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Constitutional Law—The Privileges and Immunities Clause of Article IV: Fundamental Rights Revived—Baldwin v. Fish & Game Commission, 436 U.S. 371 (1978)

Walter G. Spilsbury, Jr.

CONSTITUTIONAL LAW—THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV: FUNDAMENTAL RIGHTS REVIVED—*Baldwin v. Fish & Game Commission*, 436 U.S. 371 (1978).

In Montana, nonresident sportsmen wishing to hunt solely for elk must purchase a big game combination license,[1] though residents may acquire a separate elk license. In addition, Montana imposes substantially higher license fees on nonresidents, effectively requiring them to pay 28.2 times more than residents for the privilege of hunting elk.[2] Plaintiffs[3] challenged Montana's elk-hunting license fee scheme, charging that it discriminated against nonresident elk hunters[4] in violation of the privileges and immunities clause of article IV, section 2 of the Constitution.[5] A divided three-judge district court denied plaintiffs' demand for declaratory and other relief.[6] In *Baldwin v. Fish & Game Commission*,[7] the United States Supreme Court affirmed, holding that the scope of the privileges and immunities clause extends only to "fundamental rights" of citizenship and that equal access to Montana elk by nonresident hunters is not a fundamental privilege protected by the clause.[8] Montana's licensing scheme, therefore, withstood the challenge.

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1. Montana's big game combination license, unique among the states, Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 373 n.5 (1978), permits the nonresident holder to take one elk, one deer, one black bear, game birds, and fish. MONT. CODE ANN. § 87–2–505 (1979) (formerly MONT. REV. CODES ANN. 26–202.1(12) (Supp. 1977)).

2. The nonresident combination license cost $225 in 1977. MONT. CODE ANN. § 87–2–505 (1979) (formerly MONT. REV. CODES ANN. § 26–202.1(12) (Supp. 1977)). A resident could purchase a license solely for elk for $9; his total cost to hunt all those species that a nonresident combination license allowed was $30. *Id.* at §§ 87–2–202, –301, –401, –501 (formerly MONT. REV. CODES ANN. §§ 26–202.1(1), (2), (4), –230 (Supp. 1977)). A nonresident making maximum use of his license paid 7.5 times more than the resident bearing the same privileges. However, plaintiffs, who chose to hunt only elk, challenged both the combination license requirement and the fee differential; elk hunting cost them 28.2 times as much as it cost residents.

3. Plaintiffs-appellants were Lester Baldwin, a Montana resident and professional outfitter, licensed as a Montana hunting guide, and four residents of Minnesota who had hunted elk in Montana for a number of years and wished to continue doing so. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 372 (1978). One of these Minnesota residents also owned land in Montana. Reply Brief of Appellants at 28, Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978).

4. In 1974–75, Montana licensed approximately 198,411 residents and 31,406 nonresidents to hunt big game. Thus, while the discriminatory licensing scheme affected a large number of nonresident hunters, they comprised only 13% of the total number of hunters. Reply Brief of Appellants at 16, Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978).

5. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

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

7. 436 U.S. 371 (1978).

8. *Id.* at 388. The Court easily dismissed plaintiffs' equal protection claim, avoiding the strict

Justice Blackmun, writing for the majority,[9] grafted a fundamental rights limitation[10] onto privileges and immunities jurisprudence: "Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally."[11] To benefit from the clause's protection against discrimination,[12] he reasoned, one must seek to "engage in an essential activity or exercise a basic right."[13] The Court suggested that the right to earn a living on substantially equal terms with residents is "fundamental" in the privileges and immunities context, but that the right to engage in recreational activities is not.[14] The Court thus concluded that "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union," and therefore is not fundamental under the privileges and immunities clause.[15]

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scrutiny generally accorded fundamental rights under the equal protection clause. U.S. CONST. amend. XIV, § 1. *See* 436 U.S. at 388–91. This note does not discuss the equal protection challenge in *Baldwin*.

It has been suggested that *Baldwin* could have been litigated on commerce clause grounds. *See* Note, *Constitutional Law—Montana's Discriminatory Licensing Structure for Nonresidents: Commerce Clause Analysis*, 14 LAND & WATER L. REV. 303 (1979). Hughes v. Oklahoma, 441 U.S. 322 (1979), may provide support for such an argument.

9. The Court split 6–3, with Burger, C. J., submitting a concurring opinion, and Brennan, J., joined by Marshall and White, J. J., in dissent.

10. The Court acknowledged that the fundamental rights limitation was derived wholly from Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230). 436 U.S. at 387.

11. 436 U.S. at 383. According to the Court, the rationale for this requirement was that: "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States." *Id.*

12. Generally, the privileges and immunities clause was designed "to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Toomer v. Witsell, 334 U.S. 385, 395 (1948) (footnote omitted).

13. 436 U.S. at 387. The Court described the mandate of the clause as follows: "With 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." *Id.*

14. 436 U.S. at 377, 388. By distinguishing commercial from recreational activity, the Court sidestepped a prominent line of cases which held that a state may not discriminate against nonresident commercial fishermen by imposing higher license fees than justified by the added cost to the state resulting from the nonresidents' presence. *See* Mullaney v. Anderson, 342 U.S. 415 (1952); Toomer v. Witsell, 334 U.S. 385 (1948); Brown v. Anderson, 202 F. Supp. 96 (D. Alas. 1962); Edwards v. Leaver, 102 F. Supp. 698 (D.R.I. 1952); Gospodonovich v. Clements, 108 F. Supp. 234 (E.D. La. 1951), *appeal dismissed*, 344 U.S. 911 (1953); Russo v. Reed, 93 F. Supp. 554 (D. Me. 1950); Steed V. Dodgen, 85 F. Supp. 956 (W.D. Tex. 1949); Commonwealth v. Westcott, 344 N.E. 2d 411, 412–13 (Mass. 1976), *vacated and remanded*, 431 U.S. 322 (1977) (per curiam). *Accord* Douglas v. Seacoast Prods., Inc., 431 U.S. 265 (1977) (supremacy clause); Takahashi v. Fish & Game Comm'n. 334 U.S. 410 (1948) (equal protection clause). For a criticism of the distinction between commercial and recreational activity in the privileges and immunities context, see Part IV *infra*.

15. 436 U.S. at 388.

By imposing a fundamental rights limitation on the clause, *Baldwin* established a two-tier test for a successful privileges and immunities challenge. Initially, the right denied nonresidents[16] must be deemed fundamental to be within the scope of the clause's protection. If the right satisfies this threshold test, the discriminatory state statute will be examined under the well-established test of *Toomer v. Witsell.*[17] Under *Toomer,* nonresident status alone is an inadequate reason for differential treatment.[18]

The fundamental rights threshold erected by *Baldwin* insulated the Montana statute from scrutiny under the *Toomer* test. The *Baldwin* analysis makes it unlikely that any recreational activity could be deemed fundamental and consequently scrutinized under the clause. In effect, *Baldwin* will often preclude adjudication of whether a state statute discriminating against nonresidents is justified, because the asserted privilege will be considered too insignificant to be protected by the clause.

The purpose and history of the privileges and immunities clause,[19] however, reveal that the fundamental rights criterion is not a necessary or

16. Though the language of the privileges and immunities clause refers only to "citizens," *see* note 5 *supra,* the terms "citizens" and "residents" are essentially interchangeable for purposes of analysis under the clause. Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978); *Baldwin,* 436 U.S. at 397 n.2 (Brennan, J., dissenting). *See generally* Currie & Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities,* 69 YALE L.J. 1323, 1347 (1960). This is because state citizenship is dependent upon residence within the state, and not upon national citizenship alone. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 73–74 (1873). Consequently, a state may not avoid the mandate of the clause by couching a discriminatory statute in terms of a residency classification.

17. 334 U.S. 385 (1948). The *Toomer* test examines the nature of the classification made by a state on the basis of state citizenship or residency. *See* notes 41–47 and accompanying text *infra* (discussing *Toomer*).

18. 334 U.S. at 396. *See* Hicklin v. Orbeck, 437 U.S. 518, 525–28 (1978); *Baldwin,* 436 U.S. at 402 (Brennan, J., dissenting); note 44 *infra.*

19. Because it assures protection to citizens sojourning in states other than that of their residence, the provision is commonly referred to as the interstate privileges and immunities clause. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 404 (1978). The privileges *and* immunities protected by article IV, § 2 are those arising from citizenship in the several states, as distinguished from fourteenth amendment privileges *or* immunities, which derive from national citizenship. The two provisions were distinguished in this manner in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 75–80 (1873), and that distinction has endured. *See, e.g.,* Twining v. New Jersey, 211 U.S. 78 (1908). For discussion of the fourteenth amendment privileges or immunities clause, see Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?,* 1972 WASH. U.L.Q. 405. *See also* Benoit, *The Privileges or Immunities Clause of the Fourteenth Amendment: Can There Be Life After Death?,* 11 SUFFOLK L. REV. 61 (1976); Beth, *The Slaughter-House Cases—Revisited,* 23 LA. L. REV. 487 (1963); Lomen, *Privileges and Immunities under the Fourteenth Amendment,* 18 WASH. L. REV. 120 (1943); McGovney, *Privileges or Immunities Clause, Fourteenth Amendment,* 4 IOWA L. BULL. 219 (1918), *reprinted in* 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 402 (Assoc. of Amer. Law Schools ed. 1938); Morris, *What are the Privileges and Immunities of Citizens of the United States?,* 28 W. VA. L.Q. 38 (1921).

useful limitation on the clause and that the distinction made by the Court between commercial and recreational activities is unjustified. In looking for those activities "that are sufficiently basic to the livelihood of the Nation,"[20] the Court focused on the nature of the activity involved, rather than the nature of the state's statutory classification. The Court thus committed the grave error of upholding a grossly discriminatory statute, while failing to analyze carefully the state's justification for the discriminatory scheme. To promote the purpose of the clause, the Court should have subjected Montana's justifications for the licensing scheme to the *Toomer* test. Under that test, the scheme would fail.[21]

I. THE SUPREME COURT'S HISTORICAL INTERPRETATION OF THE CLAUSE

While there has been agreement since the earliest cases that the privileges and immunities clause does not provide nonresidents an absolute guarantee of all possible privileges and immunities,[22] courts have struggled to formulate a rule for determining which rights the clause should protect. The fundamental rights criterion enunciated in *Baldwin* represents the present Court's attempt to provide such a rule. A review of prior cases, however, indicates that the threshold test created in *Baldwin* is unwarranted. The *Toomer* test alone is sufficient to protect nonresidents, weed out spurious claims to equal treatment, and preserve state autonomy.

In *Corfield v. Coryell,*[23] the first federal case construing the clause, Justice Bushrod Washington expressed, in dictum, the view that the clause protects all those privileges and immunities that "are, in their na-

20. *Baldwin,* 436 U.S. at 388.

21. *See* text accompanying notes 94–101 *infra.*

22. The courts have persistently noted that, though the simple language of article IV, § 2 literally requires protection of "all Privileges and Immunities of Citizens," it cannot encompass every privilege which a citizen enjoys in a state, because if it did, a state would lose its independent existence. See generally the excellent discussion of the "fundamental rights gloss" in McGovney, *supra* note 19, at 227–28.

In the first reported case on the clause, Judge Chase of Maryland explained: "[A] particular and limited operation is to be given to these words, and not a full and comprehensive one. It is agreed it does not mean the right of election, the right of holding offices, the right of being elected." Campbell v. Morris, 3 H. & McH. 535, 554 (Md. 1797). He believed that "[i]t secures and protects personal rights." *Id.* This statement indicates the dividing line followed in subsequent cases: "Roughly, the 'privileges and immunities' belonging to a *citizen* by virtue of citizenship are 'personal' rights, that is, *private* rights, as distinguished from *public* rights." Meyers, *The Privileges and Immunities of Citizens in the Several States,* 1 MICH. L. REV. 286, 290 (1903) (emphasis in original).

23. 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, J., riding circuit, for

ture, fundamental; which belong, of right, to the citizens of all free governments.''[24] *Corfield's* interpretation of the clause as protecting only those fundamental rights which derive from natural law[25] did both too little and too much; it focused on guaranteeing absolute rights rather than on

himself and one other judge) (upheld a New Jersey statute forbidding nonresidents from taking oysters from the state's tidal flats on the theory that a state property interest in oyster beds gave New Jersey the power to limit the privilege of taking oysters to its own citizens).

Justice Washington seemed to ignore the fact that a primary purpose of the clause was to dissolve the disabilities of alienage among the citizens of the several states. *Id.* at 552 (" 'The Sovereign,' says Grotius (book 2, c. 2, § 5), 'who has dominion over the land, or waters, in which the fish are, may prohibit foreigners (by which expression we understand him to mean others than subjects or citizens of the state) from taking them.' "). *See generally* note 58 *infra*.

24. *Corfield*, 6 F. Cas. at 551. Justice Washington, in widely quoted dictum, described his view of the clause's scope:

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

Id. He then elaborated on his general definition with an illustrative list of rights he believed the clause protected:

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; *the enjoyment of life and liberty*, with the right to acquire and possess property of every kind, and *to pursue and obtain happiness and safety;* subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. 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; *may be mentioned as some of the particular privileges and immunities of citizens*, which are clearly embraced by the general description of privileges deemed to be fundamental: 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 551–52 (emphasis added).

25. Professor Crosskey referred to the "vague and fanciful doctrine of 'fundamental privileges and immunities' " espoused in *Corfield* as "a little meaningless rhetoric to excuse [Justice Washington's] failure to apply the clause strictly as the clause was written." 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1124 (1953). Similarly, Professor Ely has observed that *Corfield* "was an aberration that gave [the privileges and immunities clause] a substantive, nonequality construction." Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND L.J. 399, 426 n.103 (1978) [hereinafter cited as Ely, *Interpretivism*].

The *Corfield* opinion reflects the vigorous debate of that era concerning natural rights philosophy. That controvery had been heavily influenced by the strong natural rights justification expressed during the struggle to separate from England. There is no question that a substantial number of persons espoused natural law principles well after the ratification of the Constitution and at least to the time of the fourteenth amendment. *See* Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 22–23 n.82 (1978) [hereinafter cited as Ely, *Foreword*] (citing C. BECKER, THE DECLARATION OF INDEPENDENCE 24–79, 240–48 (1922); R. COVER, JUSTICE ACCUSED (1975); C. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION (1930); C. ROSSITER, SEEDTIME OF THE REPUBLIC (1953); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978)).

preventing discrimination against nonresidents,[26] and at the same time read into the clause substantive guarantees not dependent on a state's positive law.[27]

When first called upon to construe the clause, the Supreme Court showed no inclination to adopt *Corfield's* vague natural-law-fundamental-rights criterion,[28] preferring instead a case-by-case examination of "the particular rights asserted and denied therein."[29] Furthermore, later

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Natural law, however, was by no means unanimously accepted by the judiciary in the early days of the Republic. Compare the opinion of Justice Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (power of legislature necessarily limited by social compact) with the opinion of Justice Iredell in the same case, 3 U.S. at 398 (only constitutional limits on legislative power could be judicially enforceable).

26. *Corfield* indicated that judges scrutinizing a state statute under the clause might look beyond the positive law of the state to the fundamental "natural rights" of every visiting citizen of any other state. As Professor McGovney said, commenting on Justice Washington's view:

> If by "of right" was meant, permitted by statutory or unwritten law, it is safe to say that in every State of the Union at that time the citizens of the State were permitted to take oysters or fish from the public waters of the State; and since this was a privilege enjoyed of right in all, in each by its citizens, none could have denied it to the citizens of another, which is the very point decided to the contrary. The court, therefore, must not have intended to say that whatever legal rights are conceded by our States commonly or even unanimously each to its own citizens none can deny to the citizens of other States. It is highly probable that Judge Washington was giving loose expression to a vague notion of out-to-be rights, frequently called natural and even "inalienable" rights.

McGovney, *supra* note 19, at 228.

27. Justice Washington's list of illustrative rights supports the notion that his interpretation allowed for extremely broad coverage. 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) (arguing that *Corfield* represents the correct interpretation of the clause); Ely, *Interpretivism*, *supra* note 25, at 433–34 (1978). Ely stated: "[I]n context what Washington says, in essence, is that he feels 'no hesitation in confining' privileges and immunities to everything but the kitchen sink." *Id.* at 434 n.128. The result reached in *Corfield* seems anomalous in light of Justice Washington's expansive language. *See* note 24 *supra* (quoting the *Corfield* dictum); note 23 *supra* (explaining Justice Washington's reasoning).

28. Conner v. Elliott, 59 U.S. (18 How.) 591 (1855). Though the Justices must have been aware of *Corfield's* interpretation of the clause (that opinion had been cited as the leading privileges and immunities case in 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1806, at 554 n.4 (2d ed. Boston 1851) (1st ed. Boston 1833), and had been accepted as good law by a number of state courts), their early opinions never even referred to *Corfield* or the fundamental rights notion. *See, e.g.*, Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871); Downham v. Alexandria Council, 77 U.S. (10 Wall.) 173 (1871); Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868); Conner v. Elliott, 59 U.S. (18 How.) 591 (1855).

29. Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1855) ("any merely abstract definition could scarcely be correct"). The Court's reluctance to offer any general definition or characterization of the rights included within the scope of the clause continued to be evident in the 19th century. The Court in *Ward v. Maryland* explained: "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court." 79 U.S. (12 Wall.) 418, 430 (1871). In

19th century cases made clear that the clause protects only privileges of citizenship[30] actually granted by a state to its own citizens.[31]

Justice Field's opinion in *Paul v. Virginia*[32] left no doubt that, contrary to Justice Washington's dictum, the purpose of the clause is not to protect the rights of "citizens of all free governments." *Paul* emphasized instead the antidiscriminatory purpose of the clause.[33] Distinguishing between the "general" and "special" privileges of state citizenship, the Court pointed out that the clause protects those general privileges grounded in the positive law of the challenged state,[34] rather than fundamental rights

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McCready v. Virginia, the first Supreme Court case decided under the clause to so much as mention *Corfield*, the Court briefly noted Mr. Justice Washington's fundamental rights approach, and expressly declined to follow it; instead the Court decided that *Conner* offered the "safer course to pursue." 94 U.S. 391, 395 (1876).

30. "It is sufficient for this case to say that, according to the express words and clear meaning of this clause, no privileges are secured by it, except those which belong to citizenship." Conner v. Elliott, 59 U.S. (18 How.) 591, 593 (1855) (privileges of Louisiana community property statute not secured by clause to a nonresident woman claiming rights, under a marital contract made out of state, to property held by her husband in Louisiana). Because the rights asserted in *Conner* arose from the law of contracts, they were not privileges of citizenship.

31. This was the effect of Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868), generally recognized as the demise and official rejection of the *Corfield* view. Hague v. CIO, 307 U.S. 496, 511 (1939) (opinion of Roberts, J.). *See also* 2 CROSSKEY, *supra* note 25, at 1096–97, 1122–26; R. HOWELL, THE PRIVILEGES AND IMMUNITIES OF STATE CITIZENSHIP (1918); Antieau, *supra* note 27, at 1 (referring to *Paul* as a perversion of the true meaning of the clause, which he believed to be better represented by *Corfield*); McGovney, *supra* note 19, at 226–29. *Paul's* implicit rejection of the fundamental rights view of *Corfield* is emphasized because both the *Baldwin* majority and a recent article, Knox, *Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution*, 43 Mo. L. Rev. 1, 11 n.66 (1978), failed to realize that this was the impact of *Paul*.

32. 75 U.S. (8 Wall.) 168 (1868).

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

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (footnote omitted).

34. But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are *those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens.* Special privileges enjoyed by citizens in their own States are not secured in other States by this provision.

which accompany a nonresident wherever he travels.[35]

The *Slaughter-House Cases*[36] firmly established *Paul* as the leading case on the clause,[37] and *Paul's* emphasis on the clause's antidiscriminatory and equal protection purposes is essentially the posture that has been ratified over the past century.[38] Though later cases occasionally referred to Justice Washington's illustrative list of rights protected by the privileges and immunities clause, few adopted his fundamental rights terminology, and even those cases clearly followed *Paul's* interpretation of the clause.[39] Under *Paul* and its progeny, any privilege or immunity accorded by a state to all its citizens, by virtue of citizenship, fell within the ambit of the clause. Thus the Court was not required to estimate the importance of the rights asserted or denied.

Id. (emphasis added). *See also* McKane v. Durston, 153 U.S. 684, 687 (1894).

35. The Court refused to recognize that special privileges of citizenship transcend state borders, because such a notion would put an end to the ability of a state to manage it own affairs. "If . . . the provision of the Constitution could be construed to secure to citizens of each State in other States the peculiar privileges conferred by their laws, an extra-territorial operation would be given to local legislation utterly destructive of the independence and the harmony of the States." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868).

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

37. In the *Slaughter-House Cases*, Justice Miller explained the clause in light of *Paul's* antidiscriminatory interpretation:

> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, *the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction.*

Id. at 77 (emphasis added).

Called upon to examine the newly ratified privileges or immunities clause of the fourteenth amendment, the *Slaughter-House* Court distinguished the privileges and immunities clause of article IV, § 2. *Corfield* was quoted, for the first time in any Supreme Court opinion, apparently because the floor leaders of the fourteenth amendment had quoted *Corfield* at length in Congress to express the interpretation they expected the new provision to receive before the courts. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866) (remarks of Sen. Howard). The *Slaughter-House* majority, however, was primarily concerned with which privileges and immunities the fourteenth amendment did not secure to the citizens of the United States, rather than with which privileges and immunities were secured to citizens of the several states by article IV, § 2, clause 1. *See* note 19 *supra*.

The Court further qualified Justice Washington's view of fundamental rights by noting that:

> Throughout his opinion, they are spoken of as rights belonging to the individual as a citizen of a State. They are so spoken of in the constitutional provision which he was construing. And they have always been held to be the class of rights which the State governments were created to establish and secure.

83 U.S. at 76. While the dissenting Justices would have willingly looked to natural law as a source of at least some of these fundamental rights, the majority would have looked only to the positive law of the given State. In fact, had the Supreme Court literally subscribed to the *Corfield* interpretation of article IV, § 2, clause 1, it could not logically have concluded, as it did, that the rights of citizens of the United States were different from the rights of citizens of the several States. *See* note 19 *supra*.

38. *See* Hauge v. CIO, 307 U.S. 496, 511 n.19 (1939) (opinion of Roberts, J.) (citing cases).

39. The Supreme Court's first apparent approval of the *Corfield* dictum in a case decided under the clause did not occur until 1898. Blake v. McClung, 172 U.S. 239, 248–49 (1898). In *Blake*,

After *Corfield's* nagging dictum was finally dismissed in *Hague v. CIO*,[40] the path was clear for the Court to frame the modern analysis in *Toomer v. Witsell*.[41] In *Toomer*, Georgia commercial fishermen challenged highly discriminatory nonresident license fees imposed by South Carolina for shrimping in its marginal sea. The Court, making no effort to demonstrate that the clause encompassed the privilege asserted, directly applied a test modeled on *Paul's* antidiscriminatory analysis.[42] The Court acknowledged that the clause does not provide absolute protection against discrimination.[43] Nevertheless, the Court declared that a state statute dis-

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however, Justice Harlan quoted at length from all the significant cases interpreting the clause, merely cataloguing the former decisions for assistance without commenting on their impact.

Through the first quarter of this century, the Court made occasional references to *Corfield* for the purpose of garnering support from Justice Washington's illustrative list. *See, e.g.*, Ferry v. Spokane, P. & S. Ry., 258 U.S. 314, 320 (1922); United States v. Wheeler, 254 U.S. 281, 293 (1920); Canadian N.R.R. v. Eggen, 252 U.S. 553, 560 (1920). Even if these cases appear at first glance to adopt the fundamental rights criterion, most cases during that period avoided any mention of fundamental rights. They reflected the constitutional prohibition of discrimination against nonresidents, tempered when appropriate by considerations of state sovereignty. In one such case, Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907), the Court held that Ohio could confer a cause of action for wrongful death exclusively on its own citizens. Justice Harlan dissented because he believed the right at stake *especially* deserved protection by the clause because it *was* of "fundamental" importance. He said: "[I]t is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. *All agree that among such privileges and immunities* are those which, under our institutions, are fundamental in their nature." *Id.* at 154 (Harlan, White, and McKenna, J.J., dissenting) (emphasis added). Clearly, Justice Harlan believed the range of protected privileges to be much broader than those which are "fundamental."

40. 307 U.S. 496, 511 (1939). In *Hague*, Mr. Justice Roberts, speaking for himself and Mr. Justice Black in the principal opinion, recounted the evolution of theory defining the scope of the privileges and immunities clause:

> 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, Section 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.

Id. at 511 (footnotes omitted).

Mr. Justice Stone, in a separate opinion, noted that whatever the soundness of the *Slaughter-House* decision denying that the *Corfield* interpretation belonged with the fourteenth amendment privileges or immunities clause, Mr. Justice Washington had been mistaken in believing that fundamental rights are guaranteed by the privileges and immunities clause of article IV, § 2 of the Constitution. *Id.* at 520 (opinion of Stone, C.J.).

41. 334 U.S. 385 (1948).

42. *Id.* at 395–96. *See* note 33 *supra*.

43. Recognizing "the principle that the States should have considerable leeway in analyzing lo-

criminating against nonresidents will not be sustained unless the state meets the challenge with clear justification, independent of the status of state citizenship,[44] showing that: (1) nonresidents are a peculiar source of the evil which the statute aims to prevent,[45] and (2) the degree of discrimination is closely related to the problem caused by such nonresident activity.[46] Under this test the Court concluded that South Carolina's discriminatory licensing scheme exceeded the "considerable leeway" to analyze local problems and to develop appropriate cures allowed a sovereign state by the clause.[47]

The *Toomer* test, stiffened somewhat in *Mullaney v. Anderson*,[48] has been the touchstone for subsequent cases decided under the clause.[49] *Baldwin*, however, avoided *Toomer* by establishing a fundamental rights limitation on protected privileges and immunities.[50] Yet, *Hicklin v. Or-*

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cal evils and in prescribing appropriate cures," the Court conceded that the clause "does not preclude disparity of treatment in the many situations where there are *perfectly valid independent reasons* for it [and where] the degree of discrimination bears a *close relation* to them." *Toomer*, 334 U.S. at 396 (emphasis added) (footnote omitted). Thus, the Court said, "[t]he State is not without power, for example, . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." *Id.* at 398–99. *See also* Mullaney v. Anderson, 342 U.S. 415, 417–18 (1952).

44. 334 U.S. at 396 (The clause "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.").

45. *Id.* at 398 ("[T]he purpose of [the] clause . . . is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.").

46. *Id.* at 396.

47. *Id. See* note 43 *supra*.

48. 342 U.S. 415, 418 (1952) ("[S]omething more is required than bald assertion to establish a reasonable relation between the higher fees and the higher cost . . ."). A contemporary casenote assessed the contribution of *Mullaney* as follows:

> The *Mullaney* case points out that one attacking a statute which provides for different fees need not show that the differential will more than compensate the state; rather, the burden of proving the validity of the discrimination is upon the state imposing the tax. It will not suffice for the state to prove that there is a higher cost in collecting the nonresident fees. The state must go further and show that there is some reasonable relation between the higher fees and the higher costs.

28 WASH. L. REV. 55, 55 (1953).

49. Hicklin v. Orbeck, 437 U.S. 518 (1978); Austin v. New Hampshire, 420 U.S. 656 (1975); Doe v. Bolton, 410 U.S. 179 (1973); Mullaney v. Anderson, 342 U.S. 415 (1952). *See also Baldwin*, 436 U.S. at 394 (Brennan, J., dissenting); note 14 *supra* (citing cases).

Austin v. New Hampshire, 420 U.S. 656 (1975), relied heavily on Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920). Neither case invoked fundamental rights considerations, though *Austin* noted that in *Corfield* Justice Washington included the right not to be subjected to discriminatory taxation in his list of privileges within the scope of the clause. 420 U.S. at 661.

50. Justice Brennan, dissenting in *Baldwin*, argued that the *Toomer* test alone is sufficient to resolve all questions arising under the privileges and immunities clause. *See also* L. TRIBE, *supra* note 19, § 6-33; Currie & Schreter, *supra* note 16, at 1390. Brennan urged the Court to "explicitly"

beck,[51] unanimously decided four weeks after *Baldwin*, reaffirmed and applied the *Toomer-Mullaney* formulation without mentioning fundamental rights and without attempting to distinguish *Baldwin*.[52]

II. THE FUNDAMENTAL RIGHTS CRITERION CRITICIZED

By precluding scrutiny of state statutes which deny nonfundamental privileges and immunities of citizenship to nonresidents, the *Baldwin* Court excessively deferred to state sovereignty.[53] Even assuming that some threshold test is necessary, the fundamental rights criterion adopted by *Baldwin* is an inappropriate standard. Using the word "fundamental" to convey the image of foundation and weightiness[54] results in few difficulties, but using the same word to describe characteristics required as a condition to constitutional protection leads to many pitfalls.[55]

A. Baldwin *Is Inconsistent with the Purpose of the Clause*

Baldwin inaptly described the rights protected by the privileges and immunities clause as those which bear "upon the vitality of the Nation as a single entity."[56] If this description were taken literally, the clause would

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confirm the modern view that the fundamental rights limitation "has no place in our analysis," and insisted that the "primary concern is the State's justification for its discrimination." 436 U.S. at 402. Proceeding directly to apply the *Toomer* test, Brennan concluded that "Montana's discriminatory treatment of nonresident big-game hunters in this case must fall." *Id.*

51. 437 U.S. 518 (1978). The Court in *Hicklin* invalidated the "Alaska Hire" law because it granted an across-the-board job preference to qualified Alaska residents in all oil-and-gas related industries in Alaska. The Court relied principally on Toomer v. Witsell, 334 U.S. 385 (1948), and Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871), for the constitutional privilege of a citizen of one state "to travel to another State for the purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other States." 437 U.S. at 525.

52. 437 U.S. at 525–28 (1978) (opinion by Brennan, J.). *See generally The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 84–85 (1978) [hereinafter cited as *The Supreme Court*]; Note, *Domicile Preferences in Employment: The Case of Alaska Hire*, 1978 DUKE L. J. 1069, 1082 n.85 [hereinafter cited as *Domicile Preferences in Employment*]; Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Privileges and Immunities Clause of Article IV*, 92 HARV. L. REV. 1461, 1479 (1979). The court's failure to note even cursorily that they were dealing with a fundamental right might suggest discomfort with the newly established threshold test.

53. *See* L. TRIBE, *supra* note 19, at 40 (Supp. 1979) (suggesting that the Court intended to afford precisely such deference to aid the states' environmental policy efforts). One argument made in favor of a rigorous threshold test is that it permits courts easily to screen out insignificant privileges. *See The Supreme Court*, *supra* note 52, at 81.

54. This was the meaning given the phrase "fundamental rights" by some opinions early in this century. *See, e.g.*, Ferry v. Spokane P. & S. Ry., 258 U.S. 314, 320 (1922); United States v. Wheeler, 254 U.S. 281, 293 (1920); Canadian N.R.R. v. Eggen, 252 U.S. 553, 560 (1920); Chambers v. Baltimore & O.R.R., 207 U.S. 142, 154 (1907) (Harlan, J., dissenting).

55. *See generally* Ely, *Foreword*, *supra* note 25.

56. 436 U.S. at 383.

protect only those activities which if denied to nonresidents would threaten the stability of the nation as a political entity. This interpretation ignores the private rights orientation of the clause.[57]

The essential object of the privileges and immunities clause was to remove the disabilities of alienage from the citizens of each state while sojourning in another state.[58] The framers crafted the clause, like the fourth of the Articles of Confederation[59] on which it was modeled,[60] to "better . . . secure and perpetuate mutual friendship and intercourse *among the people* of the different states,"[61] and expected it to aid greatly the ulti-

57. *See* note 22 *supra*.

58. As stated early in this century in the most exhaustive study of the cases decided under the clause, the clause was designed at the least "to prevent each state from inflicting upon the citizens of other states who should come within its borders any of the disabilities of alienage." Meyers, *supra* note 22, at 380. *See* note 33 *supra*. *See also* CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, S. DOC. No 92-82, 92d Cong., 2d Sess. 831-32 (1973) (describing four theories offered at one time or another regarding the purpose of the clause and noting that the *Paul* view "has become the settled one").

59. That article was worded as follows:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively . . . .

ARTICLES OF CONFEDERATION art. IV.

60. Charles Pinckney, in explaining his proposals, commented that "[t]he 4th article, respecting the extending the rights of the Citizens of each State, throughout the United States; . . . is formed exactly upon the principles of the 4th article of the present Confederation." 3 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 112 (1911). *See also* United States v. Wheeler, 254 U.S. 281, 294 (1920). Perhaps indicating the importance of this concept to the framers, the clause appeared as a separate article (the 14th of 23 articles) in Pinckney's earliest draft and remained in that form until the Committee on Style later consolidated several provisions dealing with states' relations in article IV of the Constitution. 2 M. FARRAND, *supra*, at 187, 577, 601.

61. ARTICLES OF CONFEDERATION art. IV (emphasis added). The structure of the fourth Article of Confederation reveals two discrete privilege provisions; the first entitled the citizens of each state to "all privileges and immunities of free citizens in the several states," while the second guaranteed the right to travel and trade among the states on the same terms as the "inhabitants" of the state visited. *Id.*

When first introduced by John Dickinson in the Second Continental Congress, the committee draft contained these two distinct guarantees as separate articles:

> Art. VI. The Inhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.
>
> Art. VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities, and Advantages, in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony . . . enjoy.

mate goal of the Constitution: formation of "a more perfect union."[62] The framers not only expected to promote amicable domestic relations and equal status among the people of the several states, but also wished to avoid retaliatory measures between the states.[63] They sought to put an end to the local discriminations and impositions which had so seriously impaired the efficiency of the government under the Confederation.[64]

Paul correctly described the framers' intent to prevent discrimination against nonresidents and assure them equal protection under state law. While *Baldwin's* view of the clause's purpose may not directly conflict with the *Paul* interpretation, certainly not all those privileges and immunities upon which "mutual friendship and intercourse among the people of the different states"[65] depend are directly necessary to promote national unity. It should be irrelevant whether *access* to Montana elk is "basic to the maintenance or well-being of the Union,"[66] since *equality of access*

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5 JOURNALS OF THE CONTINENTAL CONGRESS 547 (Library of Congress ed. Washington 1906). The guarantees of "the same Rights, Liberties, Privileges, Immunities and Advantages" in the first portion clearly assured more than equal access to trade and commerce. Careful distinction of the separate but complementary purposes of these two provisions is crucial to understanding article IV, § 2, clause 1 of the Constitution, which was adapted wholly from the first provision of the earlier article.

The latter provision is commonly considered to have been deleted when drafting article IV, § 2, because the commerce power of article I, § 8 left it unnecessary. *See* Austin v. New Hampshire, 420 U.S. 656, 661 (1975); Lemmon v. People, 20 N.Y. 562, 627 (1860) (opinion of Wright, J.).

The commerce clause and the privileges and immunities clause may thus be seen as deriving from a common source, and as having a common purpose. *See* Hicklin v. Orbeck, 437 U.S. at 531–32. The "mutually reinforcing relationship" between the two clauses represents complementary efforts to join a group of mostly independent states into one union. The commerce clause assures equal treatment by the states of citizens of the other states, forbidding purely protectionist commercial regulations. Hughes v. Oklahoma, 441 U.S. 322 (1979); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911). Commercial intercourse, when affecting interstate relations, is protected by the commerce clause, while the broader privileges and immunities clause covers the normal avocations of citizens. *See also* Clarke, *Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education Under the Interstate Privileges and Immunities Clause*, 50 NEB. L. REV. 31 (1970); Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 465 (1978).

62. U.S. CONST. preamble. Hamilton considered the privileges and immunities clause "the basis of the union" and emphasized that it is reserved to the federal judiciary "[t]o secure the full effect of so fundamental a provision against all evasion and subterfuge." THE FEDERALIST No. 80 at 478 (A. Hamilton) (C. Rossiter ed. 1961). It should not be assumed that the framers intended the Constitution to be less efficient in these matters than the Articles of Confederation. Thus, partly in reliance on the language of the fourth Article of Confederation, courts have considered the privileges and immunities clause of article IV, section 2 one of the sources of the constitutional right to travel, nowhere explicitly mentioned in the document. United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941); Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868).

63. *See* Austin v. New Hampshire, 420 U.S. 656, 660–62 (1975).

64. *Id.*

65. ARTICLES OF CONFEDERATION art. IV; *see* note 61 *supra*.

66. *Baldwin*, 436 U.S. at 388.

promotes amicable domestic relations. Central to the clause is not the vindication of particular rights but the elimination of unnecessary discrimination against nonresidents to prevent interstate tensions which might undermine the well-being of the Union. Thus the purpose of the clause requires an examination of whether the reasons for differential treatment in a particular case are sufficiently related to the status of nonresidency.

By evaluating the privilege asserted rather than directly focusing on the nature of the state's classification, *Baldwin's* fundamental rights threshold denies protection to nonresidents in instances when the state's discrimination may be wholly unjustified. Yet, the basis for the Court's threshold test is weak at best. The majority acknowleged that the fundamental rights limitation was derived wholly from *Corfield,* but failed to realize that *Paul* and subsequent cases rejected the natural-law-fundamental-rights view of *Corfield.*[67] In purporting to rely on both *Corfield* and *Paul,*[68] the Court introduced new meaning to *Corfield's* fundamental rights terminology by limiting the scope of protected privileges and immunities to the intersection of the earlier theories of *Paul* and *Corfield.*[69] The fundamental rights limitation now includes only those privileges and immunities which are *both* "basic and essential" and actually granted to

67. After recognizing that in deciding *Corfield* Mr. Justice Washington had "seemingly relied on notions of 'natural rights,' " the *Baldwin* majority made the illogical claim that Washington "himself used the term 'fundamental' . . . in the modern as well as the 'natural right' sense." 436 U.S. at 387. The Court's most serious mistake, though, was the further assertion that: "Certainly Mr. Justice Field and the Court invoked the same principle [in *Paul*]." *Id. See generally* note 31 *supra.*

Mr. Justice Brennan, dissenting in *Baldwin,* emphasized that after *Paul* the *Corfield* approach retained no vitality in privileges and immunities jurisprudence. 436 U.S. at 399 (Brennan, J., dissenting). He criticized the majority for acknowledging the significance of Mr. Justice Roberts' opinion in *Hague v. CIO,* while failing to realize that *Hague* "signaled the complete demise of the Court's acceptance of *Corfield's* definition of the type of rights encompassed by the phrase 'privileges and immunities.' " *Id.*

68. Even though *Corfield's* illustrative list of fundamental rights has occasionally been cited for support, the *Corfield* dictum is irreconcilable with the *Paul* view. Justice Washington's notion of fundamental rights necessarily enjoyed by the citizens of all free states must derive more from a concept of national citizenship than state citizenship, because it effectively requires every state to guarantee certain rights which an individual carries with him.

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), however, specifically rejected the notion that article IV, § 2 protects rights of national citizenship, and sharply distinguished those rights from rights of state citizenship. *See* notes 19 & 37 *supra.* The similarity between those rights mentioned by Justice Washington and those which states have typically accorded all their citizens is a coincidental reflection that states do in fact generally act in accordance with traditional values.

69. To regard as fundamental only those rights which the states actually guarantee their citizens is inconsistent with the notion of natural-law-fundamental-rights, and must at bottom be considered a rejection of that notion. However, it was recently suggested that the natural law view will continue to be at least a factor in determining which privileges and immunities are "fundamental." *The Supreme Court, supra* note 52, at 81.

There have been essentially three significant formulas defining the scope of the clause: (1) that of *Corfield,* including only those privileges and immunities which are "fundamental in nature," be-

the state's own citizens. *Baldwin's* dual requirements set unprecedentedly narrow parameters for the privileges and immunities clause.

The fundamental rights limitation severely curtails the protection which the clause was designed to secure to politically powerless nonresidents. A primary rationale for drafting the clause was the obvious perception that nonresidents would otherwise have no effective political influence to curb abuses against them by state legislatures.[70] In this sense an analogy can be made between the clause and Justice Stone's famous *Carolene Products* footnote.[71] The concern of both is to assure that the politically ineffective are neither ignored nor discriminated against by the politically powerful.

B. Baldwin's *Fundamental Rights Threshold Test will Confuse Privileges and Immunities Jurisprudence*

Even if the Court establishes that by "fundamental rights" it means rights basic and essential to national well-being, and assuming that the clause warrants such a construction, it remains unpredictable which substantive rights will meet this criterion.[72] The fundamental rights approach

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longing "to the citizens of all free governments;" i.e., natural rights; (2) that of *Paul,* including all the privileges and immunities of citizenship actually recognized by a state in all its own citizens; and (3) that of *Baldwin,* including only those privileges and immunities "bearing upon the vitality of the Nation as a single entity" (i.e., those "essential activities" or "basic rights" without which the "formation, the purpose, or the development of a single union of those States" would be impaired), which also are actually recognized by a state in all its own citizens.

70. *See generally* Austin v. New Hampshire, 420 U.S. 656, 660–62 (1975). As Ely recently explained, the common goal behind the privileges and immunities clause and the self-operating aspect of the commerce clause was to assure the voteless nonresident a sort of "virtual representation" "by tying the interests of those without political power to the interests of those with it." Ely, *supra* note 61, at 465.

71. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (suggesting that certain "discrete and insular" groups, disadvantaged by ineffective political participation, deserve special protection under the equal protection clause). Ely, emphasizing the similar purpose of the privileges and immunities clause and the *Carolene Products* footnote, remarked:

> The examples discussed so far involve the protection of geographical outsiders, the literally voteless. But even the technically represented can find themselves functionally powerless and thus in need of a sort of "virtual representation" by those more powerful than they. Thus a need for protection akin to that of literal outsiders can arise for groups that are not that, but find nonetheless, with respect to one or a cluster of issues, that they are habitually outvoted and as a result subjected to regulation or other deprivation more onerous than that to which those who habitually prevail have proved willing to subject themselves. From one perspective the claim of such groups to protection from the ruling majority is even more compelling than that of the out-of-stater: they are, after all, members of the community that is doing them in. From another, however, their claim seems weaker: they do have the vote . . . .

Ely, *supra* note 61, at 466 (footnote omitted).

72. As McGovney critically commented, a fundamental rights limitation

> leaves it wholly to judicial reasoning as occasion arises to determine what are deemed funda-

is almost worthless as a criterion because, in protecting nonresidents' interests only with regard to those privileges and immunities both held generally by citizens of the state and considered by judges to be important, it fails to guide or control judges.[73]

A further difficulty is that fundamental rights terminology suggests inviolable rights, though the privileges and immunities of article IV, section 2 are actually conditional. For example, the clause permits a state to deny noncitizens privileges and immunities denied its own citizens.[74] Also, under *Baldwin,* a finding that an asserted privilege is fundamental does not guarantee a nonresident protection under the clause. The criterion is merely a threshold test to determine whether a discriminatory statute will be subjected to the *Toomer* test. Thus a nonresident's fundamental rights may still be denied so long as the denial squares with a state's legitimate purpose and means of discrimination.

A fundamental rights inquiry in the privileges and immunities context is also bound to create confusion with equal protection and due process jurisprudence,[75] thus threatening to impair analysis under those doctrines

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> mental, or in other words, what the "judicial mind" regards as reasonably necessary that every state should concede to the citizens of every other in order to accomplish this general purpose. Nothing but the gradual process of inclusion and exclusion will define "fundamental rights."

McGovney, *supra* note 19, at 228–29. (footnote omitted). For similar criticism by Mr. Justice Black in his lifelong attempt to see the fourteenth amendment due process and privileges or immunities clauses incorporate the Bill of Rights (and nothing else), see Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (concurring); Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (dissenting); Adamson v. California, 332 U.S. 46, 68 (1947) (dissenting, with lengthy appendix).

73. Even if the Supreme Court had accepted a fundamental rights analysis over the past century, the value of precedent as to which rights are fundamental might be questionable because fundamental rights analysis rarely carves out a consistent pattern.

Professor Ely warns of "the inevitable futility of trying to answer the wrong question: 'Which values . . . qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts?' " Ely, *Foreword, supra* note 25, at 54 (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 55 (1962)). He suggests several sources to give meaning to "fundamentalness." After examining (1) tradition, (2) consensus, and (3) progress prediction, he finds that the term fundamental right is not susceptible to being placed on firm foundation. All fail to commit judges to a pattern or to lend consistency to decisions, leaving them free to wander. Thus Ely concludes: "No answer is what the wrong question begets." *Id.* at 55.

74. *See, e.g.,* Downham v. Alexandria, 77 U.S. (10 Wall.) 173, 175 (1871) ("It is only equality of privileges and immunities between citizens of different States that the Consitution guarantees."). This was the effect of *Paul* (refusing to place the natural-law-fundamental-rights gloss on article IV, § 2) and of the *Slaughter-House Cases* (refusing to place the same gloss on fourteenth amendment privileges or immunities). *See also* 2 CROSSKEY, *supra* note 25, at 1096–97, 1122–26. For example, in *Toomer,* had South Carolina closed its shrimp fishery to residents and nonresidents alike, thus forbidding all commercial shrimping, the Court would have been compelled to uphold such a nondiscriminatory statute under a privileges and immunities challenge.

75. *See, e.g.,* Carchman v. Korman Corp., 456 F. Supp. 730, 737–38 (E.D. Pa. 1978) (discussing the confusion in determining discrete classes of fundamental rights arising under the Bill of

as well. The Court has recognized as fundamental different rights under each of these clauses,[76] indicating that by "fundamental right" it means something different in each of these contexts.[77] Identification of fundamental rights under the equal protection and due process clauses has generally involved judicial weighing and value judgment, often after a search into natural law,[78] while the scope of the privileges and immunities clause traditionally extended to the privileges of citizenship accorded generally by the state's positive law.[79] Yet, by reviving the fundamental rights limitation, *Baldwin* inevitably requires value judgments as to how basic or essential each particular privilege is and thus moves privileges and immunities analysis closer to equal protection and due process analyses. In fact, the *Baldwin* Court apparently merged the process of identifying fundamental rights under the privileges and immunities and equal protection clauses. Without separately analyzing the fundamentalness of the claim under each clause, *Baldwin* determined that recreational elk hunting is not fundamental,[80] and consequently dismissed the privileges and immunities claim[81] and avoided strict scrutiny under the equal protection clause.[82] The difficulty of identifying separate lists of fundamental rights[83] could easily obscure traditional distinctions between the analyses which have evolved out of the separate purposes of these clauses.

Rights, the equal protection clause, the due process clause, and the privileges and immunities clause).

76. For example, the right to participate in the political process, considered fundamental under the equal protection clause, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966), has been specifically excluded as a privilege of citizenship protected by the privileges and immunities clause. Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1875). On the other hand, the privilege of an equal right to employment, which has been protected under the privileges and immunities clause, Hicklin v. Orbeck, 437 U.S. 518 (1978); Toomer v. Witsell, 334 U.S. 385 (1948), is unquestionably not fundamental for equal protection purposes. Habron v. Epstein, 412 F. Supp. 256, 259–62 (D. Md.), *aff'd*, 429 U.S. 802 (1976). *See* Kotch v. Bd. of River Port Pilots Comm'rs, 330 U.S. 552, 556 (1947).

77. *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-9 (1972); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. Rev. 716, 743-45 (1969).

78. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (recognizing a woman's fundamental right to obtain an abortion under the due process clause); Shapiro v. Thompson, 394 U.S. 618 (1969) (recognizing a fundamental right to interstate migration under the equal protection clause). In *Roe* no attempt was made to ground the right in positive law. 410 U.S. at 152–55. *See* Ely, *supra* note 61, at 452 n.7.

79. *See* notes 34 & 37 *supra*.

80. 436 U.S. at 388.

81. *Id.*

82. *Id.* at 390. The Court made no separate determination that the activity at stake was not fundamental for equal protection purposes.

83. Professor Tribe recently commented: "What is strangest about the decision in *Baldwin* is that the Court created for itself much the same problem that it sought to avoid in equal protection

That the Court intends the effect of its fundamental rights analysis to differ depending on the clause being applied remains very clear. While courts have searched for fundamental rights in the equal protection and due process contexts to *expand* the protection under those clauses,[84] *Baldwin* used fundamental rights as a limitation on the reach of an otherwise broad guarantee to nonresidents in the privileges and immunities clause. And, though a fundamental right may be denied under due process analysis only when outweighed by compelling state interests,[85] the privileges and immunities clause permits a state to deny precisely those rights that under *Baldwin* would be labeled "fundamental," so long as noncitizens and citizens are similarly deprived. Finally, under the equal protection clause, a right may be protected even if not found to be fundamental, though denial of nonfundamental rights is subject to only a low level of scrutiny.[86] But under *Baldwin's* threshold test, characterizing a right as nonfundamental places it completely outside the protection afforded by the privileges and immunities clause.

III. THE *TOOMER* TEST EXPLAINED AND APPLIED

Privileges and immunities jurisprudence must reconcile two sometimes competing interests: the protection of nonresidents against discriminatory state legislation and the preservation of a state's autonomy to exercise its police powers. Though the clause has necessarily been interpreted to be less than absolute,[87] care should be taken not to compromise its guarantee beyond that required to preserve state autonomy. The *Toomer* test[88] accurately reflects the clause's aim to protect nonresident citizens while recognizing that a state must be granted wide latitude in identifying evils and selecting remedies.[89] *Toomer* held that discrimination against nonresidents without persuasive justification independent of the status of state

jurisprudence in *San Antonio Independent School Dist. v. Rodriguez* [441 U.S. 1 (1973)]: the problem of developing autonomous catalogues of fundamental rights." L. TRIBE, *supra* note 19, at 35 (Supp. 1979).

84. *See* note 77 *supra*.

85. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154–55 (1973).

86. Equal protection analysis requires strict scrutiny of any statutory classification impairing a "fundamental right," whereas classifications affecting nonfundamental rights are subject to wide legislative discretion. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). Consequently, discrimination is often permitted because of the narrow scope of judicial review of social and economic matters which have been deemed nonfundamental under the equal protection clause. *See generally* City of New Orleans v. Dukes, 427 U.S. 297, 303, 305 (1976); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 813 (1976); Dandridge v. Williams, 397 U.S. 471, 485–87 (1970).

87. *See* note 22 *supra*.

88. *See* notes 41–47 and accompanying text *supra*.

89. *Toomer*, 334 U.S. at 396. *See* note 43 *supra*.

citizenship is prohibited by the clause.[90] The thrust of *Toomer* is that any discrimination by one state against visiting citizens of other states requires rigorous review.[91] Thus it is the nature of the classification, not the weightiness of the privilege asserted, which is scrutinized, and a threshold test is superfluous.

A state may exercise its police power to regulate wildlife exploitation[92] in any manner consistent with the Constitution;[93] and each state may independently choose the means best suited to the peculiar circumstances and needs of that state. But under *Toomer* the privileges and immunities clause would prohibit Montana from exercising its police power to impose discriminatory license fees when the fee differential only serves to shift the costs of elk management onto nonresidents or effectively to prohibit them from hunting in the State.

The Montana licensing scheme should have been subjected to the *Toomer* test and held invalid. The facts in *Baldwin* wholly failed to dem-

90. 334 U.S. at 396, 398, 399.

91. Under the privileges and immunities clause, a court need not find the residency classification suspect, as is required for strict scrutiny under the equal protection clause, because in drafting the privileges and immunities clause, the framers implicitly determined that nonresidents require special protection from classifications discriminating against them. *See* note 62 *supra*. Thus, it is also unnecessary to find the asserted privilege fundamental to achieve heightened scrutiny because rigorous review is already required. *See generally* Austin v. New Hampshire, 420 U.S. 656, 663 (1975). *See also* Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 386–89 (1979) (Professor Simson sketched the *Toomer* analysis for several controversial privileges frequently denied nonresidents).

It has been suggested that the *Toomer* formulation strongly influenced subsequent development of modern equal protection analysis. L. TRIBE, *supra* note 19, at 410, and that it closely resembles the emerging intermediate level of scrutiny in equal protection cases, *e.g.*, Foley v. Connelie, 435 U.S. 291 (1978); Craig v. Boren, 429 U.S. 190 (1976). *See The Supreme Court, supra* note 52, at n.86, *Domicile Preferences in Employment, supra* note 52 at 1081 n.81.

92. By a valid exercise of its police power a state may, for the common benefit, regulate the right to hunt or fish. Lacoste v. Department of Conservation, 263 U.S. 545 (1924); Lawton v. Steele, 152 U.S. 133 (1894). In fact, it may even be requried to do so by the public trust doctrine. *See generally*, Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

The 19th century struggle over control of animals *ferae naturae* had two primary themes: (1) whether the states could assert their police powers to manage and regulate animals *ferae naturae* as against their citizens, and (2) whether the states could assert an exclusive power to do so as against the federal government. Though the Constitution is silent on the management and control of wildlife, the Court early held that the public trust had passed to the Colonies, and then to the states, by the Royal Charters. Martin v. Waddell, 41 U.S. (16 Pet.) 367, 416 (1842) (power to regulate oysters in the tidal flats included within state's police power). By this analysis, the states' police power encompassed regulation of animals *ferae naturae*. *See generally* BEAN, THE EVOLUTION OF NATURAL WILDLIFE LAW 8–45 (1977).

93. The Supreme Court, in recognizing the states as successors to the sovereign interest in animals *ferae naturae*, qualified the power as "subject . . . to the rights since surrendered by the Constitution to the general government." Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842). *See also* Geer v. Connecticut, 161 U.S. 519, 528 (1896).

onstrate any substantial reason for discrimination against nonresidents.[94] If the object of the licensing scheme was conservation, nonresidents were not a peculiar source of the evil the statute sought to alleviate (depletion of elk),[95] and the first part of the *Toomer* test[96] was not satisfied. Under a cost justification, the fees imposed on nonresident hunters were not related to the actual cost to the state from their presence,[97] and the second part of the *Toomer* test[98] was not met. The majority flatly rejected a political support justification.[99] And though the *Baldwin* majority erroneously sought

94. *See* 436 U.S. at 402–06 (Brennan, J., dissenting).

95. *Id.* at 403–04. " '[A] statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all.' " *Id.* at 404 (quoting Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 285 n.21 (1977)). In fact appellants asserted that an incidental effect of forcing nonresident hunters to purchase a combination license, even if they wished to hunt only elk, is that numerous hunters, not otherwise inclined, shoot other species than elk simply to get what they paid for. Brief of Appellants at 58, Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978).

Montana retains a broad choice of means, consistent with the privileges and immunities clause, with which to effect its strong interest in protecting elk within its borders. For example, specifying age and sex of the species to be taken, restricting geographical areas, limiting hunter days, and raising the fee to residents could all be accomplished in Montana on resident-neutral criteria. *See* MONT CODE ANN § 87–2–506 (1979).

96. *See* text accompanying note 45 *supra*.

97. 436 U.S. at 404–05 (Brennan, J., dissenting). Additional license fees imposed on nonresident hunters would normally be constitutional only to the extent they either compensate the state for any added enforcement burdens resulting from the presence of nonresident hunters or reimburse the state for any conservation expenditures from taxes which only residents pay. *See* note 43 *supra*. Appellants offered evidence in the district court showing that on these grounds, no more than a 2.5 to 1 fee differential would be justified. The court agreed, finding that on a consideration of all the evidence, a 7.5 to 1 differential "cannot be justified on any basis of cost allocation." Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1008 (D. Mont. 1976). Because the percentage of nonresident hunters varies from state to state, and because costs and taxes vary, each state must determine its own fair differential. One study concluded that the nonresident hunter generally costs a state three times as much, and that the state might be justified in charging five times as much for nonresident licenses. *See generally* WILDLIFE MANAGEMENT INSTITUTE, REPORT TO THE WESTERN ASSOCIATION OF STATE GAME AND FISH COMISSIONERS ON NONRESIDENT HUNTING AND ANGLING 10, 15 (July, 1971). The combined effect of Montana's required combination license and higher fees resulted in a 28.2 to 1 differential. *See* note 2 *supra*.

98. *See* text accompanying note 46 *supra*.

99. On appeal Montana argued that, without discrimination against nonresidents, many resident hunters would abandon their support of the state's range management and hunting regulation measures, thus jeopardizing the state's elk population. Brief of Appellees at 8, 33, Baldwin v. Fish & Game Commn'n, 436 U.S. 371 (1978). The rationale behind this justification, offered sua sponte by the district court, Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F.Supp. 1005, 1010 (D. Mont. 1976), was well stated in a casenote discussing the lower court decision. Note, *Montana Outfitters v. Fish and Game Commission: Of Elk and Equal Protection*, 38 MONT L. REV 387, 394–96 (1978). The *Baldwin* majority, however, agreed in a footnote with the dissenting judge below "that the State's need or desire to engender political support for its conservation programs cannot itself justify an otherwise invidious classification." *Baldwin*, 436 U.S. at 391–92 n.24 (citation omitted).

support from 19th century "ownership theory" cases,[100] that theory has more recently been rejected and can no longer justify discrimination against nonresidents.[101] By failing to reach the *Toomer* test, the Court essentially ruled that Montana could discriminate solely on the basis of nonresidency.

IV. THE IMPLICATIONS OF *BALDWIN*

One implication of the *Baldwin* analysis is that a state may impose any fee on nonresident elk hunters, whether 10 times, 100 times, or 1,000 times as great as that imposed on residents; by the same token, state measures limiting the number of nonresident licenses or even banning

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100. 436 U.S. at 384–86 (citing Geer v. Connecticut, 161 U.S. 519 (1896); McCready v. Virginia, 94 U.S. 391 (1876); and Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230)). The cases cited by the Court advanced the theory that a state may own as a proprietor the natural resources within its borders and consequently may reserve them for the exclusive benefit of its own citizens.

Geer, based on an antiquated commerce clause analysis, was anticlimatically overruled in Hughes v. Oklahoma, 441 U.S. 322 (1979). *See* Note, *supra* note 8, at 306 (anticipating the demise of *Geer);* 9 ENVTL. L. REP. (Environmental Law Institute) 10106.

Corfield, like *McCready*, is distinguishable from *Baldwin* on the facts. Both involved sedentary oysters in state tidelands, and should not have influenced the outcome in *Baldwin* with regard to free-ranging wild elk. In fact, *McCready*, which held that Virginia could prohibit nonresidents from planting oysters in the Ware River while granting that privilege to Virginia residents, analogized "planting of oysters in the soil covered by water owned in common by the people of the State" to "planting corn upon dry land held in the same way." 94 U.S. at 396. The Court concluded that "if the State, in the regulation of its public domain, can grant to its own citizens the exclusive use of dry lands, we see no reason why it may not do the same thing in respect to such as are covered by water." *Id. Corfield* was decided on essentially the same basis, according to Smith v. Maryland, 59 U.S. (18 How.) 71, 75 (1855). Given *McCready's* focus on regulation of state-owned tidal lands rather than oysters per se, there remains an arguable basis for the result in that case. Nevertheless, *Toomer v. Witsell* limited *McCready* to its facts and held that the ownership theory has no bearing on migratory species over which a state may not acquire ownership except perhaps as a captor. 334 U.S. at 402. *See also* Douglas v. Seacoast Prods., Inc., 431 U.S. 265, 284 (1977); Kleppe v. New Mexico, 426 U.S. 529 (1976); Missouri v. Holland, 252 U.S. 416 (1920).

Further impairing the notion that Montana could own the elk found within her territory are the facts that the elk migrate beyond Montana's borders and that, of those elk taken within Montana, 75% are taken on federal lands. Brief of Appellants at 21, 37, Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978).

101. 436 U.S. at 405 (Brennan, J., dissenting).

The myth that McCready v. Virginia, 94 U.S. 391 (1876), created an exception to the clause was challenged in Toomer v. Witsell, 334 U.S. 385, 402 (1948), and recently rejected by the Court. *See* Hicklin v. Orbeck, 437 U.S. 518, 528–29 (1978); *Domicile Preferences in Employment, supra* note 52, at 1092 (reaching this conclusion on the basis of *Hicklin*). The *Baldwin* majority acknowledged that "the States' interest in regulating and controlling those things they claim to 'own,' including wildlife, is by no means absolute." 436 U.S. at 385. The *Hicklin* Court went one step further, explaining: "Rather than placing a statute completely beyond the Clause, a State's ownership of the

nonresident hunters entirely would be immune from review under the privileges and immunities clause.[102] One looks in vain for factors which distinguish nonresident access to Montana elk from nonresident access to other wildlife or other recreational activities under state control.[103] If the Court's fundamental rights analysis sweeps so broadly as to exclude all recreational activites from protection under the clause, the states may have unlimited discretion to restrict numerous other natural resources to the recreational uses of their citizens.[104] Such discriminatory legislation has been roundly criticized in recent years for its balkanizing effect on resource enjoyment.[105]

There was no precedent for the *Baldwin* interpretation that includes activites in pursuit of a livelihood within the privileges and immunities clause but excludes activities in pursuit of recreational enjoyment. *Baldwin* reveals that a majority of the Justices believe that an individual's right to earn a livelihood outside his state of citizenship is an important value in the affairs of the Union, but that the same individual's right to engage in sport in other states is not important enough to be protected.[106]

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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." 437 U.S. at 529. Thus a state's assertion of proprietary interests in natural resources, while plausible with respect to oil and gas, will not immunize a discriminatory statute from analysis under the clause. Ownership would be merely influential under the *Toomer* test in determining whether substantial reasons exist for the discrimination. But, in any case, a state may not claim ownership over free-ranging elk found within its borders. *See* note 100 *supra*.

102. The *Baldwin* majority sought to justify the fee differential by observing that pursuit of a trophy rather than of a livelihood was involved, and "appellants [were] not totally excluded" from taking trophies. 436 U.S. at 388. But what bars Montana from excluding nonresidents? As appellants argued: "[The] holding gives the State of Montana a 'carte blanche' to develop further and even more egregious discriminatory devices aimed at restricting nonresident hunters." Brief of Appellants at 13, Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978).

103. Such things as scarcity of elk, the high cost of management, the type of hunters, and the cost of elk hunting—all factors which must have been in the minds of the legislators who enacted Montana's licensing scheme—have no apparent place in the Court's fundamental rights analysis. Even if they had been identified by the Court as factors, they do not distinguish elk hunting from many other recreational activities.

104. Similar discrimination may now be permissible as to all sport fishing and hunting, regardless of management costs, scarcity of the species, or enforcement costs. It could also extend to state parks and beaches; perhaps even to toll roads leading to elk country, parks, or beaches.

105. *See Baldwin*, 436 U.S. at 374 n.7 (citing articles). *See also* 8 ENVTL L. REP. (Environmental Law Institute) 10136, 10139 (noting the implication of *Baldwin* that as Montana can limit nonresident access to elk, so California might cordon off its redwoods).

106. This elevates commercial interests higher than they need be in the scheme of life's activities. Recent state court decisions recognize the importance of protecting recreational interests. *E.g.*, Gewirtz v. City of Long Beach, 69 Misc. 2d 763, 330 N.Y.S.2d 495 (Sup. Ct. 1972) (finding that the public trust doctrine should be construed to protect recreational interests of the public). *Accord*, Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). Other state court deci-

Yet, commercial relations were but one aspect of the range of protections guaranteed to citizens of any one state in whichever other state they visited.[107] Under the *Toomer* analysis,[108] which focuses on the nature of the classification rather than the nature of the activity, the factual differences between *Toomer* and *Baldwin* are of no significance. The persuasiveness of the state's justification for discrimination should be the factor which determines constitutionality. In fact, *Toomer's* rejection of a state's ostensible conservation purposes in the commercial context would seem to carry more weight in the recreational sphere where resource exploitation is less intensive.

V. CONCLUSION

It is difficult to perceive why the Court would revitalize the aged and feeble *Corfield,*[109] quietly buried over the last century, to form a confusingly vague analysis that provides no easily applicable test. The Court's determination to do so invites the impression that *Baldwin* was a result-oriented decision, producing a result which may return to haunt the Court.

The privileges and immunities clause sought to remove the disabilities of alienage from citizens of any one state while visiting another state by tying the rights of the visitors to those of citizens of the latter state. Though the state clearly has the police power to regulate the taking of

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sions have used the public trust doctrine to prevent municipalities from preserving to themselves the resource advantages of their location. *E.g.*, Neptune City v. Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972). Note also the comment of Judge Browning, dissenting from the district court judgment which *Baldwin* affirmed:

> Access to outdoor recreation is increasingly important to our society. It is significant, for example, that the number of visitors to national and state parks doubled in the decade 1960–70. . . . In fact if not in law, recreational resources constitute a vital national asset. The sentiment that state residents have a preferred claim to such resources within the state is unworthy of protection "under a Constitution which was written partly for the purpose of eradicating such provincialism."

Montana Outfitters Action Group v. Fish & Game Comm'n, 417 F. Supp. 1005, 1012 (1976) (Browning, J., dissenting) (citation omitted).

107. *See* note 61 *supra.*

108. The *Toomer* Court did not invalidate South Carolina's exclusionary shrimping statute on the basis that the right to earn a livelihood is a fundamental right; rather, it did so because there was no "reasonable relationship between the danger represented by noncitizens as a class, and the severe discrimination practiced upon them." Toomer v. Witsell, 334 U.S. 385, 399 (1948).

109. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). In effect, *Baldwin* revives a limitation on the privileges and immunities clause which originated in the dictum of a single justice riding circuit over a century and a half ago, though that limitation, never formally adopted by the Court, was undermined in *Paul,* specifically rejected in *Hague,* ignored in *Toomer* and *Mullaney,* and applied inconsistently in *Baldwin.*

animals *ferae naturae,* that power, since the creation of the Union, can only be exercised in a manner consistent with the Constitution. The Constitution admonishes each state that whatever are the privileges and immunities of citizenship accorded to all citizens of that state, those same privileges and immunities must also be guaranteed to the citizens of other states, unless substantial reasons independent of the status of citizenship justify differential treatment. Fishing and hunting, for commercial and recreational purposes alike, are privileges and immunities of that character. The distinction made by the *Baldwin* Court was erroneous. *Baldwin's* conclusion that elk hunting is not an activity the denial of which would impair the nation's vitality as a single entity is entirely irrelevant to the need for comity and healthy interstate relations, as recognized by the privileges and immunities clause. Under a historical understanding of the purpose of the clause, and the cases interpreting it, *Baldwin* was wrongly decided.

Walter G. Spilsbury, Jr.