corporations and aliens. See *Hicklin v. Orbeck*, 437 U.S. 518, 531 n.15 (1978) (aliens); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177-82 (1869) (corporations).

<sup>11</sup> For example, the Court at times seized upon the possible distinction between "citizenship" and "residence" as a pretext for upholding reasonable residence classifications. See *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929); *LaTourette v. McMaster*, 248 U.S. 465 (1919); B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 470-73 (1963); L. TRIBE, *supra* note 3, § 6-32, at 408. Although state "residence" frequently is used interchangeably with "citizenship" to denote the state in which one makes his or her home, it is also used to denote the state in which one currently lives with or without an intent to stay permanently. See Reese & Green, *That Elusive Word, "Residence,"* 6 VAND. L. REV. 561, 564 (1953). The Court's tactic thus consisted of construing a statutory reference to

In more recent years, the Court has committed itself explicitly to a reasonableness test like the one that it at least on occasion<sup>12</sup> tacitly had applied in the past. Most notably, in a passage that, as *Hicklin v. Orbeck* confirms,<sup>13</sup> remains authoritative today, the Court declared in 1948 in *Toomer v. Witsell*:

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.<sup>14</sup>

In addition, although the Court's opinions in *Toomer* and a later case, *Doe v. Bolton*,<sup>15</sup> appeared to intimate that the Court no longer

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"residence" in this latter sense and then finding no privileges and immunities violation on the theory that the clause speaks to discrimination on the basis of citizenship alone. As argued forcefully in B. CURRIE, *supra* at 470, any distinction between "residence" and "citizenship" is necessarily irrelevant because, if it were relevant, it would afford states a relatively painless way to circumvent the clause. At the expense only of its citizens living temporarily outside the state, a state would be able to discriminate against the overwhelming majority of noncitizens—all but those living temporarily in the state—as much as it pleased. The Court's latest decisions essentially repudiate the relevance of this distinction to analysis under the clause. See, e.g., *Hicklin v. Orbeck*, 437 U.S. 518, 524 n.8 (1978); *Toomer v. Witsell*, 334 U.S. 385, 397 (1948).

For examples and discussion of other techniques employed by the Court to avoid the results dictated by its announced approach, see L. TRIBE, *supra* note 3, § 6-32, at 407-08 & n.26; Note, *The Equal Privileges and Immunities Clause of the Federal Constitution*, 28 COLUM. L. REV. 347 (1928).

<sup>12</sup> Commentators differ in their assessments of the Court's consistency in applying its unarticulated reasonableness test. Compare L. TRIBE, *supra* note 3, § 6-32, at 408 ("The reasonableness exception thus tempered the otherwise rigid impact of the privileges and immunities clause but did so in an unpredictable and seemingly arbitrary manner.") with B. CURRIE, *supra* note 11, at 468-73, 473 (the Court's activities generally are explicable in terms of a "reasonable classification" principle").

<sup>13</sup> See *Hicklin v. Orbeck*, 437 U.S. 518, 525-26 (1978).

<sup>14</sup> 334 U.S. 385, 396 (1948) (footnote omitted).

<sup>15</sup> 410 U.S. 179, 200 (1973). In *Doe*, the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), the Court found, among other things, that Georgia's law allowing only state residents to obtain abortions in Georgia violated the privileges and immunities clause.

takes seriously the need to decide fundamentality,<sup>16</sup> the Court subsequently has affirmed that this determination remains a vital part of its approach: in 1978, it squarely rested its approval of the law in *Baldwin v. Fish & Game Commission* on a finding that the right at issue, elk hunting for sport, was not fundamental.<sup>17</sup> The *Toomer* reasonableness test, with its demand for a "substantial" relationship between means and end,<sup>18</sup> therefore does not apply to all laws discriminating against people domiciled outside the state, but only to ones that affect rights thought to be fundamental. Laws disadvantaging nonresidents as to rights not fundamental for purposes of the privileges and immunities clause may overstep the bounds of lawful discrimination set by the fourteenth amendment's equal protection clause<sup>19</sup> or may conflict with other constitutional guarantees.<sup>20</sup> Under the Court's analysis, however, they do not violate the privileges and immunities clause.

In this Article, I do not challenge the Court's various express and implicit determinations over the years with regard to the fundamentality of certain privileges and immunities and with regard to the reasonableness of specific residence classifications. Instead, I

<sup>16</sup> See L. TRIBE, *supra* note 3, § 6-33, at 410-11.

<sup>17</sup> 436 U.S. 371, 388 (1978).

<sup>18</sup> The Court in *Toomer* used the phrase "substantial reason" to refer to the means-end relationship alone and not to the weightiness of the state's goal. 334 U.S. 385, 398 (1948) (allusion to "valid objectives"); *id.* 398-99 (attention exclusively to whether or not "reasonable relationship" exists). See *Hicklin v. Orbeck*, 437 U.S. 518, 527 (1978) (*Toomer* test stated in terms of whether discrimination against nonresidents bears "a substantial relationship to the particular 'evil' they are said to present"); B. CURRIE, *supra* note 11, at 473 (under *Toomer*, classification must be "reasonably related to legitimate policy"); L. TRIBE, *supra* note 3, § 6-33, at 411 n.17 ("The *Toomer* Court spoke only in terms of *substantial connection* to *valid* state objectives.") (Emphasis in original).

<sup>19</sup> In *State Autonomy in Choice of Law: A Suggested Approach*, 52 S. CAL. L. REV. 61, 86 (1978), I maintained that, in keeping with its reasons for declaring race to be a "suspect" basis for classification under the equal protection clause, the Court *should* treat residence classifications as suspect. In *fact*, however, the Court has not treated them as such. See, e.g., *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388-91 (1978). It has acted on the premise that, in and of itself, classification by residence triggers rational basis review rather than the "strict scrutiny" associated with suspect classifications. Under the Court's approach, the only justification for reviewing a residence classification with any amount of rigor lies in the importance of the individual interest at issue. See *Simson*, *supra* note 6, at 663-64.

<sup>20</sup> For example, the "dormant" or unexercised commerce clause, U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . ."), is an important check on laws discriminating against nonresidents. See, e.g., *Hughes v. Oklahoma*, 99 S. Ct. 1727 (1979) (invalidating statute prohibiting transportation of natural minnows out of state for sale); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) (invalidating statute prohibiting transportation of natural gas out of state for sale unless local needs already satisfied). See generally Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1 (1940).

seek to demonstrate that the Court's two-step approach requiring these determinations represents an inadequate conception of the framers' intent in adopting the privileges and immunities clause. Part I argues that the purposes underlying the privileges and immunities clause indicate its applicability to any privilege or immunity granted to residents but denied to nonresidents. Part II suggests that, although a literal reading of the clause is untenable, its language calls for more rigorous review of residence classifications than the Court's reasonableness test affords. Finally, part III examines the implications of my proposed interpretation of the privileges and immunities clause for some of the principal types of residence classifications currently in effect.

### I. THE SCOPE OF THE CLAUSE

Although not extensive, the available evidence of the framers' aims in drafting the privileges and immunities clause establishes that the clause at least partly was designed to minimize friction among the people of the various states and among the states themselves.<sup>21</sup> The clause is an abbreviated version of the fourth article of the Articles of Confederation, an article which began with an affirmation of the importance to national unity of extending to out-of-staters the privileges and immunities enjoyed locally:

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 . . . .<sup>22</sup>

In a pamphlet published contemporaneously with the framing of the Constitution, Charles Pinckney of South Carolina, the delegate to the Constitutional Convention generally recognized as the author of the Constitution's privileges and immunities clause,<sup>23</sup> character-

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<sup>21</sup> See *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869); R. HOWELL, *supra* note 6, at 13.

<sup>22</sup> ARTICLES OF CONFEDERATION art. IV.

<sup>23</sup> See 5 J. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 128-29, 132 (rev. ed. 1845); Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 6 (1967); Meyers, *supra* note 9, at 287. *But see* R. HOWELL, *supra* note 6, at 14-15. Pinckney specifically claimed authorship of the clause in a speech on the floor of Congress in 1821. 37 ANNALS OF CONG. 1134 (1821). Furthermore, the clause appears verbatim in the draft of the Pinckney Plan—the plan of government submitted by Pinckney to the Constitutional Convention—that Pinckney made available to John Quincy Adams in 1818 for inclusion in Adams's journal of the

ized the clause as "formed exactly upon the principles of the 4th article of the present Confederation."<sup>24</sup> Moreover, since the delegates to the Constitutional Convention adopted virtually without debate the privileges and immunities clause submitted to them by the Committee of Detail,<sup>25</sup> it seems reasonable to infer that familiar principles—specifically, those spelled out in the provision of the Articles of Confederation on which the clause plainly was based—were widely understood to inform the clause. Lastly, in a brief allusion in *The Federalist* to the privileges and immunities clause of the new Constitution, Alexander Hamilton provides further support for the claim that the clause was drafted with interstate harmony and cooperation in mind. According to Hamilton, the clause "may be esteemed the basis of the Union."<sup>26</sup>

In view of the framers' deep commitment to representative government,<sup>27</sup> it also seems appropriate to suppose that, in placing some constraints on states' freedom to discriminate against non-residents, the framers were moved in part by democratic ideals. Basically, laws disadvantaging nonresidents, outsiders in the fullest sense to the enacting state's legislative process, clash with principles of government that the drafters of the Constitution held in highest esteem. Laws of this sort epitomize government without the consent of the governed.<sup>28</sup> At first glance, the suggestion that these concerns played any part at all in the adoption of the privileges and immunities clause may appear unusual: after all, residents ineligible to vote also are outsiders to the political process, yet they received no federal constitutional protection against unjust discrimination by the state until the fourteenth amendment became law in 1868.<sup>29</sup>

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Convention. (The secretary of the Convention was unable to provide Adams with the actual document that Pinckney presented to the Convention.) See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 426-28, 601 (M. Farrand ed. 1911). Some scholars have questioned the extent to which the draft offered in 1818 corresponds to the still missing document submitted to the Convention. See *id.* 601-04. They seem to concede, however, that the privileges and immunities clause adopted by the Convention originated with Pinckney. See *id.* 604, 606-07.

<sup>24</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 23, at 112.

<sup>25</sup> See 2 *id.* 437, 443, 456.

<sup>26</sup> THE FEDERALIST No. 80, at 497 (A. Hamilton) (H. Lodge ed. 1888).

<sup>27</sup> See U.S. CONST. preamble; *id.* art. I, §§ 2-4; *id.* art. II, § 1; *id.* art. IV, § 4; G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 532-36, 593-604 (1969).

<sup>28</sup> See L. TRIBE, *supra* note 3, § 6-33, at 411 n.17; Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 465 (1978). Cf. *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) (calling attention in a privileges and immunities context to the fact that "nonresidents are not represented in the taxing State's legislative halls").

<sup>29</sup> See U.S. CONST. amend. XIV, § 1; note 19 *supra*.

Compared to nonresidents, however, residents ineligible to vote may well have seemed to the framers to be politically well off. The drafters of article IV reasonably may have anticipated that, unlike nonresidents, this class of residents often would be protected in the political arena by enfranchised residents peculiarly interested in their well-being by virtue of kinship or other ties.<sup>30</sup>

If the framers adopted the privileges and immunities clause for either or both of the above reasons, it is not plausible that they intended coverage by the clause of particular privileges and immunities to depend on whether they are ones, in the words of *Corfield v. Coryell*, "which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments."<sup>31</sup> First, the relationship between the fundamental or nonfundamental character of a privilege or immunity and the amount of interstate friction generated by its selective denial to nonresidents is highly speculative. The friction created by discrimination as to fundamental rights is not obviously substantial, while that created by discrimination as to nonfundamental rights is not obviously insubstantial. Indeed, it is not at all clear that friction from the former type of discrimination is always greater than friction from the latter.<sup>32</sup> Second, the fundamental or nonfundamental nature of a right is irrelevant to the extent to which a law that discriminates against nonresidents with regard to the enjoyment of that right satisfies democratic norms. The only factor relevant in this respect is nonresidents' exclusion from the political process that disadvantaged them.

More broadly, these two explanations for the special solicitude shown nonresidents by the drafters of the privileges and immunities clause imply not only that the fundamental or nonfundamental character of a privilege or immunity is irrelevant to its protection under the clause. They also imply that no one privilege or immunity is

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<sup>30</sup> I have suggested elsewhere that similar concerns about the vulnerability of particular groups in the political process inform the Court's suspect classification doctrine. See Note, *Mental Illness: A Suspect Classification?*, 83 YALE L.J. 1237, 1250-58 (1974).

<sup>31</sup> 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230).

<sup>32</sup> *But cf.* *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 383, 388 (1978): Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. . . .

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 . . . Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. . . . Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

inherently any more or less deserving of protection than another. First, an attempt to rank privileges and immunities in terms of the relative impact on national unity of their discriminatory allocation seems entirely too hypothetical, too impervious to principled application, to be fairly located within the framers' intent.<sup>33</sup> Second, an attempt to rank privileges and immunities in terms of the relative inconsistency with democratic ideals of their discriminatory allocation cannot help but be unsuccessful because the source of this inconsistency—nonresidents' lack of input into the process that singled them out for disadvantage—does not vary from right to right. If some residence classifications should be upheld under the clause and others struck down, the reason thus is not that some rights are more important than others for purposes of the clause. All rights fall within its scope.

## II. A STANDARD OF REVIEW

If the framers' goals in protecting nonresidents from discrimination were those that I have described, they also militate in favor of reading the privileges and immunities clause as a blanket prohibition on residence classifications. By invalidating even the most reasonable residence classifications, a court promotes both of these ends. Although residence classifications supported by weighty state justifications generally may be less offensive to nonresidents and less provocative to sister states than wholly arbitrary classifications, it is not at all evident that any interstate friction that they create is constitutionally insignificant. Furthermore, a residence classification closely related to a legitimate state goal may well be "fairer" in some objective sense than one that irrationally discriminates against nonresidents, but it is no less objectionable in terms of government by the consent of the governed.

On its face, the privileges and immunities clause appears to constitutionalize the blanket prohibition that these underlying policies suggest. It speaks in absolute, uncompromising terms—non-citizens "shall be entitled" to "all" privileges and immunities.<sup>34</sup> There should be little question, however, that, whether or not the framers actually thought about the implications of disallowing all residence classifications, they did not "intend," in any realistic sense

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<sup>33</sup> On the various levels of generality at which the framers' intent may be understood, see P. BREST, *CONSTITUTIONAL DECISIONMAKING* 41-44 (1975), and sources cited therein. The claim made in the text is that such an attempt to rank privileges and immunities does not fall within the broadest conception of the framers' intent.

<sup>34</sup> U.S. CONST. art. IV, § 2, cl. 1.



of the word,<sup>35</sup> for the clause to be interpreted literally. Most obviously, it would have been odd to say the least for the framers to prohibit states entirely from using residence classifications while they themselves made state residence relevant in article I both to a person's eligibility to represent a state in the House or Senate<sup>36</sup> and to the size of a state's delegation in the House.<sup>37</sup> More important, however, the framers could not have intended to incapacitate states totally from disadvantaging nonresidents because the effect would have been to destroy the integrity of one of the basic units of the federal system that they envisioned—the state. Very simply, if states could not limit to their residents voting in state-wide elections and holding of high elected office, they would cease to be the separate political communities that history and the constitutional text make plain were contemplated.<sup>38</sup>

If the privileges and immunities clause thus cannot logically be read to say what it appears to be saying, it may be plausible to assume, as the Court does, that it is saying a good deal less. Indeed, in calling for a substantial nexus to a legitimate end,<sup>39</sup> the *Toomer* reasonableness test arguably demands in "fundamental" rights contexts more than the clause's due. For the many years before the equal protection clause was added to the Constitution, the privileges and immunities clause was nonresidents' only federal constitutional protection against discrimination. As a result, without denying that it served a meaningful role at the time of its adoption, the privileges and immunities clause may be construed as a bar on only wholly arbitrary residence classifications.

Considerably more plausible, however, is the assumption that the clause means something fairly close to the ordinary connotation of its words. To be sure, the obvious exceptions to a strict reading of the clause—restrictions on voting and office-holding—do establish that the framers could not have intended to subordinate all state interests to the national policies behind equal treatment of residents and nonresidents. The state's justification for these exceptions is so potent, however, that their existence hardly implies that the framers chose their words carelessly in drafting the clause and that the words

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<sup>35</sup> See note 33 *supra*.

<sup>36</sup> U.S. CONST. art. I, § 2, cl. 2; *id.* art. I, § 3, cl. 3.

<sup>37</sup> U. S. CONST. art. I, § 2, cl. 3.

<sup>38</sup> See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972); L. FRIEDMAN, A HISTORY OF AMERICAN LAW 30-32, 60-81, 93-101 (1973); Simson, *supra* note 19, at 71; text accompanying notes 66-72 *infra*.

<sup>39</sup> See note 18 *supra*.

therefore are most appropriately ignored. Rather, the existence of these particular exceptions is fully consistent with the notion that the framers used language calculated to convey a general rule or presumption of unconstitutionality that would yield only in an extreme case.

Basically, then, I propose that the Court approach the mandate of the privileges and immunities clause in much the same way as it does the seemingly unyielding prohibition of the first amendment.<sup>40</sup> The Court's response to the need to find room in the first amendment for some limitations on free expression has not been to assume that the first amendment's "no law" admonition means simply "no unreasonable law." Instead, its response has been to place a heavy burden of justification on any law materially abridging speech.<sup>41</sup>

The particular accommodation of federal and state interests that I believe best reflects the framers' specific aims in drafting the privileges and immunities clause and their general goals for the federal system is summarized by a standard of review that invalidates *any* residence classification not shown by the state to be *necessary* to serve a *significant* state objective.<sup>42</sup> On the one hand, this standard strikes the balance heavily in favor of the policies underlying the forceful prohibition on discrimination expressed in the clause. It vindicates these policies unless the state carries the heavy burden of proving that classification on the basis of state residence is the most effective means available to it for serving an important goal. If the state can serve its goal as precisely by alternative means not beyond its capacity to implement, these policies therefore prevail.<sup>43</sup> On the

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<sup>40</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

<sup>41</sup> See, e.g., *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Schneider v. State*, 308 U.S. 147 (1939). In general, see C. BLACK, *THE PEOPLE AND THE COURT* 218 (1960):

[I]n view of the absolute character of the language of the [First] Amendment, and of the secondary and implicational nature of the reasons for disregarding it in part, it seems to me reasonable to cast on the governmental agency that would introduce an exception the burden of establishing that it is a valid exception, and not to cast on the man whose speech is being abridged the burden of showing that the exception is *not* a valid exception. (Emphasis in original.)

<sup>42</sup> Contrast the Court's approach, described at text accompanying notes 12-20 *supra*.

<sup>43</sup> The imperfection of a residence classification is a good, but not conclusive, indicator that the classification lacks the necessary means-end relationship required by the proposed standard of review. An imperfect classification is necessary when the state cannot make the classification more precise without impairing severely its ability to govern effectively, see *Simson*, *supra* note 6, at 679-80, 687 n.121, or when the goal being served resists by its very nature more precise implementation, see text accompanying notes 76-77, 80-81 *infra*.

other hand, this standard recognizes that, as the decisionmaking bodies traditionally vested with primary authority and responsibility to provide for the general welfare, states have a strong claim to use residence classifications essential to further ends that are important, though perhaps not critical or "compelling,"<sup>44</sup> to their residents' well-being.<sup>45</sup> Residence classifications for purposes of voting and office-holding no doubt would satisfy the more stringent requirement that the state's interest be not only significant but compelling.<sup>46</sup> As the following discussion invites one to infer, however, few other necessary residence classifications would meet this higher test. The effect of requiring a compelling rather than a significant state interest almost certainly would be to narrow substantially states' prerogatives and opportunities for experimentation.

### III. THE STANDARD APPLIED

#### A. Bar Admissions

One of the most common types of residence classifications is the statute or court-made rule making residence a qualification for admission to the state bar.<sup>47</sup> According to various courts and com-

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<sup>44</sup> The term "compelling" is the one commonly used by the Court in equal protection and other individual-rights contexts to indicate a governmental interest of the highest order. See *Simson*, *supra* note 6, at 675-77, 679.

<sup>45</sup> The difference between a state's interest in promoting its residents' well-being and its interest in advantaging its residents over nonresidents should be kept in mind. The former interest is a perfectly valid one in light of the special reciprocal relationship between a state and its residents, the persons who make the state their home. They are the individuals "most likely to benefit or burden its operations." *Simson*, *supra* note 19, at 75. In contrast, the latter interest is unconstitutional because it in effect is nothing more than an interest in frustrating the enjoyment of one's core right under the privileges and immunities clause to be free from discrimination based *solely* upon the fact of one's nonresidence. For further discussion of unconstitutional objectives, see Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN. L. REV.* 585, 589-91 (1975); *Simson*, *Abortion, Poverty and the Equal Protection of the Laws*, 13 *GA. L. REV.* 505, 513 n.44 (1979). In some instances, then, a state legitimately may disadvantage nonresidents relative to residents as a means to promote its residents' well-being, but it may never disadvantage nonresidents relative to residents as an end in and of itself.

<sup>46</sup> *Cf.* *Simson*, *supra* note 6, at 677 (compelling nature of laws vital to "governmental stability and effectiveness" derives from the state's "need to protect its ability to function effectively in the people's behalf").

<sup>47</sup> See NATIONAL BAR EXAMINATION DIGEST (1979); Note, *The Constitutionality of State Residency Requirements for Admission to the Bar*, 71 *MICH. L. REV.* 838, 838 n.3 (1973) [hereinafter cited as *MICH. L. REV.*]. States often require for admission to the bar not only residence but also residence for a specified period of time. See NATIONAL BAR EXAMINATION DIGEST, *supra*; *MICH. L. REV.*, *supra* at 838 n.2. Since durational residence requirements disadvantage short-term residents as well as nonresidents, they raise some equal protection problems not generated by pure residence requirements. See *Memorial Hosp. v. Maricopa County*, 415

mentators, laws of this sort protect the public from attorneys incompetent in local law,<sup>48</sup> screen out morally unfit lawyers,<sup>49</sup> and facilitate the smooth and efficient administration of justice.<sup>50</sup> Under the proposed standard of review, these laws are unconstitutional because, even assuming that the objectives that they serve are significant,<sup>51</sup> they serve none of these objectives with the necessity that the privileges and immunities clause demands.<sup>52</sup>

First, if the state wishes to safeguard people from lawyers not skilled in the intricacies of its law, a residence classification is an almost irrational means of doing so. As a result of day-to-day contact with the state and its people, resident attorneys conceivably may acquire knowledge about local customs and events that they otherwise would not have acquired and that deepens their under-

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U.S. 250 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Simson*, *supra* note 6, at 698-701. The fact that laws of this sort disadvantage some residents, however, does not place them beyond the reach of the privileges and immunities clause. Any classification that disadvantages all nonresidents implicates the concerns about national unity and representative government that underlie the clause. Moreover, on a less abstract level, if the fact that a law disadvantaged some residents indeed did mean that nonresidents could not attack it successfully under the privileges and immunities clause, the clause would be virtually inconsequential. States rarely, if ever, treat all residents better than all nonresidents because, after classifying between residents and nonresidents, they typically differentiate among residents in terms of age, skills, need, or other characteristics relevant to lawful state goals.

<sup>48</sup> See Note, *Attorneys: Interstate and Federal Practice*, 80 HARV. L. REV. 1711, 1716 (1967).

<sup>49</sup> See MICH. L. REV., *supra* note 47, at 848-49.

<sup>50</sup> See Application of Titus, 213 Va. 289, 294-95, 191 S.E.2d 798, 802 (1972). Critics of residence requirements for the bar have claimed that a fourth purpose, eliminating out-of-state competition, is an important and perhaps dominant force behind such requirements. See, e.g., Dalton & Williamson, *State Barriers Against Migrant Lawyers*, 25 U. KAN. CITY L. REV. 144, 147-48 (1957); Note, *Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change*, 56 CORNELL L. REV. 831, 837 (1971) [hereinafter cited as CORNELL L. REV.]. Because this purpose seeks to achieve a result that the commerce clause was designed to prevent, it is not a legitimate state interest and therefore does not arguably support denying nonresidents admission to the bar. For more on illegitimate purposes, see note 45 *supra*.

<sup>51</sup> This qualification, one intended to emphasize that the absence in the text of any discussion of the importance of particular objectives neither endorses nor disputes their "significant" status, will not be reiterated elsewhere in part III. It should be understood as implicit, however, in any instance in which, without reaching the issue of the importance of a specific objective, I claim that a residence classification is insupportable in terms of that objective.

<sup>52</sup> The Court has never ruled on the constitutionality under the privileges and immunities clause of a residence requirement for admission to the bar. In *Suffling v. Bondurant*, 409 U.S. 1020, *affg mem.* 339 F. Supp. 257 (D.N. Mex. 1972) (three-judge court), however, it summarily affirmed a lower court decision rejecting an equal protection challenge to a six-month durational residence requirement. For a recent attempt to apply the Supreme Court's two-step privileges and immunities approach to residence requirements for admission to the bar, see Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461 (1979).

standing of local law. This potential benefit associated with state residence is so slight and hypothetical, however, that residence in one's state of practice offers virtually no promise of competence in local law and residence outside of the state holds no real threat of incompetence.<sup>53</sup> Instead, adequacy in this respect almost certainly turns on factors such as prior education, diligence, and research techniques. A state concerned about providing its people with lawyers well-versed in local law far more reasonably would pursue alternatives, such as improving the methods of testing bar applicants' familiarity with its law and requiring lawyers to pass periodic examinations on issues of state law as a condition to continued practice in the state.

Second, a residence classification for bar admissions is also highly imprecise in identifying persons not morally fit to practice law in the state. Some resident attorneys arguably behave more ethically than they would if they lived outside their state of practice, because they feel a personal stake in the welfare of the community most immediately affected by their work and because they are more susceptible to pressures from the local bar and community to act responsibly. Any correlation between ethical behavior and in-state residence, however, is marginal at best. Many nonresidents can be expected to practice law honestly in the state, and some resident attorneys can be expected to do so reprehensibly, because the individual lawyer's personal code of ethics and moral fortitude influence behavior much more than his or her place of residence.<sup>54</sup> If a state is serious about limiting admission to its bar to persons whose behavior will be beyond reproach, it has available to it demonstrably more effective means of pursuing its goal than a residence requirement. In particular, it can devote materially more resources to investigating bar applicants' backgrounds<sup>55</sup> and to enforcing its code of professional ethics.

Finally, a prohibition on nonresidents becoming members of the state bar is a needlessly severe means of coping with any problems that an attorney's out-of-state residence may pose for the administration of justice in the state. For example, although a residence requirement for admission to the bar helps ensure that clients wishing to sue their attorneys for malpractice will not find themselves faced with the inconvenience of bringing causes of action out-

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<sup>53</sup> See CORNELL L. REV., *supra* note 50, at 838.

<sup>54</sup> See *id.* 838-39.

<sup>55</sup> Traditionally, such investigations have been lax. See Note, *Restrictions on Admission to the Bar: By-Product of Federalism*, 98 U. PA. L. REV. 710, 711 (1950) [hereinafter cited as U. PA. L. REV.].

side their home state, it is hardly a necessary device for securing this end. A long-arm statute giving the state's courts personal jurisdiction over nonresident attorneys in suits for wrongs committed in the course of their practice in the state accomplishes the purpose equally well. Similarly, while the exclusion of nonresidents from the bar alleviates certain difficulties for local courts and opposing counsel with regard to serving notices and pleadings, statutes providing for service by mail can achieve substantially the same result.<sup>56</sup>

### B. Public Office and Employment

States typically disqualify nonresidents from holding elected office<sup>57</sup> and from working for the state in various nonelected capacities.<sup>58</sup> In addition, they often grant residents a preference in competing for certain state jobs.<sup>59</sup> Laws disadvantaging nonresidents in these ways generally have been explained in terms of one or more of three goals: reducing unemployment in the state,<sup>60</sup> minimizing turnover in state personnel,<sup>61</sup> and preserving the state's political integrity.<sup>62</sup> Under the privileges and immunities test previously set forth, residence classifications premised on either of the first two objectives are unconstitutional, while in some instances ones premised on the third objective are not.<sup>63</sup>

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<sup>56</sup> See *Attorneys: Interstate and Federal Practice*, *supra* note 48, at 1715; U. PA. L. REV., *supra* note 55, at 718. In both examples in the above text, unless the state supplements its residence requirement for admission to the bar with a continuing residence requirement for practicing in the state after admission, the suggested alternatives serve the state's goals not simply as well as, but instead materially better than, the residence classifications employed. According to a recent study, New York is the only state with a continuing residence requirement of this sort. A *Constitutional Analysis of State Bar Residence Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, *supra* note 52, at 1487.

<sup>57</sup> E.g., N.H. CONST. pt. 2, art. 14 (state representative); VA. CONST. art. V, § 3 (governor).

<sup>58</sup> E.g., HAWAII REV. STAT. § 78-1(b) (Supp. 1978) (all state, county, and municipal employment); MO. ANN. STAT. § 36.050(1) (Vernon Supp. 1979) (state personnel advisory board).

<sup>59</sup> E.g., N.J. STAT. ANN. § 34:9-2 (West 1965) (public works); N.Y. CIVIL SERVICE DEP'T RULES & REGULATIONS § 3.1 (1972) (classified civil service).

<sup>60</sup> See Brief for State of Hawaii, Amicus Curiae at 2-3, *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

<sup>61</sup> See *State v. Wylie*, 516 P.2d 142, 150 (Alas. Sup. Ct. 1973).

<sup>62</sup> See *Chimento v. Stark*, 353 F. Supp. 1211, 1215 (D.N.H.) (three-judge court), *aff'd mem.*, 414 U.S. 802 (1973).

<sup>63</sup> In *Heim v. McCall*, 239 U.S. 175 (1915), and *Crane v. New York*, 239 U.S. 195 (1915), the Court upheld a New York law requiring preference for state residents in employment on public works projects. The petitioners had claimed violations of various constitutional provisions, including the privileges and immunities clause. The Court's theory in allowing the discrimination to stand essentially was that the state "owned" the jobs at issue and therefore could allocate them as it wished. The extent to which *Hicklin v. Orbeck*, 437 U.S. 518 (1978), qualifies

First of all, if the state wishes to ensure that its citizens are gainfully employed, a residence classification is no better than a plausible means of doing so. On the one hand, if the state hires any of its residents already employed in the private sector, it furthers its goal only to the uncertain extent that private employers hire unemployed residents to fill the openings created. On the other hand, the state can serve its objective at least as effectively by job-training programs and other less drastic means.<sup>64</sup>

Similarly, as a device to avoid the disruption to governmental operations caused by rapid turnovers in state personnel, classifying by residence is manifestly flawed. On the one hand, it is patently under- and overinclusive. Although, by definition, state residence indicates an intent to make one's home in the state for the foreseeable future,<sup>65</sup> it is no guarantee that someone will continue to work for the state in one capacity for a substantial period of time. Furthermore, though implying an intent to settle outside the state, nonresidence does not necessarily mean—especially with regard to nonresidents who live permanently within daily commuting distance of places of public employment in the state—that someone will remain in a state job only briefly. On the other hand, by alternative means such as monetary and fringe-benefit rewards for lengthy tenure in a state job, the state can limit personnel turnover with greater success.

In contrast, as discussed briefly with respect to high elected office,<sup>66</sup> some residence classifications denying nonresidents oppor-

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this proprietary interest theory remains to be seen. The Court emphasized in *Hicklin* that the Alaska statute under review "extends to employers who have no connection whatsoever with the State's oil and gas, perform no work on state land, have no contractual relationship with the State, and receive no payment from the State," *id.* 530, and held that the privileges and immunities clause prevents Alaska from requiring private employers to prefer State residents for, in the words of the statute, "all employment which is a result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes, unitization agreements or any renegotiation of any of the preceding to which the state is a party after July 7, 1972," ALAS. STAT. ANN. § 38.40.050(a) (1977). See also *Hicklin*, 437 U.S. at 531 n.15 (distinguishing *Heim* and *Crane* on the ground that the Court in those cases did not rule expressly on the privileges and immunities objection raised).

In *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978), the Court stated in dictum that "[n]o one would suggest" that the privileges and immunities clause requires states to allow nonresidents to run for public office. *Id.* 383. Moreover, the Court's indulgent attitude toward residence classifications for office-holding is evidenced by its summary affirmance of a decision that a seven-year durational residence requirement for governor comports with the equal protection clause. See *Chimento v. Stark*, 414 U.S. 802, *affg mem.* 353 F. Supp. 1211 (D.N.H. 1973) (three-judge court).

<sup>64</sup> See *State v. Wylie*, 516 P.2d 142, 149 & n.14 (Alas. Sup. Ct. 1973).

<sup>65</sup> See note 10 *supra*.

<sup>66</sup> See text accompanying note 38 *supra*.

tunities to serve or work for the state are necessary to promote the state's compelling end of maintaining its intended place in the federal system as a discrete political entity. More specifically, in order to carry out its traditional function of deciding autonomously which policies to pursue in its people's best interests, the state must limit to its residents, the class of persons who identify with it most closely, any public office or employment involving substantial discretion in making policy decisions that significantly affect the general welfare. Thus, at one end of the spectrum, the state legitimately may make state residence a qualification to run for governor or to be appointed to the state board of education. At the other end, the state may not validly make state residence a qualification to run for local dogcatcher or to be hired for the custodial staff in a state office building. Between these extremes, many close cases obviously will arise, and the Court would be expected to identify the end of the spectrum to which they are closest. In the course of deciding the range of opportunities for public office and employment that a state may deny to resident aliens, the Court in effect has begun this task.<sup>67</sup> For largely the reasons detailed by several Justices in dissent,<sup>68</sup> however, I am dubious that the Court's performance of this task has been satisfactory to date. In particular, although the Court may have been correct in *Foley v. Connelie*<sup>69</sup> and *Ambach v. Norwick*<sup>70</sup> in finding that state troopers and public school teachers exercise considerable discretion in making decisions that can seriously affect individuals,<sup>71</sup> I cannot agree with its con-

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<sup>67</sup> See *Ambach v. Norwick*, 99 S. Ct. 1589 (1979) (public school teacher); *Foley v. Connelie*, 435 U.S. 291 (1978) (state trooper); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (classified civil servant). The applicable test was stated in *Sugarman*: is the position one that calls upon the individual to "participate directly in the formulation, execution, or review of broad public policy"? 413 U.S. at 647. The Court in *Sugarman* seemed to assume that all elected positions meet this test. See *id.* As indicated in the text, I do not regard the elected status of a position as legitimating under the privileges and immunities clause a state's reserving the position for its own residents. Rather, the type of policymaking that the elected position entails is determinative.

<sup>68</sup> See *Ambach v. Norwick*, 99 S. Ct. 1589, 1597-1601 (1979) (Blackmun, J., dissenting); *Foley v. Connelie*, 435 U.S. 291, 302-07 (1978) (Marshall, J., dissenting); *id.* 307-12 (Stevens, J., dissenting). In particular, consider Justice Marshall's observation in *Foley* that "the phrase 'execution of broad public policy' in *Sugarman* cannot be read to mean simply the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature." 435 U.S. at 304.

<sup>69</sup> 435 U.S. 291 (1978).

<sup>70</sup> 99 S. Ct. 1589 (1979).

<sup>71</sup> See *Ambach v. Norwick*, 99 S. Ct. 1589, 1595 (1979):

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of



clusion that these occupations call for the type of broad policy decisions that only a full-fledged member of the body politic should be allowed to make.<sup>72</sup>

### C. Public Higher Education

In administering state-supported colleges, graduate schools, and professional schools, states ordinarily require nonresidents to pay considerably higher tuition than residents.<sup>73</sup> They also typically limit the number of places available to nonresidents.<sup>74</sup> As long as the tuition charged nonresidents does not exceed the costs of educating them, a residence classification for tuition purposes survives the rigorous scrutiny that, under my analysis, the privileges and immunities clause prescribes. Classifying by residence for admis-

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citizens in our society. . . . In shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students;

Foley v. Connelie, 435 U.S. 291, 298 (1978): "Clearly the exercise of police authority calls for a very high degree of judgment and discretion, the abuse or misuse of which can have serious impact on individuals."

<sup>72</sup> In dismissing an equal protection challenge to a New Jersey law requiring police to make their home in the city where they work, the court in *Krzewinski v. Kugler*, 338 F. Supp. 492 (D.N.J. 1972) (three-judge court), relied primarily upon a state interest other than one of the three mentioned above—specifically, the interest in ensuring community respect for and cooperation with law enforcement personnel. It accepted the view expressed in a presidential task force report that "local residence avoids the impression that the police come from the outside world to impose law and order on the poor and minority groups and also avoids the risk of police isolation from the needs, morals and customs of the community . . . ." *Id.* 500 (quoting THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE (1967)). Under the proposed privileges and immunities standard of review, it is dubious that this state interest peculiar to the municipal law enforcement context explains adequately the discrimination against out-of-staters effected by the New Jersey law, which has been repealed, and others like it, e.g., MASS. GEN. LAWS ANN. ch. 31, § 58 (1979). Although a municipal residence requirement may be helpful as a means of maintaining healthy relations between the community and the persons charged with keeping its members within lawful bounds, it probably is not necessary to this end. Greater care and sophistication in recruiting, training, and supervising police would appear to be an equally or more effective means of securing the community's confidence and good will. Finally, for essentially the reasons set forth in note 47 *supra*, the fact that laws classifying by municipal residence disadvantage some state residents along with all out-of-staters does not preclude their invalidation under the privileges and immunities clause. See *Fecheimer v. Louisville*, 84 Ky. 306, 2 S.W. 65 (1886); *State v. Nolan*, 108 Minn. 170, 122 N.W. 255 (1909). But see R. HOWELL, *supra* note 6, at 45-47.

<sup>73</sup> See Bornstein, *Residency Laws and the College Student*, 1 J.L. & ED. 349, 350-56 (1972); Clarke, *Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education Under the Interstate Privileges and Immunities Clause*, 50 NEB. L. REV. 31 (1971).

<sup>74</sup> See Bornstein, *supra* note 73, at 351; Knox, *supra* note 10, at 1.

sions purposes, however, fails to satisfy this elevated standard of review.<sup>75</sup>

A practice of charging nonresident students for all or most of the costs of educating them while asking resident students to pay relatively little or nothing for their education is valid due to a combination of factors. First, although the objective served by this practice—the fair distribution of the costs of funding public higher education in the state—probably is not critical to the general welfare, it is no less than significant to the people's well-being. Second and less obviously, the relationship between this practice and the objective that it serves is a necessary one. When the state requires nonresident but not resident students to compensate the state's taxpayers fully or in large part for the costs of their education, it takes into account as precisely as possible the disparate contributions made over time to the state's treasury by resident students and their parents, on the one hand, and by nonresident students and their parents, on the other.<sup>76</sup> Thus, although most, if not all, nonresident students no doubt pay some taxes to the state during their years at the state school, and many nonresident students' parents may have occasion to pay some taxes to the state as well, resident students and their parents typically pay far more. Unlike nonresident students, resident students—personally and through their parents—generally have paid, are paying, and will continue to pay taxes to the state for owning property, earning income, and consuming goods and services within it. Furthermore, although the assumption that resident students' contributions to the state treasury differ dramatically from those of nonresident students obviously is imperfect, the classification that it helps explain is as precise as possible in light of the impossibility of predicting future contributions with any degree of exactness.

The unconstitutionality of nonresident admissions quotas derives from their less-than-necessary correlation to either of the two goals that they are designed to serve: protecting the fiscal integrity of a system that offers the state's residents tuition-free or low-cost

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<sup>75</sup> The Court's activities in this area include two summary affirmances of decisions upholding durational residence requirements for lower tuition, *Sturgis v. Washington*, 414 U.S. 1057, *aff'g mem.* 368 F. Supp. 38 (W.D. Wash. 1973) (three-judge court); *Starns v. Malkerson*, 401 U.S. 985 (1971), *aff'g mem.* 326 F. Supp. 234 (D. Minn. 1970) (three-judge court), and an invalidation on due process grounds of a state law precluding persons classified as nonresidents at the time of admission to the state university from establishing resident status for tuition purposes during their years at the university, *Vlandis v. Kline*, 412 U.S. 441 (1973).

<sup>76</sup> See *Sturgis v. Washington*, 368 F. Supp. 38, 40-41 (W.D. Wash.) (three-judge court), *aff'd mem.*, 414 U.S. 1057 (1973); *Clarke v. Redeker*, 259 F. Supp. 117, 123 & n.6 (S.D. Iowa 1966) (three-judge court).

higher education,<sup>77</sup> and limiting for purposes of educational quality the size of the state's institutions of higher learning.<sup>78</sup> First, if, as argued above, the state legitimately may charge nonresidents for the costs of educating them, it should not need a nonresident admissions quota to keep the costs of higher education in the state within feasible bounds. The state of course may find it more expensive to offer residents tuition-free or low-cost higher education without a nonresident quota than with one. In order to accommodate a larger student body without sacrificing institutional quality, the state may need, for example, to add faculty and to expand its schools' physical facilities; and as the state invests in these improvements, the cost per pupil may well rise.<sup>79</sup> With nonresident students being subject to tuition fees equal to the costs of educating them, however, the state almost certainly will not find it so much more expensive that the costs of operating without a quota become insuperable.

Second, the state's option of assessing nonresidents their fair share of its education bill also makes a nonresident admissions quota unnecessary for preserving for state residents the advantages of learning in a relatively small, high quality institution. If existing state schools are inadequate to serve this goal, this option facilitates the state's funding of additional schools. It keeps any resulting rise in cost per pupil within feasible bounds. The fact that the state may not be able to educate as many residents in a particular, existing institution as it did previously is constitutionally inconsequential, because the state has no material interest in educating its residents in a specific school. Instead, its only substantial interest in this regard is in providing its residents with the type of benefits conferred by the small, quality institution that it esteems.

#### D. *Basic Necessities*

States generally allocate welfare and medical assistance benefits only to their own residents.<sup>80</sup> In doing so, they conform to the strictures of the proposed privileges and immunities test because they serve as well as possible a goal significant to their citizens' well-being—the equitable distribution of the costs of alleviating poverty

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<sup>77</sup> See Bornstein, *supra* note 73, at 350-51.

<sup>78</sup> Cf. Clarke, *supra* note 73, at 47 (acknowledging special need for admissions preference for residents in schools "of national excellence or other attractiveness").

<sup>79</sup> For a brief discussion of the concepts relevant to a formal economic analysis of this possibility, see P. SAMUELSON, *ECONOMICS* 465-71 (10th ed. 1976).

<sup>80</sup> *E.g.*, ILL. ANN. STAT. ch. 23, § 6-1.1 (Smith-Hurd Supp. 1979); MICH. COMP. LAWS § 400.55(a) (1976).

in the state.<sup>81</sup> Although indigent residents who qualify for public assistance may not at present contribute materially more in taxes to the state than do indigent nonresidents, the former may have contributed materially more in the past, and the hope is that public assistance at this time will enable them to become more productive and contribute materially more in the future. Further, although the premise that indigent residents ultimately compensate the state's taxpayers much more adequately than do indigent nonresidents plainly is inexact, the classification that it supports is as precise as the state's rather open-ended goal permits.

### E. Access to Courts

By statute or common law, courts in various states are authorized to treat a plaintiff's residence outside of the forum state as a basis for dismissing his or her suit against a nonresident or a foreign corporation over whom the court has acquired personal jurisdiction.<sup>82</sup> In addition, some states have long-arm statutes that may be invoked by resident, but not nonresident, plaintiffs in order to sue nonresidents or foreign corporations in the legislating state's courts with regard to acts performed or to be performed in the state.<sup>83</sup> Disadvantaging nonresidents in these ways is explained by the state's interest in protecting local plaintiffs from the ill effects of crowded dockets.<sup>84</sup> Under the approach to the privileges and immunities clause suggested in this Article, these residence classifications should be struck down because they are not necessary means to this end.<sup>85</sup> Very simply, although denying nonresidents equal access to courts is a rational tactic to safeguard resident plaintiffs from harmful delay, the state is obliged by the privileges and immunities clause to opt for a less drastic alternative, such as supplementing its judicial

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<sup>81</sup> In *Shapiro v. Thompson*, 394 U.S. 618 (1969), and *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974), the Court struck down on equal protection grounds durational residence requirements for state welfare and free nonemergency medical care, respectively. In both cases, however, the Court appeared to concede the constitutionality of a pure residence requirement. See 415 U.S. at 267; 394 U.S. at 636-37 & nn.16-17.

<sup>82</sup> E.g., N.Y. BUS. CORP. LAW § 1314(b) (McKinney Supp. 1978); *Foss v. Richards*, 126 Me. 419, 139 A. 313 (1927).

<sup>83</sup> E.g., IOWA CODE ANN. § 617.3 (West Supp. 1979).

<sup>84</sup> See *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377, 387 (1929).

<sup>85</sup> Although the Court on various occasions has said that access to courts is a fundamental right under the privileges and immunities clause, e.g., *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 148 (1907); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1870), it has held that laws disadvantaging out-of-staters in this regard are constitutional as long as they discriminate on the basis of "residence" rather than "citizenship." See *Southern R.R. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929). On the artificiality of this distinction, see note 11 *supra*.

resources to accommodate nonresident plaintiffs on an equal basis with resident ones. It should be emphasized that the state legitimately may use a fee differential to take into account the fact that the state's residents finance its courts' operations through taxes and nonresidents generally do not. By tailoring nonresident plaintiffs' court fees as closely as possible to the burden that they impose on the state's judicial system, the state would disadvantage nonresidents in a manner necessary to achieve its significant goal of allocating equitably the costs of administering its courts.

#### F. *Recreational Licenses*

A majority of states require nonresidents to pay more than residents for licenses to hunt in the state.<sup>86</sup> In addition, some states either make nonresidents ineligible for licenses to hunt certain types of game<sup>87</sup> or impose a ceiling on the number of nonresidents who may be issued hunting licenses for particular species of wildlife.<sup>88</sup>

For reasons similar to ones already discussed,<sup>89</sup> fee differentials that achieve as precisely as possible a fair distribution of the costs to the state of game management and conservation meet the proposed privileges and immunities standard of review. They are necessary to serve an objective important to popular well-being. If, on the other hand, the higher fees charged nonresidents exceed the sum essential to compensate the state's taxpayers for payments made in nonresidents' behalf, the state's licensing scheme cannot withstand an attack under the privileges and immunities clause.<sup>90</sup> Schemes of the latter sort bear some nexus to the state's interest in conserving game for its residents' future hunting and perhaps sight-

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<sup>86</sup> See Brief for Appellees appendix 1a-5a, *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978).

<sup>87</sup> E.g., NEV. REV. STAT. §§ 502.130, 502.250 (1977) (antelope and elk); S.D. CODIFIED LAWS §§ 41-6-24, 41-8-22 (1977) (fur-bearing animals, with several exceptions).

<sup>88</sup> E.g., MONT. REV. CODES ANN. § 26-202.1(16)(f) (Supp. 1977) (number of big-game licenses issued to nonresidents not to exceed 17,000); N.D. CENT. CODE ANN. § 20.1-03-11(4) (1978) (number of deer licenses and permits issued to nonresidents not to exceed one percent of total number issued).

<sup>89</sup> See text accompanying notes 76 & 81 *supra*; text following note 87 *supra*.

<sup>90</sup> In *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978), the Court approved a fee differential for licenses to hunt elk without denying the correctness of the lower court's finding, *Montana Outfitters Action Group v. Fish & Game Comm'n*, 417 F. Supp. 1005, 1008 (D. Mont. 1976) (three-judge court), that the differential did not manifest an effort to achieve as nearly as possible a fair distribution of costs. See 436 U.S. at 390 ("There is, to be sure, a contrasting cost feature favorable to the resident, and, perhaps, the details and the figures might have been more precisely fixed and more closely related to basic costs to the State."). The Court's rationale for rejecting the appellants' privileges and immunities challenge to the licensing scheme was that, in its view, the right to hunt elk is not fundamental. *Id.* 388.

seeing enjoyment. The nexus, however, is not remotely a necessary one. Limits on the total number of resident and nonresident licenses issued and on the number of animals that a licensee may kill accomplish the state's goal with far greater precision.<sup>91</sup>

The constitutionality under the privileges and immunities clause of state prohibitions or ceilings on nonresident hunting turns on the relationship between such measures and two ends not critical but almost certainly significant to the happiness and prosperity of the people of the state—the conservation interest named above, and the objective of maximizing within the boundaries set by the latter interest the benefits that local residents currently derive from the wildlife in the state.<sup>92</sup> If the state can show that the prohibition or ceiling is part of a conservation effort carefully calculated to maintain the population of the hunted species, the discrimination survives. If it cannot, the law must fall.<sup>93</sup> A state's inability to document a past or prospective decline in wildlife population or its failure to regulate residents to the extent necessary for conservation purposes therefore would call for the invalidation of its law denying hunting privileges to all or some nonresidents.

#### IV. *Corfield* REVISITED

Brainerd Currie once observed that the process of construing the privileges and immunities clause "got off to a bad start"<sup>94</sup> in the early circuit court decision of *Corfield v. Coryell*.<sup>95</sup> In this Article, I have attempted to show that this "bad start" is one from which the Supreme Court has yet to recover. The Court has remained faithful to the irrelevant distinction drawn by *Corfield* between fundamental and nonfundamental privileges and immunities. Moreover, perhaps as a reaction to *Corfield's* extreme suggestion that all residence classifications affecting fundamental rights are invalid,

<sup>91</sup> See *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 403-04 (1978) (Brennan, J., dissenting).

<sup>92</sup> A commercial licensing scheme aimed at maximizing the economic benefits enjoyed by local residents from the wildlife in the state obviously raises serious commerce clause problems. See *Hughes v. Oklahoma*, 99 S. Ct. 1727 (1979); *Hicklin v. Orbeck*, 437 U.S. 518, 531-34 (1978); *Foster Packing Co. v. Haydel*, 278 U.S. 1 (1928).

<sup>93</sup> Under the Court's approach in *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371 (1978), see note 90 *supra*, the privileges and immunities clause does not even require that such prohibitions or ceilings be rationally related to lawful ends. See also *Kemp v. South Dakota*, 340 U.S. 923 (1951), *dismissing appeal from* 73 S.D. 458, 44 N.W.2d 214 (1950) (allowing to stand, for the want of a substantial federal question, a state court ruling that a law denying nonresidents the opportunity to hunt migratory waterfowl does not violate the privileges and immunities clause).

<sup>94</sup> B. CURRIE, *supra* note 11, at 460-61.

<sup>95</sup> 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

the Court before long embraced an unduly noninterventionist standard of review, a standard which persists today. I do not doubt that reasonable people—and Justices—may differ with my approach to the privileges and immunities clause. I am hopeful, however, that at a minimum I have succeeded in establishing that the time for the Court to step back and take a fresh look at the clause is long overdue.