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The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights

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> ble pretenses must be found for removing or hoodwinking, one after another, those sentries who are posted by the constitution of a free country for warning the people of their danger.[59]

In *KQED,* the Court is a constitutional sentry fallen asleep. It has failed to protect meaningful access to publically supported penological facilities and, presumably, to "all other public facilities such as hospitals and mental institutions."[60]

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The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights

In this note, the author examines the continuing debate over the role of the judiciary in reviewing state legislative acts and indicates the continued reluctance of the Supreme Court of the United States to expand the content of rights protected under the privileges and immunities clause of article IV and the fourteenth amendment. The author concludes that the present refusal of the Court to impose its own value judgments over those of the state legislature is consistent with the purpose and past interpretation of the privileges and immunities clause, absent a conflict with other rights of the Constitution.

A Montana resident, who was licensed by the state as a hunting guide, and four nonresident hunters sued the Fish and Game Commission of Montana in federal district court[1] seeking declaratory and injunctive relief from a discriminatory licensing scheme. Under this scheme, nonresidents were charged between seven and one-half to twenty-five times more than residents for elk hunting privileges.[2] A three-judge district court, in a two to one decision, held that the licensing scheme as applied to nonresidents did not violate the Constitution on the grounds that the asserted right was not one that was

59. E. WALFORD, SPEECHES OF THOMAS LORD ERSKINE 336 (1870), *quoted in First Amendment Balance, supra* note 22, at 1424.

60. 98 S. Ct. at 2597.

1. Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005 (D. Mont. 1976).

2. MONT. REV. CODES ANN. §§ 26-202.1(4), (12), 26-230 (Supp. 1977) provide that a Montana resident can purchase a license solely for elk for $9, while a nonresident must purchase a license which entitles him to take one elk, one deer, one black bear, and game birds, and to fish with hook and line for a fee of $225. Under these statutes, a resident can enjoy all of the privileges granted to the nonresident under the combination license for only $30.

fundamental under the privileges and immunities clause of article IV.[3] In discussing the equal protection challenge, the district court also found that the right to hunt elk for sport was not fundamental for equal protection purposes.[4] The Montana statute, therefore, failed to trigger a strict scrutiny analysis. The court upheld the statute on equal protection grounds as bearing a rational relationship to a legitimate state purpose.[5] The dissenting judge believed that the fee differential provision failed under the equal protection clause because the state could not justify the discrimination.[6] On certiorari, the Supreme Court of the United States *held,* affirmed: Access by nonresidents to recreational elk hunting in Montana was not protected by the privileges and immunities clause of the Constitution of the United States. The differentiation within the fee schedule between resident and nonresident hunters was rationally related to preservation of a finite resource and to the state's interest in regulating its wildlife, and thus did not violate the equal protection clause of the fourteenth amendment. *Baldwin v. Fish & Game Commission,* 436 U.S. 371 (1978).

The *Baldwin* decision reflects a basic philosophical difference among members of the Burger Court as to when and to what extent the privileges and immunities clause of article IV, section 2 permits the Supreme Court to review the acts of state legislatures which discriminate against nonresidents. The majority viewed the privileges and immunities clause as permitting judicial intervention into the political process of a state only when a right fundamental to the maintenance of the federal scheme is involved; that is, a privilege and immunity of national citizenship protected by article IV, section 2 of the Constitution.[7] Justice Brennan, in his dissenting opinion, saw the privileges and immunities clause as requiring judicial intervention into the political process of a state whenever a legislative act discriminates against a nonresident.[8]

Justice Blackmun, writing for the majority, cited *Paul v. Virginia,*[9] *Hague v. CIO,*[10] and *Austin v. New Hampshire*[11] in dem-

3. 417 F. Supp. at 1009. Article IV, section 2 of the Constitution provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

4. 417 F. Supp. at 1005.

5. *Id.*

6. *Id.* at 1010.

7. 436 U.S. at 383.

8. *Id.* at 400. Justices White and Marshall joined in the dissent.

9. 75 U.S. (8 Wall.) 168 (1868) (held only natural persons are entitled to protection of privileges and immunities clause).

10. 307 U.S. 496 (1939) (held ordinance prohibiting assembly and distribution of circulars invalid).

onstrating that the purpose of the privileges and immunities clause was to strengthen the union by preventing discrimination among citizens of different states.[12] By looking to specific cases, the Court determined that there were three areas in which the privileges and immunities clause had been applied to prevent discrimination against nonresidents. These areas included: the pursuit of commercial livelihood,[13] ownership and disposition of privately held property,[14] and access to the courts of the state.[15] The Court noted that the clause did not mean that a state was without power to discriminate at all between residents and nonresidents.[16] Addressing the issues of legislative purpose, the Court determined that the regulation of wildlife within a state's borders is a proper exercise of state power[17] as long as such regulation does not impede interstate commerce[18] or other proper exercise of federal power.[19] The Court concluded that the means employed by the Montana Legislature did not infringe upon rights fundamental to national unity and that the end, regulation of elk hunting, was a proper legislative purpose.[20]

An analysis of the history of the privileges and immunities clause indicates that the majority's interpretation of the clause as providing a list of protected privileges and immunities is consistent with precedent. A close reading of the cases also suggests that the

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11. 420 U.S. 656 (1975) (held New Hampshire Commuters Income Tax an invidious discrimination).

12. For a comparison of the majority view and the dissent by Justice Brennan, see text accompanying notes 63-73 *infra*.

13. *E.g.*, Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (aliens must be granted commercial fishing licenses); Toomer v. Witsell, 334 U.S. 385 (1948) (commercial shrimp fishing in marginal sea); Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870) (Maryland statute imposed discriminatory licensing fee on nonresident traders).

14. *E.g.*, Blake v. McClung, 172 U.S. 239 (1898) (resident creditors of corporation may not be given preference over nonresident creditor).

15. *E.g.*, Canadian N. Ry. v. Eggen, 252 U.S. 553 (1920) (nonresident has a year in which to bring action).

16. *E.g.*, Sosna v. Iowa, 419 U.S. 393 (1975) (state interest exists to require petitioner in divorce suit to reside in state one year prior to action).

17. *E.g.*, Geer v. Connecticut, 161 U.S. 519 (1896) (state may forbid killing of woodcock, ruffled grouse and quail for purposes of interstate shipment); McCready v. Virginia, 94 U.S. 391 (1876) (held statute prohibiting citizens of other states from planting oysters in Virginia river invalid).

18. *E.g.*, Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (Louisiana could not prohibit exportation of locally caught shrimp from which heads and shells had not been removed as it acted to obstruct interstate commerce); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (natural gas producers may not give first preference to local customers).

19. *E.g.*, Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) (Federal Enrollment and Licensing Act preempted Virginia statute prohibiting nonresidents' federally licensed vessels from fishing in Virginia); Kleppe v. New Mexico, 426 U.S. 529 (1976) (federal government may regulate wild horses and burros on federal land); Missouri v. Holland, 252 U.S. 416 (1920) (federal treatymaking power extends to migratory birds within state).

20. 436 U.S. at 390.

dissent's view of the clause as establishing a "nonresident" as a member of suspect classification or as requiring judicial scrutiny as a matter of due process[21] is contrary to historical concepts of federalism.[22]

The term "fundamental right" was first used in conjunction with the privileges and immunities clause in 1823 in *Corfield v. Coryell*.[23] Justice Brennan, dissenting in *Baldwin*, argued that *Corfield* should, in effect, be overruled.[24] Citing Professor Tribe's comment that Justice Washington was attempting to "import the natural rights doctrine into the Constitution by way of the privileges and immunities clause of article IV,"[25] Justice Brennan argued that the fundamental rights concept, in terms of the privileges and immunities clause, was synonymous with a natural rights theory. Because modern constitutional law no longer views the natural rights theory as giving content to protected rights, Justice Brennan believes "the time has come to confirm explicitly that . . . an inquiry into whether a given right is 'fundamental' has no place in our analysis of whether a State's discrimination against nonresidents . . . violates the Clause."[26]

But Justice Washington did not read the theory of natural rights into the Constitution. As Professor Tribe admits, the theory had always been present.[27] In *Corfield*, Justice Washington simply

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21. *Id.* at 400 (Brennan, J., dissenting) (scrutiny triggered because nonresidents not represented in legislative halls of the discriminating state).

22. For a definition of federalism, see Diamond, *Commentaries on the Federalist*, 86 YALE L. J. 1273 (1977).

23. 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit Justice) (noncitizens have no right to gather shellfish in New Jersey waters). Justice Washington identified the following as "fundamental rights" guaranteed by the privileges and immunities clause:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; . . . to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised.

Id. at 552.

24. 436 U.S. at 402.

25. *Id.* at 396 (citing L. TRIBE, AMERICAN CONSTITUTIONAL LAW 405-06 (1978)).

26. *Id.* at 402.

27. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 427 (1978).

> The notion that governmental authority has implied limits which preserve private autonomy predates the establishment of the American republic. During the 17th and 18th centuries, there evolved an American tradition of "natural law," postulating that "certain principles of right and justice . . . are entitled to prevail of their own intrinsic excellence." . . . Just as each of the three branches of the federal government was bound to remain within its proper jurisdiction, so

defined those privileges and immunities, those "natural rights," which the framers had assumed to be implicit in the Constitution as a social contract.

The majority in *Baldwin* also defined the phrase "privileges and immunities." As Justice Blackmun noted, both decisions used the concept of "fundamental" in the same sense, that of a basic right.[28] Thus, while the Court in *Corfield* had relied on a historical definition of natural rights, the Court in *Baldwin* relied on history in terms of constitutional interpretation both before and after adoption of the fourteenth amendment. The latter approach is consistent with Justice Washington's interpretation of the privileges and immunities clause, an interpretation which has been almost uniformly accepted to the present day.[29]

The adoption of the fourteenth amendment in 1868 brought hope that the privileges or immunities provision in section 1 of that amendment[30] would provide protection for rights not specifically listed in the Constitution or considered fundamental to national unity under the *Corfield* definition of the privileges and immunities clause.[31] That hope was dashed by the Court's decision in the

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> the state or federal government as a whole had no power to act outside its rightful jurisdiction to intrude upon the "natural rights" reserved to the people . . . .

Id. (footnotes and quotations omitted).

28. 436 U.S. at 387.

29. The one right not listed by Justice Washington, but now considered by the Court to be fundamental, is the right to privacy. *See* Doe v. Bolton, 410 U.S. 179, 210-11 (1973) (Douglas, J., dissenting) (right to privacy encompasses woman's decision whether to terminate pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy protects decision whether to bear or beget a child). *See generally* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

The right to travel was suggested by Justice Washington in *Corfield*. *See* note 23 *supra*. *See also* Dunn v. Blumstein, 405 U.S. 330, 338 (1972) (durational residence requirement for voting directly impinges upon exercise of constitutional right to travel); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (residency requirements inhibit welfare recipient's right to travel); United States v. Guest, 383 U.S. 745, 758 (1966) (freedom to travel throughout the United States recognized as a basic right under the Constitution); Edwards v. California, 314 U.S. 160, 165 (1941) (statute struck down as impermissible burden on interstate travel of indigent persons).

30. U.S. CONST. amend. XIV, § 1 which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

31. *See* Live-Stock Dealers' and Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co., 15 F. Cas. 649, 652 (C.C.D. La. 1870) (No. 8,408) (Bradley, Circuit Justice):

> The new prohibition that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" is not

Slaughter-House Cases.[32] Fearing that the fourteenth amendment was a threat to state sovereignty, Justice Miller found that the privileges and immunities clause "did not create those rights, which are called privileges and immunities of citizens of the States. It threw around them . . . no security for the citizen of the State in which they were claimed or exercised."[33] The effect of the *Slaughter-House* decision was to establish that the fundamental rights as defined by the *Corfield* interpretation of the privileges and immunities clause were rights of federal citizenship.[34] It also served to merge the "privileges or immunities" of the fourteenth amendment with the privileges and immunities language of article IV, section 2.[35]

This confusion over the relationship of the two constitutional provisions was initially of little significance in equal protection analysis. Equal protection challenges arise when the government attempts to classify certain persons in a manner different from those similarly situated. Traditionally, the Court has analyzed equal protection challenges by determining whether the classification provided by the contested statute is reasonably related to a legislative purpose of promoting the general good.[36] Consideration of whether a right was fundamental often played no part in its analysis. The definition of "fundamental rights," however, took on new importance in the 1960's when the Warren Court introduced the two-tiered standard of strict scrutiny into equal protection analysis.

Under the strict scrutiny analysis, the Court first determines whether a "suspect" classification or a "fundamental right" or "interest" is involved. If so, then strict scrutiny is called for and the

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identical with the clause in the Constitution which declared that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states." It embraces much more.

32. 83 U.S. (16 Wall.) 36 (1873).

33. *Id.* at 77; *see id.* at 78 for a statement of Justice Miller's concern for state sovereignty.

34. *See* Hague v. CIO, 307 U.S. 496, 510 (1939). The first sentence of the amendment settled the old controversy as to citizenship by providing that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside." Thenceforward citizenship of the United States became primary and citizenship of a state became secondary.

35. 435 U.S. at 330 (relationship between the privileges and immunities clauses of article IV and the fourteenth amendment "less than" clear).

36. *See, e.g.*, Morey v. Doud, 354 U.S. 457 (1957) (affording continuing protection to public is a reasonable legislative purpose) (overruled by City of New Orleans v. Dukes, 427 U.S. 297 (1976)); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (legislature may have had reasonable purpose in discrimination between opticians and seller of ready-to-wear glasses). For cases stating that a strong presumption of constitutionality attaches to state statutes, see, *e.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 60-62 (1973) (Stewart, J., concurring); McGowan v. Maryland, 366 U.S. 420, 424-26 (1961); United States v. Des Moines Nav. & Ry., 142 U.S. 510, 544-45 (1892); Powell v. Pennsylvania, 127 U.S. 678, 684-85 (1888).

state must show a substantial and compelling reason for treating individuals differently. If the Court determines that neither a "suspect" classification nor a "fundamental right" or "interest" is involved, then the state must show a rational relationship to a legitimate legislative purpose.[37]

The case of *Shapiro v. Thompson*[38] is considered to be a classic example of the fundamental rights strand of strict scrutiny analysis. In *Shapiro,* the Court determined that a state statute which required a period of residency before one could become eligible for welfare benefits restricted the exercise of the right to travel.[39] The strict scrutiny standard was applied due to the involvement of a fundamental right. The Court could find no compelling state interest justifying the residency requirement and thus held the statute to be an invidious discrimination against nonresidents.[40] In his dissent, Justice Harlan disapproved of both the compelling governmental interest test and, in particular, of the fundamental rights strand of this test. He feared that because virtually every state statute affects important rights, any challenge under equal protection would be given strict scrutiny.[41] This fear was based upon his conviction that the judiciary should neither impose its beliefs onto the Constitution,[42] nor inject itself into the political process by unnecessarily reviewing the acts of the state legislatures.[43]

Justice Harlan's fears appeared to be justified when the Court subsequently applied a compelling state interest test in *Dunn v. Blumstein.*[44] By finding that residency requirements for voting impinged upon the fundamental right to travel, the Court apparently

37. For discussions of the Court's attempts to develop equal protection analyses, see Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death,* 11 SUFFOLK L. REV. 61 (1976); Gunther, *The Supreme Court, 1971—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection,* 86 HARV. L. REV. 1 (1972); Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round At Last?,"* 1972 WASH. UNIV. L.Q. 405; Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 197 (1976); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975); *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065 (1969); Comment, *Fundamental Personal Rights: Another Approach to Equal Protection,* 40 U. CHI. L. REV. 807 (1973).

38. 394 U.S. 618 (1969).

39. *Id.* at 629-31.

40. *Id.* at 638.

41. *Id.* at 661 (Harlan, J., dissenting).

42. "I know of nothing which entitles this Court to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test." *Id.* at 662.

43. *Id.* at 666-76.

44. 405 U.S. 330 (1972); *e.g.,* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Pope v. Williams, 193 U.S. 621 (1904). *But see* McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Carrington v. Rash, 380 U.S. 89 (1965).

limited the ability of a state to legislate on the subject of election franchise.[45] However, the fear that the compelling state interest test would "swallow the standard equal protection rule"[46] was assuaged by the Court in *San Antonio School District v. Rodriguez,*[47] wherein it was held that education was not a fundamental right. Although the Court noted that education was of "undisputed importance,"[48] the Court chose to discredit the "interest" strand of the strict scrutiny test and to define fundamental right solely as one provided for in the Constitution.[49]

Two years after the *Rodriguez* decision, a New Hampshire commuters income tax was challenged under the privileges and immunities and equal protection clauses of the constitutions of New Hampshire and the United States. In *Austin v. New Hampshire,*[50] the court found that the statute violated the privileges and immunities clause of article IV, section 2, and should be subjected to more than a minimum scrutiny analysis.[51] Instead of basing its decision on the concept of rights fundamental to the maintenance of a federal scheme, the Court determined that the privileges and immunities clause created a "suspect" classification—nonresidents.[52] Applying a "middle level" of scrutiny, the Court concluded that the tax was invalid under the privileges and immunities clause and never reached the equal protection issue. The Burger Court originally applied this sliding scale or "newer equal protection" analysis[53] to fourteenth amendment challenges. Under this standard, the Court will apply a "middle level" of scrutiny even though there is no suspect class or fundamental right involved. Certain classifications do not rise to the level of "suspect," but nevertheless require a higher level of scrutiny.[54] This newer standard requires that the

45. 405 U.S. at 338-39.

46. 394 U.S. at 661 (Harlan, J., dissenting).

47. 411 U.S. 1 (1973); *cf.* Pierce v. Society of Sisters, 268 U.S. 510 (1924) (Oregon law requiring compulsory attendance of children at public schools unconstitutional deprivation of parental right to direct education of child).

48. *Id.* at 35.

49. "[T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance . . . . Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34.

50. 420 U.S. 656 (1975).

51. *See* text accompanying notes 53-55 *infra.*

52. 420 U.S. at 662.

53. *See* Gunther, *supra* note 37, at 20-48.

54. For example, race is considered to be a suspect class because the individual cannot choose which race to belong to, he cannot change his condition, and race has traditionally carried a burden of stigma in many circumstances. Other classifications which warrant greater scrutiny but which do not rise to the level of "suspect," include sex, Craig v. Boren, 429 U.S. 190 (1976) (invalidating statute prohibiting sale of 3.2% beer to males under age 21

means used to carry out the challenged statute must not be merely rational but must serve the actual and articulated purposes of the statute.[55] The Court in *Austin* extended the use of this middle level of scrutiny to the privileges and immunities clause.

In *Baldwin*, the Court was again faced with an action brought directly under the privileges and immunities clause. The Court rejected the prior interpretation of the privileges and immunities clause articulated in *Austin* and reaffirmed Justice Washington's definition in *Corfield* of that clause in terms of rights fundamental to the maintenance of the Union.[56] Believing that the consideration of fundamental rights was the basis for the Court's decision in *Paul v. Virginia*[57] and in subsequent cases decided under the privileges and immunities clause, Justice Blackmun concluded that "[w]ith respect to such basic and essential activities, interference with which would frustrate the purposes of the formation of the Union, the States must treat residents and nonresidents without unnecessary distinctions."[58] Whether the phrase "basic and essential activities" was an attempt by the Court to provide a more inclusive definition of fundamental rights than that traditionally associated with the privileges and immunities clause will have to be determined by future courts.

There is no doubt, however, that the Court in *Baldwin* reaffirmed that the privileges and immunities clause was meant to protect the type of fundamental rights listed in *Corfield*.[59] Elk hunting for sport is not an activity involving livelihood, nor is access to Montana elk basic to the maintenance of the Union. The Court concluded that recreational elk hunting is not a fundamental right or activity of the type protected by the privileges and immunities clause of article IV, section 2.[60]

The Court also considered the equal protection challenge in

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and females under age 18); illegitimacy, Trimble v. Gordon, 430 U.S. 762 (1977) (invalidating illegitimacy clause in Illinois law governing intestate succession); and alienage, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (invalidating Civil Service Commission regulation barring resident aliens from employment in the federal competitive civil service). *But see* Mathews v. Diaz, 426 U.S. 67 (1976) (upholding alien's eligibility for participation in federal Medicare program after continuous residence in the United States for five year period and after admission for permanent residence).

55. *See* Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Schlesinger v. Ballard, 419 U.S. 498, 511 (1975) (Brennan, J., dissenting); McGinnis v. Royster, 410 U.S. 263 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

56. *See* note 23 *supra*.

57. 75 U.S. (8 Wall.) 168 (1868).

58. 436 U.S. at 387.

59. *Id.*

60. *Id.* at 388.

terms of its analysis of the privileges and immunities clause. Because the Court had determined that a fundamental right under article IV was not present, strict scrutiny and the compelling state interest test was not used. Justice Blackmun simply applied the traditional test of rational relationship to legislative purpose and found that "[t]he legislative choice was an economic means not unreasonably related to the preservation of a finite resource and a substantial regulatory interest of the State."[61]

Justice Brennan, writing for the dissent, never reached the issue of equal protection.[62] Instead, he found power to review the state action in the privileges and immunities clause. He relied upon *Toomer v. Witsell*[63] for the proposition that the role of the Court in *any* privileges and immunities challenge is to review actions of state legislatures to determine whether: "(1) the presence or activity of nonresidents is the source or cause of the problem or effect with which the State seeks to deal; and (2) the discrimination practiced against nonresidents bears a substantial relation to the problem they present."[64] Justice Brennan argued that the Constitution requires automatic judicial review of decisions of state legislatures which affect nonresidents: "[A]n inquiry into whether a given right is 'fundamental' has no place in our analysis of the privileges and immunities clause."[65] Case precedent, however, is consistent in requiring that a right fundamental to national unity be present before the Court is justified in applying a greater than minimum rationality test to actions of state legislatures challenged under the privileges and immunities clause.[66]

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61. *Id.* at 390. The Court listed the following as reasonable grounds for the adoption of a licensing differential for hunters: (1) nonresidents did not pay the taxes to support the production and maintenance of big game populations; (2) there was a great influx of nonresident hunters, many of whom did not know a deer from an elk; (3) group hunting by nonresidents threatened license "swapping"; (4) the elk supply was limited; (5) short-term visitors were more likely to commit game violations; and (6) hunting practices need supervision in order to prevent violations and illegal overkill. *Id.*

62. Because I find Montana's elk licensing scheme unconstitutional under the Privileges and Immunities Clause of Art. IV, § 2, I find it unnecessary to determine whether the scheme would pass equal protection scrutiny. In any event, where a State discriminates *solely* on the basis of noncitizenship or nonresidency in the State . . . it is my view that the Equal Protection Clause affords a discriminatee no greater protection than the Privileges and Immunities Clause.

436 U.S. at 406 n.8 (Brennan, J., dissenting).

63. 334 U.S. 386 (1948).

64. 436 U.S. at 402.

65. *Id.*

66. The fact that case law may bear but a tenuous relationship to a current decision is not by itself enough to invalidate an opinion. *See* E. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

There can be no authoritative interpretation of the Constitution. The Constitution in its general provisions embodies the conflicting ideals of the community.

Justice Brennan argued that the Court in *Paul v. Virginia*[67] and *Toomer v. Witsell*[68] interpreted the privileges and immunities clause as "prohibiting a State from unjustifiably discriminating against nonresidents"[69] and was not concerned with the question of fundamental rights.[70] The dissent interpreted the *Paul* and *Toomer* decisions as requiring a state legislature to justify to the federal government any act which treats nonresidents less favorably than residents. This interpretation, however, is not in accord with the decisions in *Paul* and *Toomer*.

The focus of the Court in *Paul* was on fundamental rights and whether these rights extended to the corporation.[71] The Court held that corporations were not entitled to the privileges and immunities guaranteed by the clause because corporations were only entitled to state rights; that is, corporations were merely legal entities whose existence was determined solely by the state of incorporation.[72] The Court held that the privileges and immunities clause extended only to natural persons, presumably on the theory that natural persons, unlike corporations, had made a compact with the federal government and, as a result, enjoy certain national rights which they carry into other states without fear of discrimination. One of these rights

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> Who is to say what these ideals mean in any definite way? Certainly not the framers . . . . Nor can it be the Court for the Court cannot bind itself in this manner; an appeal can always be made back to the Constitution . . . . [C]onstitutional interpretation cannot be as consistent as case-law development or the application of statutes. The development proceeds in shifts; occasionally there are abrupt changes in direction . . . . There will be some consistency, but it is not the consistency of case law or statute . . . . There is an affirmative recognition in a constitutional case that the problem is the connection between what is sought to be done and the ideals of the community . . . .
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> . . . The emphasis should be on the process. The contrast between logic and the actual legal method is a disservice to both. Legal reasonining has a logic of its own. Its structure fits it to give meaning to ambiguity and to test constantly whether the society has come to see new differences or similarities.

Id. at 58-60, 104.

67. 75 U.S. (8 Wall.) 168, 177-85 (1868).

68. 334 U.S. 385 (1948).

69. 436 U.S. at 397.

70. *Id.* at 397-98. All of the other cases Justice Brennan cited in his *Baldwin* dissent explicitly involved a right considered to be fundamental by the Court. In Austin v. New Hampshire, 420 U.S. 656, 661 (1975), the Court cited *Corfield* as evidence that " 'an exemption from higher taxes or impositions than are paid by other citizens of the state' " was one of the fundamental rights protected by the privileges and immunities clause. *But see* Chemung Canal Bank v. Lowery, 93 U.S. 72 (1876), wherein the Court failed to mention rights when discussing whether there was a justification for a state statute which tolled the statute of limitations on a cause of action against a defendant absent from the state only when the plaintiff was a state resident.

71. 75 U.S. (8 Wall.) at 177-85.

72. *Id.*

of national citizenship is the right to commercial livelihood. The *Paul* decision does not suggest, as Justice Brennan indicated, that "Justice Washington's view was seemingly discarded in *Paul* . . . and replaced by the view that the measure of the rights secured to nonresidents was the extent of the rights afforded by a State to its own citizens."[73]

Justice Brennan also read the majority's reliance on the concept of fundamental rights out of *Toomer*. He asserted: "Although the Court in *Toomer* did 'hold that commercial shrimping in the marginal sea, like other common callings, is within the privileges and immunities clause,' . . . its statement to this effect was conclusory and clearly secondary to its extensive analysis of whether South Carolina's discrimination against nonresidents was properly justified."[74] Justice Brennan found support for this interpretation in another section of the *Toomer* opinion:

> Like many other constitutional provisions, the privileges and immunities clause is not 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 this 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.[75]

Justice Brennan further claimed that since no fundamental interest was involved in *Toomer*, South Carolina had only to satisfy a rational basis test under the traditional equal protection standard.[76] Because the stricter scrutiny was applied, the standard under the privileges and immunities clause must have differed. He argued that the greater scrutiny was permissible because the "classification based on the fact of noncitizenship was constitutionally infirm."[77] Logically, this should create a suspect class and evoke the standard of strict scrutiny and the compelling state interest test. Justice Brennan, however, invoked the concept of the sliding scale or mid-

73. 436 U.S. at 397.

74. *Id.* at 401.

75. *Id.* at 399-400 (quoting 334 U.S. at 396) (footnote omitted and emphasis added by Justice Brennan). Justice Blackmun, however, would have placed the emphasis on the last sentence.

76. *Id.* at 400.

77. *Id.*

dle level scrutiny, not in terms of equal protection, but in terms of the privileges and immunities clause.[78]

Justice Brennan's analysis completely ignored the fact that the Court in *Toomer* applied a greater scrutiny not because of the fact of discrimination but because of the commercial interest involved in this discrimination. The Court was justified in extensively analyzing the act because of the fundamental right involved. Immediately preceding the section that Justice Brennan quoted from *Toomer,* the Court stated: "[I]t was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of *doing business* in State B on terms of *substantial* equality with the citizens of that State."[79] The Court in *Toomer* found that shrimping was subject to stricter judicial scrutiny not because it was shrimp fishing but because it was *commercial* shrimp fishing and involved a right to livelihood.[80] Justice Blackmun indicated that if there had been any indication that Montana elk were hunted commercially, then a greater scrutiny would have been called for in *Baldwin.*[81] The majority properly rejected Justice Brennan's theory that the privileges and immunities clause is not concerned with the concept of fundamental rights.

By so holding, the Court implicitly relied upon a belief that principles of federalism and state sovereignty bar a broad activist intervention on the part of the judiciary. Through its definition of privileges and immunities in terms of rights fundamental to the maintenance of a federal scheme, the Court in *Baldwin* attempted to limit the ability of the federal judiciary to impose its own value judgments onto a constitutional framework and thereby attempted to prevent federal interference with a state's political process.[82]

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78. *See id.* at 402, 406 n.8. For the suggestion that nonresidence would not rise to the level of a suspect class, see note 54 *supra.*

79. 334 U.S. at 396 (emphasis added).

80. *Id.* at 407 (Frankfurter, J., concurring) (reliance by the Court on the commerce clause in order to justify its invalidation of the legislative act).

81. 436 U.S. at 388.

82. In Hicklin v. Orbeck, 437 U.S. 518 (1978), decided soon after *Baldwin*, the Court held that an Alaska statute requiring residents be hired in preference to nonresidents was invalid under the privileges and immunities clause. In *Hicklin,* Justice Brennan, writing for a unanimous Court, adopted the rationale of his dissenting opinion in *Baldwin. Id.* at 523-31. While Justice Blackmun did not write a seperate opinion, it would seem that Justice Brennan's heavy reliance upon the commerce clause in the latter part of the opinion, and the involvement of the right to travel which is within the *Baldwin* definition of rights fundamental to the maintenance of a national scheme, allows *Hicklin* to be read as being consistent with the majority opinion in *Baldwin. Id.* at 531-34. Thus, it seems that a majority of the Court will permit judicial interference with the political processes of a state under the privileges and immunities clause, at least when there is a "mutually reinforcing" constitutional provision, such as the commerce clause. A broader reading would indicate that a constitutional provision which affirmatively grants the federal government authority over that of a state would

Thus, the privileges and immunities clause can be seen to retain importance to the extent that it protects rights not recognized as fundamental under the equal protection clause.[83] But for those who consider that the rights of nonresidents should be the same as those of residents, and that protection of those rights always requires more than the test of a rational relationship to a legitimate state purpose, the Court's decision may be viewed as rendering the privileges and immunities clause superfluous; if the clause protects only those rights found elsewhere in the Constitution, then those provisions of the Constitution would be sufficient to protect those rights.

It is doubtful that the Court will use all of the rights identified under the privileges and immunities clause as an integral part of future equal protection analysis. At least three factors suggest that for certain members of the Court, the privileges and immunities clause will have little appeal. First, the Court's implicit limitations on the definition of "basic and essential activities"[84] make it unlikely that the Court will be able to define further those activities so as to include more rights than those traditionally recognized as fundamental under *Corfield* or guaranteed elsewhere in the Constitution.

Second, the relationship between the privileges and immunities clause and the "privileges or immunities" language of the fourteenth amendment remains unsettled.[85] It is unlikely, however, that the Court could, in the future, successfully define that relationship in a way that would limit the application of the privileges and

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act to reinforce mutually a right fundamental to the maintenance of the federal scheme. *Id.* at 531-32. By looking only to previously interpreted constitutional provisions as a means of giving content to rights under the privileges and immunities clause, the Court has limited its ability to impose its own value judgments upon the state's political process.

83. Despite the theoretical implications of the *Baldwin* decision, the practical effect is arguably minimal. Ever since the Court's decision in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (privileges and immunities clause protects only the rights of federal citizenship), litigants have looked to other parts of the Constitution to protect their rights and have used the privileges and immunities clause only as a last resort. This has been true both before and after most of the Bill of Rights was incorporated into the fourteenth amendment. *See, e.g.*, Colgate v. Harvey, 296 U.S. 404 (1935) (overruled in Madden v. Kentucky, 309 U.S. 83 (1940)) (privileges and immunities clause provides immunity from tax imposed solely on dividends and interest earned outside of state); West v. Louisiana, 194 U.S. 258 (1904) (implicitly holding the sixth amendment right to confront witnesses not to be a privilege or immunity); *In re* Kemmler, 136 U.S. 436 (1890) (privileges and immunities clause did not protect against cruel and unusual punishment); Walker v. Sauvinet, 92 U.S. 90 (1875) (privileges and immunities clause not violated by lack of trial by jury in state civil cases); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875) (right to vote in state election not privilege or immunity of United States citizenship—women constitutionally denied suffrage).

84. 436 U.S. at 387.

85. *See* note 35 *supra*.

immunities clause in equal protection analysis. With the adoption of the middle level scrutiny in equal protection analysis, it is more likely that the two provisions will continue to be confused; even if a fundamental right is not found under a privileges and immunities analysis, greater scrutiny might be allowed in an equal protection analysis on the basis of classification.

Finally, under the Court's definition of the privileges and immunities clause in *Baldwin*, the rights of individuals will continue to be determined in conjunction with the rights of states. States will be allowed to discriminate against nonresidents as long as such discrimination results from a proper exercise of state powers.

Even so, to the extent that the principles of federalism are inherent in the structure of the Constitution and govern its interpretation, the Court's decision in *Baldwin* should be welcomed as a recognition that the privileges and immunities clause provides more than lip service to the protection of needed constitutional rights without allowing an aggessive judiciary to impose its value judgments upon the Constitution or to interfere unnecessarily with the political processes of state government. Thus, the *Baldwin* decision acts to reaffirm the vitality of a provision of the Constitution important to judicial notions of federalism without unnecessarily infringing upon principles of state sovereignty.

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Baird v. Bellotti: Abortion—The Minor's Right to Decide

In the recent case of Baird v. Bellotti, *a Massachusetts federal district court struck down state legislation providing for judicial and parental intrusion into a minor's informed decision to abort. The policies behind the statute and reasoning offered by the court in its invalidation are examined below in light of relevant case law and constitutional strictures. The author's exploration of the present boundaries of minors' rights in the abortion choice concludes with approval of the continued protection of these rights by the court in* Baird.

A minor, like an adult, has a constitutional right to be free of unwarranted state intrusion into her decisionmaking in matters concerning childbearing.[1] The scope of this freedom in the context

1. Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Planned Parenthood v. Danforth, 428 U.S. 52 (1976). *See generally* Letwin, *After* Goss v. Lopez: *Student Status as a Suspect Classification?*, 29 STAN. L. REV. 627, 631-35 (1977); *see also* Rehnquist, *The Adver-*