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Commerce Clause; Privileges and Immunities Clause; State Hiring; Discrimination Against Nonresidents; Hicklin v. Orbeck

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CONSTITUTIONAL LAW

Commerce Clause • Privileges and Immunities Clause • State Hiring Discrimination Against Nonresidents

Hicklin v. Orbeck, 98 S. Ct. 2482 (1978)

IN *Hicklin v. Orbeck*,¹ the United States Supreme Court unanimously held² that Alaska's statute entitled "Local Hire Under State Leases"³ violates the Constitution due to its discriminatory effect on nonresidents. Basing its decision on the Privileges and Immunities Clause,⁴ the Court found that there was insufficient justification for the extensive discrimination against nonresidents required by the Act because the unemployment problem to be alleviated by the legislation was not due to a great influx of nonresident jobseekers. Rather, the Court attributed the problem to the fact that a large percentage of the unemployed in Alaska lack sufficient education and job training to obtain employment or live too far from employment opportunities.

The Alaska Hire statute clearly sets forth the policy reason behind the enactment of the legislation.⁵ The interest to be furthered is development of Alaska's human resources at the same time the natural resources are being exploited by increasing employment opportunities for state residents. The state legislature, pursuant to its investigations, found that Alaska had an unusually high unemployment rate which would persist unless the government actively intervened to provide employment opportunities for residents.⁶ It was for this reason that the statute mandated that Alaska residents be hired

¹ 98 S. Ct. 2482 (1978).

² Justice Brennan delivered the opinion of the Court.

³ ALASKA STAT. ANN. § 38.40.10 to 38.40.90 (1977).

⁴ U.S. CONST. art. IV § 2. Section 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

⁵ ALASKA STAT. ANN. § 38.40.10 (1977). The statute states: "State policy. It is the policy of the state in the development of its natural resources to seek and accomplish the development of human resources by providing maximum employment opportunities for its residents in conjunction with natural resource management."

⁶ ALASKA STAT. ANN. § 38.40.20 (1977). The statute explains:

Legislative findings. The legislature finds that Alaska has a uniquely high unemployment record among the states due both to cultural and geographical migration barriers which record has existed for many years and which experts have attested will persist without drastic governmental intervention. The legislature further finds that employment opportunities which from time to time occur in the areas of the state suffering from the largest chronic unemployment problem are nonrecurring and usually relate to the exploitation of the state's natural resources and that the state has an obligation to assure that the benefits of this employment enure to the residents of the state.

in preference to nonresidents whenever the state was a party to an oil or gas lease.⁷

Appellants were five nonresidents of the State of Alaska, none of whom could satisfy the residency requirements under the Alaska Hire statute.⁸ The Court found appellants' continuing interest in restraining enforcement of the Alaska Hire statute in favor of Alaska residents prevented the case from being moot. Even though the Alaska Supreme Court⁹ had struck down the one year residency requirement found in the statute on the basis of the Equal Protection Clauses of the United States Constitution¹⁰ and the Alaska Constitution,¹¹ appellants still could not meet the statutory qualifications.

⁷ ALASKA STAT. ANN. § 38.40.30 (1977). The statute provides:

Resident employment. (a) In order to create, protect and preserve the right of Alaska residents to employment, the commissioner of natural resources shall incorporate into all oil and gas leases, easements 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, provisions requiring the lessee to comply with applicable laws and regulations with regard to the employment of Alaska residents, a provision requiring the employment of qualified Alaska residents, a provision prohibiting discrimination against Alaska residents, and, when in the determination of the commissioner of natural resources it is practicable, a provision requiring compliance with the Alaska Plan, in accordance with the provisions of this chapter. (b) All employment falling within the purview of § 50 of this chapter shall be filled by Alaska residents if they are qualified and available. The commissioner of labor, whose decision is final as to residency, shall determine the resident status of individuals for purposes of this chapter and issue a certificate to persons determined to be residents of the state. The commissioner may issue exemptions from this chapter to the employer for those individuals he shall determine to be administrative, management, or professional employees of the employer. (c) In implementing this chapter the commissioner of labor may require compliance with the terms and conditions of the Alaska Plan as approved by the United States Secretary of Labor to the extent feasible. (d) The Department of Labor shall adopt regulations necessary to implement the provisions of this chapter.

⁸ ALASKA STAT. ANN. § 38.40.90 (1977). The statute provides:

Definitions. In this chapter (1) "resident" means a person who
 (A) except for brief intervals, military service, attendance at an educational or training institution, or for absences for good cause, is physically present in the state for a period of one year immediately before the time his status is determined;
 (B) maintains a place of residence in the state;
 (C) has established residency for voting purposes in the state;
 (D) has not, within the period of required residency, claimed residency in another state;
 and
 (E) shows by all attending circumstances that his intent is to make Alaska his permanent residence;
 (2) "qualified" means capable, through education, training, or experience, of performing the duties and satisfying the usual terms and conditions of the employment, if those duties, terms and conditions meet the reasonable standards of the industry as required of other employees performing the same type of work in the industry.
 (3) "willful noncompliance" means intentionally, knowingly, or purposely, without justifiable excuse, not giving preference to qualified Alaska residents in employment covered by this chapter;
 (4) "noncompliance" means not giving preference to qualified Alaska residents in employment covered by this chapter.

⁹ *Hicklin v. Orbeck*, 565 P.2d 159 (Alas. 1977).

¹⁰ U.S. CONST. amend. XIV.

¹¹ ALASKA CONST. art. I § 1.

The case was initially brought in the Superior Court, Third Judicial District of Alaska. By consent of the parties, a motion for a preliminary injunction and also the merits of the case were consolidated and submitted on affidavits, depositions and memoranda of law with no oral testimony taken.¹² Judgment was entered for the defendants and plaintiffs appealed to the Alaska Supreme Court. On appeal, the Alaska Supreme Court addressed itself to appellants' equal protection argument by applying the strict scrutiny test,¹³ reasoning that durational residency requirements "penalize those who have exercised their fundamental right of interstate migration."¹⁴ The court held the one year durational residency requirement was not the least drastic means by which the state could obtain its goal of reducing unemployment and stabilizing the Alaska economy.¹⁵ It further stated that durational residency requirements are not unconstitutional per se. However, the court found this particular statute swept too broadly in giving Alaska residents absolute preference whether or not they were currently unemployed. The correlation between the classification made in the statute and the goals

¹² 565 P.2d at 162.

¹³ Since equal protection provides the logistical support for a constitutionally based assault upon durational residence requirements, scrutiny of durational residency law must necessarily begin with an outline of the analyses the Supreme Court has used to resolve equal protection challenges. The standards currently used to evaluate allegations that a governmental classificatory system is constitutionally infirm—rational relation and strict scrutiny—were clearly delineated during the Warren Court era. The Burger Court has worked an as-yet-uncertain modification of this traditional two-tier approach. Under either Court's approach, however, determining which model applies in a particular case is crucial since the level of scrutiny used often makes the outcome inevitable. Under the rational relation test usually applied, the Court shows great deference to legislative judgments. The challenger has the burden of proving impermissibility. That burden often cannot be overcome since the state can defeat a challenge by merely showing that there is some rational basis for its classification and that the means chosen are appropriate to the legislative end sought. The Court rarely examines whether the purported ends are actually attained and frequently accepts any justification for the classificatory scheme adopted.

In contrast, under strict scrutiny, which is invoked only when a statute creates a "suspect classification" or encroaches upon a "fundamental right" the Court carefully examines legislative judgments. Strict scrutiny shifts the burden of proving constitutional validity, requiring the state to show strong justification—a "compelling" state interest—to sustain a suspect classificatory system or one that infringes fundamental rights. Proof that a legitimate state interest is promoted is not enough. Even a compelling state interest, however, will justify only a precisely drawn and "tailored" statute that is the "least drastic means" available to attain the legislative end: if the Court believes that the state has ignored other viable means to achieve its goals—means which impose less severe burdens upon constitutional rights—the state will be denied use of the more offensive method.

Note, 50 N.Y.U.L. REV. 622, 623-24 (1975). For a discussion of the Burger Court's modification of equal protection analysis, see Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Karst, *The Supreme Court, 1976 Term — Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977).

¹⁴ 565 P.2d at 162.

¹⁵ *Id.* at 165.

sought to be achieved by the legislature was not sufficiently strong to pass muster under the strict scrutiny test according to the Alaska Supreme Court.¹⁶

Upon addressing itself to appellants' Privileges and Immunities Clause argument, the majority of the Alaska Supreme Court¹⁷ based its decision on *McCready v. Virginia*.¹⁸ The Alaska Supreme Court adopted appellees' position when it held *McCready*¹⁹ set forth a natural resources exception to the Privileges and Immunities Clause of Article IV, Section 2. Therefore, preferential hiring of state residents to work on the pipeline and under oil and gas leases was seen as a justifiable economic measure. The two judges who dissented on this point²⁰ felt the statute had far broader application, extending to any refineries and distribution systems utilizing oil and gas obtained under Alaska leases,²¹ and the same rationale behind this legislation could be expanded in future legislation to all leases of state lands.²² Further, they felt that the *McCready* case was not appropriate precedent to apply to the case at bar as later opinions had distinguished and limited the *McCready* holding.²³ The dissenting judges would have declared the entire

¹⁶ See *id.*

¹⁷ Judges Connor, Erwin and Burke.

¹⁸ 94 U.S. 391 (1877).

¹⁹ *Id.*

²⁰ Chief Judge Boochever and Judge Rabinowicz.

²¹ ALASKA STAT. ANN. § 38.40.50. (1977). The statute states:
Applicability of Chapter.

(a) The provisions of this chapter apply to 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; however, the activity which generates the employment must take place inside the state and it must take place either on the property under the control of the person subject to this chapter or be directly related to activity taking place on the property under his control and the activity must be performed directly for the person subject to this chapter or his contractor or a subcontractor of his contractor or a supplier of his contractor or subcontractor.

²² See 565 P.2d at 173.

²³ See *Toomer v. Witsell*, 334 U.S. 385 (1948), where the Court distinguished *McCready* on its facts and stated at 402, "These considerations lead us to the conclusion that the *McCready* exception to the privileges and immunities clause, if such it be, should not be expanded to cover this case." (*emphasis added*). See also *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948); *Manchester v. Massachusetts*, 139 U.S. 240 (1891), wherein a unanimous Court indicated the rule in *McCready* might not apply to free swimming fish; *Kravitch, Free Swimming Fish*, 11 GA. B.J. 191 (1948); Note, 1949 WIS. L. REV. 181 (1949).

A recent line of cases dealing with fish under the Submerged Land Act, 43 U.S.C. § 1301-15 (1970), provide an interesting comparison to the privileges and immunities constitutional cases. See *Massachusetts v. Westcott*, 431 U.S. 322 (1977); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Massachusetts v. Westcott*, 344 N.E.2d 411 (Mass. Sup. Jud. Ct. 1976); Morrison, *The Right to Fish for Seacoast Products: Gibbons v. Ogden Resurrected*, 1977 SUP. CT. REV. 239 (1977); Note, 8 RUT.-CAM. L.J. 532 (1977).

statute unconstitutional under the Privileges and Immunities Clause because such a hiring practice is contra to the concept of federalism.²⁴

In reversing the Alaska Supreme Court on the privilege and immunities issue,²⁵ the United States Supreme Court adopted the position of the dissenting judges on the Alaska Supreme Court that the scope of the statute extends beyond employers connected with the natural resources of the state. The Court stated, "Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire, and the connection with the State's oil and gas with much of the covered activity is sufficiently attenuated so that it cannot justifiably be the basis for requiring private employers to discriminate against nonresidents."²⁶ Focusing on the scope of the statute,²⁷ the Court felt discriminatory hiring practices could extend to employers having no contractual relationship with the State of Alaska and those who would be receiving no monies from Alaska. Coverage under the Act was not limited to the extraction of oil and gas; the only limit of consequence was that "the activity which generates the employment must take place inside the state."²⁸ The Supreme Court felt the Act was an attempt by Alaska to force all businesses that would benefit by development of the state's oil and gas deposits to bias hiring in favor of Alaska residents. The Court rejected Appellees' argument that *McCready v. Virginia*²⁹ set forth an absolute exception to the Privileges and Immunities Clause guarantee to citizens.

The divergent interpretations expressed by the Alaska Supreme Court majority and by the United States Supreme Court regarding the meaning, scope and application to the Privileges and Immunities Clause of the *McCready* opinion have been a matter of disagreement since that case was decided in 1877. The uncertainty surrounding that case and the Privileges and Immunities Clause has been perpetuated because:

[T]hat clause is not one the contours of which have been previously shaped by the process of wear and tear of constant litigation and judicial interpretation over the years since 1789 Historically, it has been overshadowed by the appearance in 1868 of similar language in §1 of the fourteenth amendment, and by the continuing controversy

²⁴ See 565 P.2d at 173-74.

²⁵ The Supreme Court did not address appellants' fourteenth amendment equal protection argument.

²⁶ 98 S. Ct. at 2490.

²⁷ See note 21 *supra*.

²⁸ 98 S. Ct. at 2490.

²⁹ 94 U.S. 391.

and consequent litigation that attended that Amendment's enactment and its meaning and application.³⁰

At first, the Privileges and Immunities Clause was applied to those privileges and immunities deemed to be fundamental and inherent to free men.³¹ This broad application of the clause to all fundamental rights shared by free men was limited in *Paul v. Virginia*.³² The Court there said, "privileges and immunities secured to citizens of each State in the several States, . . . are those which are common to the citizens in the latter States under their Constitutions and laws by virtue of their being citizens."³³ The purpose of the clause is to preclude states from benefiting their own citizens and excluding citizens from other states from sharing those benefits.³⁴ Today, when the courts apply the privileges and Immunities Clause, they use the restricted view set forth in *Paul v. Virginia*³⁵ by emphasizing nationalism and comity.³⁶ Courts look for disparity of treatment between state citizens and noncitizens when a right deemed to be fundamental is involved.³⁷ If

³⁰ *Baldwin v. Fish and Game Comm'n*, 98 S. Ct. 1852, 1856 (1978) (Blackmun, J.).

³¹ Justice Washington, writing for the Court in *Corfield v. Coryell*, 6 F. Cas. 546, 551 (No. 3230) (C.C.E.D.Pa. 1825), stated, "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining those expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign."

³² 75 U.S. 168 (1869).

³³ *Id.* at 171.

³⁴ *Hague v. CIO*, 307 U.S. 496, 511 (1939). The Court stated,

As has been said prior to the adoption of the Fourteenth Amendment, there had been no constitutional definition of citizenship of the United States, or of the rights, privileges and immunities secured thereby or springing therefrom At one time it was thought that this section recognized a group of rights which, according to the jurisprudence of the day, were classed as "natural rights"; and that the purpose of the section was to create rights of citizens of the United States by guaranteeing the citizens of every State the recognition of this group of rights by every other State. Such was the view of Justice Washington.

While this description of the civil rights of the citizens of the States has been quoted with approval, it has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.

³⁵ 75 U.S. 168.

³⁶ See Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967), for a thorough discussion of the origin of this clause. Professor Antieau expresses the opinion that the current application of this clause by the courts is incorrect.

³⁷ There appears to be no common thread running through the cases which would provide a standard to determine whether a particular privilege or immunity is fundamental. The courts have used broad categories, e.g., pursue happiness, and enter into contracts, to characterize the basic privileges and immunities and then have asked whether a certain

there is discriminatory treatment practiced by a state against noncitizens, the scope of the clause encompasses any interest the court may find to be fundamental.³⁸

As with most other constitutional guarantees, the Privileges and Immunities Clause is not absolute and the states may distinguish among citizens and noncitizens so long as there is a valid and substantial reason for so doing.³⁹ Discriminatory acts prohibited by that clause and the other guarantees found in Article IV are those which polarize a state and give its citizens an advantage which infringes upon the nation as an entity.⁴⁰ Justice Brennan in *Hicklin* confirmed appellants' position that "the protection of the Clause is strongly supported by this Court's decisions holding violative of the Clause state discriminations against nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling within the State."⁴¹ The scope of the protection afforded by the Privileges and Immunities Clause is far reaching, as evidenced by recent cases which have dealt with such

privilege or immunity could be deemed fundamental in a particular fact setting Of the most commonly raised issues in recent years, the following have been held by the Courts to be privileges entitled to protection under the privileges and immunities clause: the right to own and sell property, to enter into contracts, to engage in business, to pursue happiness, to enjoy free ingress and egress, to have access to the courts, to have access to medical care (including abortions), to import and export property, to enjoy equal treatment with respect to taxes, to enjoy remedies similar to those enjoyed by resident creditors, and to rely on the statute of limitations on an equal basis with state residents. Cases specifically involving the term immunities usually involved discriminatory taxes against nonresidents; citizens of other states are entitled to immunity from such discriminatory taxes. It also has been held that the privileges and immunities clause does not provide protection from state discrimination against nonresidents regarding the right to sell liquor, to vote in state elections, to get a divorce, to receive dower, and to practice certain professions. These matters were held to be either not included within the privileges and immunities of the citizens of the various states or not sufficiently fundamental to be worthy of protection. Also excluded from coverage because not deemed privileges and immunities are political rights and quasi-political rights.

Knox, *Prospective Application of the Article IV Privileges and Immunities Clause of the United States Constitution*, 43 MO. L. REV. 1, 11-15 (1978). See also Currie & Schreter, *Unconstitutional Discrimination in the Conflicts of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960).

³⁸ The more essential or important any activity to the preservation and enjoyment of life, liberty, property, and the ability to earn a living, the more likely it will be included in the fundamental category due protection under Article IV, privileges and immunities It is apparent that the courts have been reluctant to define in advance those privileges and immunities which are essential or fundamental. The courts have preferred to approach the problem on a case-by-case basis and to determine incrementally, which activities are or are not protected by the clause. This approach does not provide advance notice to the states, but does allow the courts to adjust to changing norms of behavior, morality, and social and economic acceptability.

Knox, 43 MO. L. REV. at 15-16.

³⁹ See generally *Sosna v. Iowa*, 419 U.S. 393 (1975); *Kanapaux v. Ellis*, 419 U.S. 891 (1974); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Canadian Northern R. Co. v. Eggen*, 252 U.S. 553 (1920).

⁴⁰ See 98 S. Ct. 1852 (1978).

⁴¹ 98 S. Ct. at 2487.

subjects as gas and oil leases,⁴² wildlife,⁴³ medical care,⁴⁴ reciprocity statutes,⁴⁵ and state income tax.⁴⁶

Appellees' argument of a "natural resource exception" was based upon the unanimous view of the *McCready* Court set forth by Chief Justice Waite that, "the citizens of one State are not invested by this Clause of the Constitution with any interest in the common property of the citizens of another State."⁴⁷ This Court felt the ownership of property in a state, held in common by all the citizens of a particular state was "not a privilege and immunity of general citizenship but of special citizenship. It does not belong of right to the citizens of all free governments, but only to the citizens of Virginia, on account of the peculiar circumstances in which they are placed They own it not by virtue of citizenship merely, but of citizenship and domicile united; that is to say by virtue of citizenship confined to that particular locality."⁴⁸ Therefore, the Court reasoned, if a "state may grant to one of its citizens the exclusive use of a part of the common property, the conclusion would seem to follow, that it might by appropriate legislation confine the use of the whole to its own People alone."⁴⁹

This concept of state ownership of wildlife and other natural resources and the right to preserve such resources for their citizens alone based upon state sovereignty was applied by the Court during the late 1800's.⁵⁰ The ownership concept found in the Privileges and Immunities Clause which allows the states to exercise their power to regulate has been severely curtailed by the courts through the Commerce Clause.⁵¹

In the Articles of Confederation, the Commerce Clause and the Privileges and Immunities Clause were found together in the fourth article.⁵² The purpose of the fourth article was to unite the separate states into

⁴² *Hicklin v. Orbeck*, 98 S. Ct. 2482 (1978).

⁴³ *Baldwin v. Fish and Game Comm'n*, 98 S. Ct. 1852 (1978); *Commonwealth v. Westcott*, 344 N.E.2d 411 (1976).

⁴⁴ *Doe v. Bolton*, 410 U.S. 179 (1973).

⁴⁵ *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir. 1974).

⁴⁶ *Austin v. New Hampshire*, 420 U.S. 656 (1975).

⁴⁷ 94 U.S. at 392.

⁴⁸ *Id.* at 393.

⁴⁹ *Id.*

⁵⁰ See generally *Baldwin v. Fish and Game Comm'n*, 98 S. Ct. 1852 (1978).

⁵¹ *Id.* at 1861.

⁵² 98 S. Ct. at 2491 n.16 provides,

That article provided: "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce subject to the same duties,

a common marketplace and union instead of perpetuating the widespread practice of discrimination against citizens of other states.⁵³ Although, upon drafting the United States Constitution, the Commerce Clause was placed in Article I, Section 8, Clause 3 and the Privileges and Immunities Clause was placed in Article IV, Section 2, the application of the two has remained similar in purpose to the fourth article of the Articles of Confederation, *i.e.*, to "establish a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment,"⁵⁴ and to fashion a single nation. The close relationship between the two concepts is evidenced by the Court's opinion in *Hicklin*.⁵⁵ The Court addresses itself to the purpose of the Commerce Clause even though that argument was neither briefed nor raised by appellants. The Court stated, "*West*,⁵⁶ *Pennsylvania v. West Virginia*,⁵⁷ and *Foster Packing*⁵⁸ thus establish that the Commerce Clause circumscribes a State's ability to prefer its own citizens in the utilization of natural resources found within its borders, but destined for interstate commerce."⁵⁹

Since *Toomer v. Witsell*,⁶⁰ it has been recognized by the Court that to have a right to regulate preservation or exploitation of resources the state must have:

[a] substantial reason for discrimination beyond the mere fact that they are citizens of other states The inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relationship 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.⁶¹

impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them," *citing* 9 J. OF THE CONTINENTAL CONG. 908-909 (1906).

⁵³ *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975).

⁵⁴ *Id.* at 660.

⁵⁵ 98 S. Ct. at 2491.

⁵⁶ *West v. Kansas Natural Gas*, 221 U.S. 229 (1911). *See also* Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power 1910-1914 I*, 21 COLUM. L. REV. 737 (1921); Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power 1910-1914 II*, 22 COLUM. L. REV. 281 (1922).

⁵⁷ *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

⁵⁸ *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); *See Note*, 15 VA. L. REV. 155 (1928); *Note*, 3 U. OF CIN. L. REV. 64 (1929); *Note*, 14 CORNELL L.Q. 245 (1929); *Note*, 29 COLUM. L. REV. 355 (1929).

⁵⁹ 98 S. Ct. 2482.

⁶⁰ 334 U.S. 385 (1948). *See also Note*, 11 GA. B.J. 83 (1948); *Note*, 46 MICH. L. REV. 559 (1948).

⁶¹ 334 U.S. at 396.

Toomer is "the leading modern exposition of the limitations the Clause places on a State's power to bias employment opportunities in favor of its own residents."⁶²

It was upon the *Toomer* rationale that the United States Supreme Court disagreed with the holding of the Alaska Supreme Court in the *Hicklin* case. The Alaska court found the *McCready* case to set forth an absolute exception to the Privileges and Immunities Clause when natural resources owned by the state are involved. The Supreme Court, on the other hand, reaffirmed the *Toomer* standard as the appropriate test of a statute dealing with natural resources and stated that ownership of a resource in itself does not completely remove a law concerning that resource from the prohibition of the clause.⁶³

In *Baldwin v. Fish and Game Commission*,⁶⁴ a case decided in May, 1978, Justice Blackmun described the ownership theory espoused in such cases as *Corfield v. Coryell*,⁶⁵ *McCready v. Virginia*,⁶⁶ and *Geer v. Connecticut*⁶⁷ as having a remaining vitality,⁶⁸ but ownership today connotes the power states as sovereign entities possess to preserve and regulate the exploitation of an important resource.⁶⁹ Regulation is permissible even though a fundamental right is involved, as long as the regulation is reasonable and bears a substantial relationship to the goal to be achieved. Justice Brennan, on behalf of the Court in *Hicklin v. Orbeck*,⁷⁰ clarifies that statement by saying,

rather than placing a statute [regarding a natural resource] completely beyond the [Privileges and Immunities] Clause, a State's ownership of the property with which the statute is concerned is a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause.⁷¹

However, the Court also stated:

States may not compel the confinement of the benefits of their resources, even their wildlife, to their own people whenever such hoarding and confinement impedes interstate commerce Nor does a State's control over its resources preclude the proper exercise of

⁶² 98 S. Ct. 2488.

⁶³ *Id.* at 2489.

⁶⁴ 98 S. Ct. 1852 (1978).

⁶⁵ 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825).

⁶⁶ 94 U.S. 391 (1877).

⁶⁷ 161 U.S. 519 (1896).

⁶⁸ *See* 98 S. Ct. 1852.

⁶⁹ *See* *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977).

⁷⁰ 98 S. Ct. 2482.

⁷¹ *Id.* at 2490.

federal power And a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a non-resident's right to pursue a livelihood in a State other than his own.⁷²

The *Hicklin* Court explained that ownership in that case was not dispositive of the issue because Alaska had no proprietary interest in many of the employment opportunities brought within the scope of the statute. Private employers who would be receiving no funds from the state were mandated by the legislation to engage in discriminatory hiring practices.

A review of those cases under which a discriminatory regulatory statute has been upheld by the Court as not infringing upon the Privileges and Immunities Clause guarantee⁷³ indicates that if the natural resource to be regulated is in no way connected with interstate commerce,⁷⁴ the statute will be upheld as validly within the state's police power, based upon the ownership factor, if there is a substantial reason for the disparity of treatment between individuals.⁷⁵ In *Corfield v. Coryell*,⁷⁶ *McCready v. Virginia*,⁷⁷ and *Baldwin v. Fish and Game Commission*,⁷⁸ the Supreme Court found the subject of the legislation under review was not bound for interstate commerce at the time the restrictions were being placed on its use. However, when a resource has been or is bound for interstate commerce, the Commerce Clause comes into play and is an additional limitation on regulation of any ownership interest a state may have in the resource. In such situations, the state regulation may not unreasonably burden interstate commerce. The courts will balance the respective state and national interests involved, and the greater national importance the commodity has, the less discrimination will be tolerated before the Court will find that the legislation violates the Privileges and Immunities guarantee and the Commerce Clause grant of power to the federal government⁷⁹ by the Constitution.

⁷² *Baldwin v. Fish and Game Comm'n*, 98 S. Ct. at 1861.

⁷³ See generally 98 S. Ct. 1852 (1978); *McCready v. Virginia*, 94 U.S. 391 (1877); *Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825).

⁷⁴ Statutes have been upheld which provide for hunting and fishing licenses issued to private individuals to be used for sport or for their own purposes. Most states have such licensing laws. See 98 S. Ct. at 1855 nn. 2 & 7.

⁷⁵ See 334 U.S. at 398-99, where the Court explained "noncitizens constitute a peculiar source of the evil at which the statute is aimed . . . and there must be a reasonable relationship between the danger represented by noncitizens as a class, and the discrimination practiced upon them."

⁷⁶ 6 F. Cas. 546.

⁷⁷ 94 U.S. 391.

⁷⁸ 98 S. Ct. 1852.

⁷⁹ See generally 334 U.S. 385 (1948); *Baldwin v. Seelig*, 295 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *Ward v. Maryland*, 12 Wall. 418 (1870). In all these cases, the item was in interstate commerce at the time of its regulation. See also Note, 10 Wis. L. Rev. 388 (1935); Note, 3 GEO. WASH. L. REV. 494 (1935); Note, 48 HARV. L. REV. 1437 (1935); Comment, 1 Mo. L. Rev. 64 (1936).

Hicklin brings the current status of judicial application of the Privileges and Immunities Clause to the states more closely in line with the type of reasoning used by the Court in Commerce Clause cases when natural resources of the state are the subject of the regulatory statute. In the Commerce Clause area, if Congress has not specifically preempted an area by prior legislation and the statute deals with a purely local concern not requiring uniformity,⁸⁰ a state, via its police power, may regulate so long as there is no discriminatory burden placed upon interstate commerce⁸¹ and so long as the legislation bears a rational and substantial relationship between the means of regulation taken in the statute and the purpose to be achieved by the statute.⁸² Further, in commerce cases, the purpose advanced must be a legitimate state interest and there must be no less burdensome alternative.⁸³

Application of the Privileges and Immunities Clause requires that the complainant be a citizen of some state, but not of the state whose actions are under scrutiny.⁸⁴ Corporations and associations are not citizens for purposes of Article IV and cannot use the protections of this clause.⁸⁵ Further, there must be discriminatory action by a state against nonresidents to invoke the Privileges and Immunities Clause⁸⁶ and a fundamental right must be infringed upon.⁸⁷ In order for the regulation to be upheld, it must have a real and substantial relationship to the purpose of the legislation⁸⁸ and the purpose must be a legitimate state interest.⁸⁹ In deciding whether there is a legitimate state goal and whether it has a substantial relationship to the purpose to be achieved, the Court will balance the competing interests as

⁸⁰ See *Cooley v. Board of Wardens*, 12 How. 299 (1851); Bickle, *The Silence of Congress*, 41 HARV. L. REV. 2 (1927).

⁸¹ See *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); Note, 24 TEX. L. REV. 89 (1945); Note, 31 VA. L. REV. 943 (1945).

⁸² See *South Carolina State Highway Dept. v. Barnwell*, 303 U.S. 177 (1938); Kauper, *Interstate Commerce, Constitutionality of State Weight and Size Limitations as Applied to Interstate Motor Carriers*, 36 MICH. L. REV. 1018 (1938); Note, 24 CORNELL L.Q. 114 (1938); Note, 38 COLUM. L. REV. 1084 (1938).

⁸³ See *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951); Note, 13 GA. B.J. 480 (1951); Note, 19 GEO. WASH. L. REV. 352 (1951); Note, 39 GEO. L.J. 484 (1951).

⁸⁴ See *Blake v. McClung*, 172 U.S. 239 (1898).

⁸⁵ See *Hemphill v. Orloff*, 277 U.S. 537 (1928); *Paul v. Virginia*, 75 U.S. 168 (1868).

⁸⁶ See *United States v. Harris*, 106 U.S. 629 (1882); *contra*, *Antieau*, *supra* note 36.

⁸⁷ See *Blake v. McClung*, 172 U.S. 239 (1898); *Coryfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825); See also *Meyers, The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286 (1902); but see dissenting opinion of Justices Brennan, White and Marshall in 98 S. Ct. 1852.

⁸⁸ See *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976); *Pike v. Bruce Church*, 397 U.S. 137 (1970); *Toomer v. Witsell*, 334 U.S. 385 (1948).

⁸⁹ See *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir. 1974), *cert. denied*, 420 U.S. 928 (1974).

it does in the Commerce Clause area.⁹⁰ As in Commerce Clause cases, the complainant has the burden of showing the discrimination is based upon mere citizenship.⁹¹

As outlined above, there are many similarities between the purposes behind and the application of the Commerce Clause and the Privileges and Immunities Clause. The Commerce Clause can be used in situations where the complainant's own state or an individual is doing something which unduly places a burden upon the free flow of commerce. For a privileges and immunities violation, a state, other than the complainant's home state, must be involved. Discriminatory acts by the complainant's home state or an individual will find no protection under this clause of Article IV.⁹² On the other hand, the Privileges and Immunities Clause will afford protection any time a fundamental right is violated by a sister state, whether commerce is burdened or not.⁹³

In many cases where the Privileges and Immunities Clause has been involved, plaintiffs often offer arguments under the Equal Protection Clause⁹⁴ of the fourteenth amendment.⁹⁵ The Equal Protection Clause also requires state action but can be invoked whether complainant's home state or sister state is involved and whether complainant is an individual or corporation.⁹⁶ No fundamental right need be involved for an equal protection infringement; merely disparity of treatment among classes of people⁹⁷ by the state challenged is required.

Unlike the Commerce Clause and Privileges and Immunities Clause which share the purpose of national unity, the purpose of the Equal Protection Clause is to guarantee all members of society equal citizenship and "the right to be treated by the organized society as a respected, responsible and participating member"⁹⁸ [T]he principle guards against degradation or imposition of stigma."⁹⁹ Therefore, the reason behind the complaint

⁹⁰ *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Knox*, *supra* note 37; *see also* Note, 29 Sw. L.J. 965 (1975).

⁹¹ *See* dissenting opinion in 98 S. Ct. 1852 (1978).

⁹² *Knox*, *supra* note 37.

⁹³ *See Corfield v. Coryell*, 6 F. Cas. 546 (No. 3230) (C.C.E.D.Pa. 1825); *Meyers*, *The Privileges and Immunities in the Several States*, 1 MICH. L. REV. 286 (1902).

⁹⁴ *See generally* 98 S. Ct. 2482; 98 S. Ct. 1852; *Austin v. New Hampshire*, 420 U.S. 656 (1975); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948); *Blake v. McClung*, 172 U.S. 239 (1898); *Hawkins v. Moss* 503 F.2d 1171 (4th Cir. 1974).

⁹⁵ U.S. CONST., amend. XIV § 1.

⁹⁶ *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *North Dakota Pharmacy Bd. v. Snyder Drug Stores, Inc.*, 414 U.S. 156 (1973).

⁹⁷ *See* note 13 *supra*.

⁹⁸ *Karst*, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977).

⁹⁹ *Id.* at 6.

will often define which clause provides the strongest constitutional policy argument for the complainant.

*Hicklin v. Orbeck*¹⁰⁰ is such a case. Appellants were being treated discriminatorily by the State of Alaska because Alaska sought to favor its residents over all other citizens of the United States. There was no degradation or stigma involved in the classification. It was merely an attempt to prefer residents of Alaska because they were residents of Alaska. The Supreme Court raised the Commerce Clause and the strong relationship between its purpose and that of the Privileges and Immunities Clause to bolster its decision.¹⁰¹

In those instances where discriminatory statutory regulations exist which deal with wildlife conservation measures or use of natural resources, *Hicklin* may be useful precedent for a state which is trying to uphold legislation, so long as it does not encroach upon commerce and trade. It further defines the limits on regulation by police power of the states in areas which infringe on commerce and trade. The case should provide guidance to legislatures in that it establishes a more definitive standard to be applied by the courts under the Privileges and Immunities Clause when purely local matters are sought to be regulated by the states in the natural resource and wildlife areas. If the state is the employer and state funds are being spent to develop the resource, the *Hicklin* case seems to intimate that state proprietary interests may control and the regulation be deemed appropriate if narrowly drawn.¹⁰²

As Justice Jackson stated in his concurring opinion in *Edward v. California*,¹⁰³ "for nearly three-quarters of a century this Court has rejected every plea to the Privileges and Immunities clause."¹⁰⁴ During its term last past, the Supreme Court decided two cases on the basis of the Privileges and Immunities Clause,¹⁰⁵ and has thus indicated a willingness to listen and prevent the states from infringing upon this guaranteed right. The full extent of the protection afforded by this clause of Article IV is yet to be decided.¹⁰⁶ *Hicklin v. Orbeck*¹⁰⁷ and *Baldwin v. Fish and Game Commission*¹⁰⁸ have cleared up the confusion caused by the ownership theory espoused in *McCready*

¹⁰⁰ 98 S. Ct. 2482.

¹⁰¹ *Id.* at 2491.

¹⁰² *Id.* at 2490.

¹⁰³ 314 U.S. 160 (1941).

¹⁰⁴ *Id.* at 182.

¹⁰⁵ 98 S. Ct. 2482; 98 S. Ct. 1852.

¹⁰⁶ See Kurland, *The Privileges and Immunities Clause: "Its Hour Come Round at Last?"* 1972 WASH. U. L.Q. 405 (1972).

¹⁰⁷ 98 S. Ct. 2482.

¹⁰⁸ 98 S. Ct. 1852.

v. *Virginia*.¹⁰⁹ That theory still has viability but the contemporary view is that it refers to the states' power to regulate use of natural resources within the confines of constitutional guarantees. *Hicklin*¹¹⁰ sets forth a standard to guide courts in reviewing cases in the natural resource area when state legislation is challenged under the Privileges and Immunities Clause of Article IV.

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¹⁰⁹ 94 U.S. 391 (1877).

¹¹⁰ 98 S. Ct. 2482.

CRIMINAL LAW

Death Penalty • Cruel and Unusual Punishment • Individualized Sentencing Determination

Lockett v. Ohio, 98 S. Ct. 2954 (1978).

Bell v. Ohio, 98 S. Ct. 2977 (1978).

IN *Bell v. Ohio*¹ and *Lockett v. Ohio*² the United States Supreme Court found the sentencing provisions of the Ohio capital punishment statute³ to be incompatible with the eighth and fourteenth amendments⁴ which prohibit cruel and unusual punishment.⁵ These two opinions represent the most recent attempt by the Supreme Court to explain what elements must be included in a constitutionally valid capital punishment statute.

The two cases, almost identical factually, were reviewed together. In *Lockett*, the defendant was the driver of the getaway car in an aggravated robbery. While Lockett waited in the car, the owner of the pawn shop being robbed was accidentally killed. It was shown at trial that while defendant Sandra Lockett freely participated in the robbery she had no idea that the pawn shop owner would be shot. Apparently, none of the participants in the robbery planned to kill the owner. However, Lockett, as an accomplice

¹ 98 S. Ct. 2977 (1978).

² 98 S. Ct. 2954 (1978).

³ OHIO REV. CODE ANN. §§ 2929.03, 2929.04 (Page 1975).

⁴ U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Robinson v. California*, 370 U.S. 660 (1962), explicitly held that the eighth amendment applies to the states through the fourteenth amendment.

⁵ 98 S. Ct. at 2965.