Golden Gate University Law Review

Volume 52 | Issue 2 Article 3

November 2022

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Ryan Griffith

COMMENT

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*RYAN GRIFFITH, ESQ.**

INTRODUCTION

The founders of this country envisioned that United States citizens could travel throughout the Union without being denied fundamental rights based on their state residency.[1] This was specifically outlined in Article IV, Section II of the United States Constitution, known as the Privileges and Immunities Clause, which reads, "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[2]

Both James Madison and Alexander Hamilton, in the Federalist Papers, discussed the importance of ensuring that states did not discriminate against each other's citizens.[3] The Federalist Papers were key

* Ryan Griffith graduated from GGU Law in 2012 and started his career at the Vallejo City Attorney's Office that same year where he created the cities Neighborhood Law Program, which involved utilizing civil litigation to help distressed neighborhoods. After his first year as a Neighborhood Law Attorney the Solano County Bar Association named him the Young Lawyer of the Year for 2013. Ryan continues work primarily in the receivership world, but also has its own small private practice on the side where he handles sports law and business litigation.

Ryan is also a routine guest on Fox Sports and has had several law review articles published by universities such as University of Massachusetts, Seattle University, and Lincoln Memorial University. He is also a frequent columnist for the California Daily Journal. He is also an adjunct professor at Golden Gate University School of Law.

[1] Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, 98 GEO. L.J., 329, 1258–1259 (2011), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2457&context=law-faculty-publications.

[2] U.S. CONST., art. IV, § 2.

[3] THE FEDERALIST NO. 80, (Alexander Hamilton).

documents that led to the creation of the United States Constitution. In Federalist No. 42, James Madison wrote, "Nothing which tends to facilitate the intercourse between the States can be deemed unworthy of the public care."[4] Alexander Hamilton was more adamant that states be in harmony with each other when he wrote in the Federalist No. 80, "Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control."[5] To achieve harmony between the states Hamilton further wrote, "It may be esteemed the basis of the Union, that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' "[6]

Based on Madison and Hamilton's writings, the basic principle that states should not discriminate against citizens of another state makes sense. Why have a United States if states treat each other differently? Of course, as with anything in the law, exceptions exist. For example, the United States Supreme Court held that recreational elk hunting was not a protected right under the Privileges and Immunities Clause,[7] This is because elk in Montana were a finite resource and it would be extremely burdensome for the state of Montana to preserve the elk.[8] Therefore, the Court allowed the state of Montana to charge out-of-state residents more than Montana residents for a hunting license.[9] In a similar case however, the United States Supreme Court ruled to protect state harmony by holding that South Carolina charging out-of-state residents 100 times more for a shrimp fishing license violated the Privileges and Immunities Clause.[10] One distinction between the elk hunting and shrimp fishing cases is that hunting is recreational, while shrimp fishing is a means of livelihood.[11] The concept of recreation versus livelihood for purposes of the Privileges and Immunities Clause was further articulated in a Supreme Court case involving lawyers' rights to be licensed to practice in law in a state where they did not have residency.[12]

In the shrimp fishing case, the Supreme Court held that a state can discriminate if there is a substantial reason that is closely tied to achieving a state interest.[13] However, the high court ruled the South Carolina

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[4] THE FEDERALIST NO. 42, (James Madison).

[5] THE FEDERALIST NO. 80 (Alexander Hamilton).

[6] *Id.*

[7] Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 390–391 (1978).

[8] *Id.*

[9] *Id.*

[10] Toomer v. Witsell, 334 U.S. 385, 389 (1948).

[11] *Baldwin v. Fish & Game*, 436 U.S. at 391.

[12] *Toomer v. Witsell*, 334 U.S. at 398.

[13] *Id.* at 393.

law did not combat any evil, nor was it closely tied to achieving the state's interest.[14] This leads us to the question posed by this article: how can public universities charge out-of-state tuition rates without violating the Privileges and Immunities Clause?

Furthermore, with the innovation of online education and remote work growing at a rapid pace due to COVID-19, how can the practice of charging out-of-state tuition continue? This article argues that for the good of the nation the discriminatory practice of charging out-of-state tuition should be ceased and that under the Privileges and Immunities Clause, as well as the Fourteenth Amendment, this practice has violated the law for decades.

I. THE STUDENT DEBT CRISIS AND CRIPPLING OUT-OF-STATE TUITION RATES AND HOW ONLINE EDUCATION IS CHANGING THE LANDSCAPE

America's student debt crisis is well documented and has reached the staggering rate of $1.5 *trillion*.[15] Public universities continue to increase tuition at unprecedented rates as well, and for anyone coming to a school from out-of-state, the tuition rates are crippling.[16] The University of California, Los Angeles ("UCLA"), for example, charges $13,258 for undergraduate tuition.[17] However, it charges out-of-state students the regular tuition of $13,258, in addition to a non-residential supplemental tuition of $29,754.[18] Therefore, an out-of-state UCLA student pays $43,012, while an in-state student pays $13,258. As a result of these fees, an out-of-state student pays more than three times the cost of an in-state student. This practice is blatantly discriminatory to out-of-state residents and is actively contributing to the student loan debt crisis this country is facing.

In addition to the discriminatory tuition practice, universities actually use the very students they overcharge as recruitment tools to promote diversity.[19] For example, UCLA actively recruits students from out

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[14] *Id.* at 398.

[15] Wesley Whistle, *What Is Driving the $1.5 Trillion Student Debt Crisis*, FORBES (Sept. 1, 2020), https://www.forbes.com/sites/wesleywhistle/2020/09/01/what-drives-the-15-trillion-student-debt-crisis/?sh=6082d08a7aec.

[16] *The Absurd Rise in College Costs: Comparing Tuition and Fees from the Last 50 Years*, BROKE SCHOLAR, https://brokescholar.com/absurd-rise-in-college-costs-comparing-tuition-and-fees (last visited Jan. 29, 2022).

[17] *Undergraduate Admissions*, UCLA, https://admission.ucla.edu/tuition-aid/tuition-fees (last visited Jan. 29, 2022).

[18] *Id.*

[19] *Student Profile*, UCLA, https://admission.ucla.edu/apply/student-profile (last visited Jan. 29, 2022).

of state, and UCLA even boasts of location diversity on its website, showing the numerous out-of-state students it has.[20] This same practice is actively used by numerous law schools. However, despite being a beneficial recruiting tool for their school, these same students are being charged as much as three times as in-state residents, for no other reason than their state residence.[21]

If students are helping universities diversify and are even using that diversity as recruitment tools, what evil is the school combating by overcharging students from different states? Even more bizarre is that state universities with entirely online degree programs charge out-of-state tuition.[22] Online out-of-state students obtain no benefit from the physical university campus, while conversely not taking up any university resources. Despite these facts, an out-of-state student is penalized for merely residing in another state. The same holds true for traditional students that physically attend out-of-state schools.

Additionally, with COVID-19 impacting the country, numerous schools closed their physical campuses.[23] Therefore, even if a student wants to physically attend the university, they are prevented from doing so.[24] However, they are still being charged out-of-state tuition, while being denied physical access to the school.[25] In short, if students are used as recruiting pawns, denied physical access to the school, and still charged three times the amount of in-state residents, how can this practice not violate the Privileges and Immunities Clause or Equal Protection?

The desire of states to spend more money on education—wanting to ensure their residents reap the benefit of the state's investment—passes the straight face argument test. However, every state spends more on any given service than other states might choose to spend on that same service. For example, as discussed in 1948, South Carolina officials were responsible for regulating the waterways that cost the state money.[26] In

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[20] *Id.*

[21] *Tuition and Fees*, UCLA, https://admission.ucla.edu/tuition-aid/tuition-fees (last visited Jan. 29, 2022).

[22] *ASU Online*, ARIZ. STATE UNIV., https://asuonline.asu.edu/online-degree-programs/undergraduate/bachelor-arts-anthropology/ (last visited Jan. 29, 2022).

[23] Press Release, Cal. State Univ., Chancellor Timothy P. White, CSU Campuses to Continue with Predominantly Virtual Instruction for Academic Terms Beginning in January 2021, (Sept. 10, 2020), https://www.calstate.edu/csu-system/news/Pages/CSU-Campuses-to-Continue-with-Predominantly-Virtual-Instruction-for-Academic-Terms-Beginning-in-January-2021.aspx (on file with author).

[24] *Id.*

[25] *Office of Student Financial Aid – 2020–2021 Cost of Attendance*, S.F. STATE UNIV., https://financialaid.sfsu.edu/content/20-21-archive-coa (last visited Jan. 29, 2022).

[26] *Toomer v. Witsell,* 334 U.S. 385 (1948).

an attempt to save money, South Carolina officials charged out-of-state residents a shrimp license fee that was 100 times more than what South Carolina residents paid.[27] However, South Carolina could not discriminate against out-of-state residents that wanted to earn their livelihood using their waters to engage in shrimp fishing.[28] To conclude the state investment argument, if every state charges out-of-state travelers for anything they spend money on then what is the point of having a United States or the Privileges and Immunities Clause?

Additionally, numerous geographic locations prevent students from pursuing their educational goals within their home state. For example, Alaska does not have a law school.[29] Therefore, any native Alaskan must travel out-of-state to obtain a legal education. Alternatively, Oregon State University has one of the best oceanographic programs in the United States.[30] Considering it is on the West Coast near the Pacific Ocean, this is not surprising. However, the University of Nebraska and residents of Nebraska that want to study oceanography are at a disadvantage, because there is no ocean connected to Nebraska.[31] Therefore, to study at Oregon State University, everyone but Oregon residents seeking to pursue a career in oceanography are penalized for no other reason than being born in a different state. The purpose of forming the United States and including the Privileges and Immunities Clause in the Constitution is to better secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.[32] The practice of overcharging non-state residents for merely residing in another state imposes a penalty and burden, rather than friendship among the states. Therefore, the practice is unconstitutional.

I. EARLY HISTORY OF THE PRIVILEGES AND IMMUNITIES CLAUSE

The roots of the Privileges and Immunities Clause stem back to tensions between American Colonists and Great Britain.[33] Many American Colonists felt they were treated as second-class citizens under British law, even though they had colonized America and paid taxes to the

[27] *Id.* at 389.

[28] *Id* at 398.

[29] *State Map*, L. SCH. ADMISSIONS COUNCIL, https://officialguide.lsac.org/Release/Maps/Maps.aspx (last visited Jan. 29, 2022).

[30] *College of Earth, Ocean, and Atmospheric Sciences*, OR. STATE UNIV., https://ceoas.oregonstate.edu/ (last visited Jan. 29, 2022).

[31] *Triple Landlocked State*, WORLD ATLAS, https://www.worldatlas.com/articles/which-is-the-only-triply-landlocked-state-of-the-us.html (last visited Jan. 29, 2022).

[32] Corfield v. Coryell, 6 F. Cas. 546, 552 (1823).

[33] Lash, *supra* note 1, at 1241, 1258.

Crown.[34] Therefore, after the Revolution, Colonists wanted to ensure the United States were truly united and states did not discriminate against each other.[35] That is why this country's original founding document, the Articles of Confederation, included the following language:

> 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 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.[36]

Of course, the original Articles of Confederation did not give the United States enough power.[37] Therefore, the United States Constitution was drafted to create a stronger Union.[38] Key documents, known as the Federalist Papers, were instrumental in creating the Constitution, and James Madison and Alexander Hamilton both wrote about the importance of states not discriminating against each other.[39] As a result, the Privileges and Immunities Clause was added to the United States Constitution, which states "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[40]

One of the first cases to analyze the Privileges and Immunities Clause occurred in 1797.[41] The case involved a property dispute between citizens of Pennsylvania and Maryland.[42] The Maryland resident was a creditor of the Pennsylvania resident and when it came time to collect the debt, the Pennsylvania resident argued that the laws of Maryland did not apply to him.[43] The court disagreed, because it would allow anyone to avoid justice in each state.[44] The court also provided a roadmap to interpret the Privileges and Immunities Clause:

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Constitution Daily Staff, *10 Reasons Why America's First Constitution Failed*, NAT'L CONST. CTR. (Nov. 17, 2021), https://constitutioncenter.org/blog/10-reasons-why-americas-first-constitution-failed.

[38] *Id.*

[39] THE FEDERALIST NO. 42 (James Madison), NO. 80 (Alexander Hamilton).

[40] U.S. CONST. art. IV, § 2.

[41] Campbell v. Morris, 3 H. & McH. 535 (1797).

[42] *Id.* at 555.

[43] *Id.*

[44] *Id.* at 566.

> The court are of opinion it means that the citizens of all the states shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the state, in the same manner as the property of the citizens of the state is protected. It means, such property shall not be liable to any taxes or burdens which the property of the citizens is not subject to. It may also mean, that as creditors, they shall be on the same footing with the state creditor, in the payment of the debts of a deceased debtor. It secures and protects personal rights.[45]

In 1812, the New York courts again interpreted the Privileges and Immunities Clause.[46] The issue in the case involved New York providing the exclusive license to a steamboat operator, which excluded others from using steamboats.[47] The court held that New York was allowed to create local regulations regarding transportation.[48] The court reasoned that the Privileges and Immunities Clause intends that the same immunities and privileges shall be extended to all citizens equally for the wise purpose of preventing local jealousies which discrimination produces.[49] However, the steamboat operator had worked to preserve his rights with the state legislature and therefore was entitled to exclusive use of the steamboat.[50]

Furthermore, a landmark case regarding the Privileges and Immunities Clause occurred in 1823.[51] The case involved New Jersey's regulation that penalized oyster fishing when it was not in season.[52] For New Jersey residents the fine was $10, but for out-of-state violators the penalty was $50.[53] This was a facially discriminatory law, but the court found that privileges and immunities only applied to rights that were fundamental in nature.[54] This included the right to engage in trade, agriculture and professional pursuits.[55] It also provided an exemption from higher taxes or impositions than other citizens face.[56] As it related to out of season oyster fishing, there was no fundamental right to engage in the practice.[57] In fact, the practice violated the law and was not a protected

[45] *Id.* at 554.
[46] Livingston v. Van Ingen, 9 Johns. 507 (1812).
[47] *Id.* at 559.
[48] *Id.* at 566–567.
[49] *Id.* at 561.
[50] *Id.* at 590.
[51] Corfield v. Coryell, 6 F. Cas. 546 (1823).
[52] *Id.* at 550.
[53] *Id.*
[54] *Id.* at 551–552.
[55] *Id.* at 552.
[56] *Id.*
[57] *Corfield v. Coryell*, 6 F. Cas. at 552.

right, because the state had a legitimate reason to protect its limited resources.[58] As to the parties, the case was not conclusive. However, as it relates to the Privileges and Immunities Clause, it left open the question of what is considered a fundamental right protected by the Privileges and Immunities Clause.[59]

II. THE PRIVILEGES AND IMMUNITIES CLAUSE AFTER THE CIVIL WAR

State rights became an increasingly important issue, and eventually the Civil War broke out in the United States over it. However, the Union prevailed and in doing so increased federal control over the states. A few examples of increases in federal power include Abraham Lincoln's imposition of the first federal income tax, which was 3%.[60] A federal pension was also created to reward Civil War Veterans.[61] Most importantly, because of the war, the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were passed.[62]

The Fourteenth Amendment provided a great increase in federal power over the states, and it specifically restated that no citizen shall be deprived of privileges and immunities.[63] The Fourteenth Amendment also made the Bill of Rights applicable to the states.[64] Whether the Bill of Rights applied to state government action had been an issue since the decision of *Barron v. Baltimore,* which held that the Bill of Rights applied only to the Federal Government and not the states.[65] During the debates in creating the Fourteenth Amendment, the legislature discussed and analyzed the importance of states not discriminating against each other. The 39th Congress even articulated examples of what should not be done.[66] Indiana Congressman Michael Kerr stated,

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[58] *Id.*

[59] *Id.* at 551–552.

[60] Revenue Act of 1861, Ch. 45, 12 Stat. 292; *see also The Civil War: The Senate's Story*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/civil_war/RevenueAct_FeaturedDoc.htm (last visited Jan. 30, 2022).

[61] An Act to Grant Pensions, Ch. 166, 12 Stat. 566 (1862); Claire Prechtel Kluskens, *A Reasonable Degree of Promptitude*, 42 PROLOGUE MAG. 1, 1 (2010), https://www.archives.gov/publications/prologue/2010/spring/civilwarpension.html.

[62] *Landmark Legislation: Thirteenth, Fourteenth, & Fifteenth Amendments*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/CivilWarAmendments.htm (last visited Jan. 30, 2022).

[63] U.S. CONST. art. XIV, § 1.

[64] *Id.*

[65] Barron v. Balt, 32 U.S. 243, 351 (1833).

[66] Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, 99 GEO. L.J., 329, 382 (2011), https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=2455&context=law-faculty-publications.

> I understand the primary object to be to secure equal privileges and immunities to the citizens of each State while temporarily sojourning in any other State, and its secondary and only other purpose is to prevent any State from discriminating in its laws in favor for or against the citizens of any other State merely because they are citizens of such other State, or in other words, for mere sectional reasons. For example, Indiana cannot form any tacit or express alliance or friendship with Kentucky which shall require or justify Indiana in giving to the citizens of Kentucky who shall settle in Indiana any privileges and immunities it does not equally give to the same class of citizens from any other State.[67]

The Congressmen's statement articulated that Americans should not be discriminated against based on their residence, and the Privileges and Immunities Clause is now found not once, but twice in the United States Constitution.[68]

A major case analyzed by the United States Supreme Court after the Civil War related to the Privileges and Immunities Clause was the *Slaughterhouse Cases* in New Orleans, Louisiana.[69] The city wanted to restrict certain butchering to certain geographical areas of the city and provided an exclusive right to certain butcheries to engage in butchery.[70] The reason was that if animals were allowed to be slaughtered anywhere, it would be a nuisance.[71] Suit was brought against the city, because it discriminated against out-of-state residents that wanted to engage in butchery and it also created a monopoly.[72] The Court however, ruled that the city, within its police power, had the right to control who engaged in butchery and where it occurred.[73] The Court also cited the 1823 decision of *Corfield* and stated the Privileges and Immunities Clause applied to fundamental rights.[74] The Court did not detail exactly what fundamental rights consisted of, but provided the following guidance.

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

[67] *Id.*
[68] U.S. CONST. art. IV, § 2; U.S. CONST. art. XIV, § 1.
[69] *Slaughter-House Cases*, 83 U.S. 36 (1873).
[70] *Id.*
[71] *Id.* at 62–63.
[72] *Id.* at 64.
[73] *Id.* at 87.
[74] *Slaughter-House Cases*, 83 U.S. at 75–76.

> sovereign. What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads: protection by the government, 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 prescribe for the general good of the whole.[75]

This of course still leaves us with the question of what is fundamental and what is not, related to the Privileges and Immunities Clause.

III. PRIVILEGES AND IMMUNITIES CLAUSE IN THE MODERN ERA AND A SUPREME COURT TUITION CASE

A landmark case analyzing the Privileges and Immunities Clause, *Toomer v. Witsell* occurred in 1948.[76] In this case, the United States Supreme Court acknowledged the primary purpose of the Privileges and Immunities Clause was to ensure that citizens of different states were given equal privileges to citizens of other states.[77] The high court, however, acknowledged that the Privileges and Immunities Clause was not absolute.[78] A state can discriminate for a substantial reason that is closely tied to achieving a state interest.[79] For example, in *Toomer,* South Carolina passed a law that drastically discriminated against out-of-state shrimp fishers by charging a license fee of $2,500 for out-of-state fishers and $25 for in-state fishers.[80] This was undeniably a discriminatory law against out-of-state fishers, but it did not achieve any substantial purpose or combat any evil.[81]

South Carolina argued that the purpose of the discriminatory statute was to prevent overfishing and regulating different fishing tactics from out-of-state fishers.[82] However, there was no indication that out-of-state fishers were doing any more or less fishing than in-state fishers or used any different tactics than in-state fishers.[83] Therefore, the law was clearly designed to favor South Carolina fishers at the exclusion of out-of-state fishers.[84] This caused the Court to find South Carolina's statute unconsti-

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[75] *Id.* at 117.
[76] Toomer v. Witsell, 334 U.S. 385 (1948).
[77] *Id* at. 395–396.
[78] *Id.* at 396.
[79] *Id.*
[80] *Id.* at 389.
[81] *Id.* at 397–398.
[82] Toomer v. Witsell, 334 U.S. at 397–398.
[83] *Id.* at 398–399.
[84] *Id.* at 399.

tutional.[85] Looking at this case related to the issue of fundamental rights, it seems that charging someone to pursue legitimate trade should not be discriminated against based on their state residency.

In 1973, the United States Supreme Court partially analyzed the issue presented by this article.[86] The case involved a University of Connecticut student that was being charged out-of-state tuition.[87] However, the plaintiff's case challenged the Connecticut statute, which had an irrebuttable presumption that any out-of-state resident had no intention of staying in-state after graduation.[88] The Court struck down a permanent irrebuttable presumption that no student intended to stay in-state after graduating.[89] The Court went so far as to say irrebuttable presumptions are highly disfavored.[90]

The three defenses that University of Connecticut put forward are worth analyzing, because they are still present today.[91] The first defense asserted by the University is that the state had a valid interest in equalizing the cost of public education between residents and non-residents to ensure that Connecticut residents receive their full subsidy.[92] The Court ruled against this logic because the University's policies were over inclusive and did not actually achieve the objective.[93]

The second defense raised by the University is that it needed to award the residents that had paid taxes for the state university.[94] The Court again struck down this logic, because someone could have been a resident of Connecticut for years then obtained residency in another state temporarily and then moved back to Connecticut.[95] Therefore, the tax would not be credited, making the statute overinclusive.[96]

The third defense raised by the University was that the irrebuttable presumption provided administrative ease.[97] The University went on to say without the irrebuttable presumption it would be almost impossible to determine who would stay in Connecticut after graduation.[98] The

[85] *Id.*
[86] Vlandis v. Kline, 412 U.S. 441 (1973).
[87] *Id.* at 443.
[88] *Id.*
[89] *Id.* at 453.
[90] *Id.* at 446.
[91] *Id.* at 448.
[92] Vlandis v. Kline, 412 U.S. at 448–449.
[93] *Id.*
[94] *Id.* at 449–450.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 451.
[98] Vlandis v. Kline, 412 U.S. at 451.

Court was not persuaded by this argument, because administrative ease is not a justification for denying due process.[99]

The plaintiff in this case did not argue Privileges and Immunities, which certainly seemed applicable. However, the high court has been reluctant to expand on the Privileges and Immunities Clause, instead relying on due process to achieve results that analyzing the Privileges and Immunities Clause could equally achieve.[100] However, Justice Thomas, through his dissents, has repeatedly expressed an interest in expanding the Privileges and Immunities Clause,[101] which any litigant on this issue should take notice of. Nevertheless, the plaintiff prevailed on due process grounds.[102]

The Court however, provided guidance on how universities should handle out-of-state tuition matters.[103] The Court found that reasonable durational residency requirements were acceptable, because a state has an interest in maintaining the quality of its universities.[104] The student in this case was successful, but it still leaves open the question of what constitutes a reasonable durational residency requirement.[105] Furthermore, since Privileges and Immunities were not argued that question was left unanswered.

In 1999, the issue of durational residency requirements for state benefits came before the United States Supreme Court.[106] In this case, the Court struck down residential duration requirements for people moving to California to obtain state welfare benefits.[107] The Court found that the right to travel between states was a guaranteed constitutional right.[108] The Court further found that if the right to travel did not exist there would be no point of having a United States.[109] The Court went on to say that travel into other states for medical services, commercial shrimp fishing, and to obtain employment were instances where a state could not discriminate.[110] The Court however, cited *Vladmir,* saying that a state had a legitimate interest in charging out-of-state tuition rates.[111] This again leaves us in a conundrum, because the Court states that a state

[99] *Id.*
[100] Saenz v. Roe, 526 U.S. at 503-504.
[101] *Id.* At 512-513
[102] *Id.* at 453–454.
[103] *Id.* at 452–453.
[104] *Id.*
[105] *Id.*
[106] Saenz v. Roe, 526 U.S. 489 (1999).
[107] *Id.* at 499.
[108] *Id.*
[109] *Id.*
[110] *Id.* at 502.
[111] *Id.*

cannot discriminate against citizens of other states where there is no substantial reason other than the fact that they are citizens of other states.[112] However, tuition is mentioned in the opinion as a legitimate reason,[113] but the case cited imposed a durational residency requirement,[114] which the Supreme Court invalidated in the very case it was analyzing.[115] Nevertheless, some guidance was provided by the Court, which found that durational residency requirements were subject to intermediate scrutiny.[116]

The Privileges and Immunities Clause can come up numerous ways and exact outcomes are difficult to ascertain. Therefore, whether the facial discrimination that public universities impose upon out-of-state residents violates the Privileges and Immunities Clause is a debatable question. Therefore, the next item to analyze is whether education is a fundamental right. This is because the 1823 case of *Corfield* found that fundamental rights were protected under the Privileges and Immunities Clause.[117] However, the Court did not specify what constituted a fundamental right.

IV. EDUCATION IS A FUNDAMENTAL RIGHT SUBJECT TO THE PRIVILEGES AND IMMUNITIES CLAUSE

The case of *Brown v. Board of Education* held that public education is a fundamental right. In fact, the Court specifically stated "Today, education is perhaps the most important function of state and local governments."[118] With such strong words from the United States Supreme Court it is hard to imagine that education would not be considered a fundamental right subject to the Privileges and Immunities Clause.

However, the Supreme Court has been posed with the question of whether education is a fundamental right in different cases and reached different conclusions. In a case involving property tax distribution for school districts, the Supreme Court found that education was not a fundamental right.[119] However, this case did not analyze the Privileges and Immunities Clause but looked only at how school districts utilized their tax revenue.[120]

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[112] Saenz v. Roe, 526 U.S. at 502.
[113] *Id.*
[114] *Id.*
[115] *Id.* at 499.
[116] *Id.* at 500.
[117] Corfield v. Coryell, 6 F. Cas. 546, 551–552 (1823).
[118] Brown v. Board of Education, 347 U.S. 483, 493 (1954).
[119] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30–31 (1973).
[120] *Id.* at 40–41.

Based on the reading of various Privileges and Immunities Clause cases and the statement in *Brown v. Board of Education* that education is one of the most important rights offered,[121] it seems that higher education constitutes a fundamental right protected by the Privileges and Immunities Clause. Case law dating back to 1797 however, specifically states, "property shall not be liable to any taxes or burdens which the property of the citizens is not subject to."[122] Certainly being charged tens of thousands of dollars more than in-state residents for no other reason than being an out-of-state resident burdens the pocketbook, which is property of out-of-state students. Meanwhile, in-state students are not subject to the same burden.

Corfield further articulated the rights protected under the Privileges and Immunities Clause, which included the following:

> 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.[123]

Reading *Corfield,* engaging in professional pursuits and seeking happiness would include an out-of-state student being able to attend an American university of their choosing without being burdened with significantly higher tuition rates than in-state residents. Furthermore, considering that the United States Supreme Court stated the following, "Today, education is perhaps the most important function of state and local governments,"[124] that education should be a fundamental right under the Privileges and Immunities Clause. Additionally, since the Supreme Court has held the right to travel is a fundamental right,[125] it only bolsters the argument that out- of-state tuition violates that right, as well as the Privileges and Immunities Clause of the Constitution.

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[121] Brown v. Board of Education, 347 U.S. at 493.

[122] Campbell v. Morris, 3 H. & McH. 535, 554 (1797).

[123] Corfield v. Coryell, 6 F. Cas. 546, 552 (1823).

[124] Brown v. Board of Education, 347 U.S. at 493.

[125] Saenz v. Roe, 526 U.S. 489, 499 (1999).

V. How Online Education and Covid-19 Campus Restrictions Make Out-of-state Tuition a Penalty for State Citizenship

Even before the COVID-19 Pandemic hit the world,[126] remote work and online education were becoming prevalent facets in the daily life of Americans.[127] Despite being entirely online, state universities charged more to students that were not state residents. For example, Southern Oregon University[128] and Arizona State University[129] offer online degrees, but still charge out-of-state tuition rates. This is difficult to comprehend, because certainly an online student is not burdening the school in any way. An out-of-state online student does not even have access to the facilities they are being charged for. However, they are still penalized for no other reason than being an out-of-state resident.

Additionally, with COVID-19, numerous state schools have shut down their physical campuses entirely. Chico State University[130] in California went entirely to online learning in 2020-2021. Notwithstanding this, Chico State still charged out-of-state students' additional tuition.[131] This is occurring even though out-of-state students have no access to the physical campus, even if they wanted to use it.

Finally, an argument presented by universities is that schools have no way of knowing if a student will remain in-state after graduation.[132] However, with today's remote work and online environment it is impossible for anyone to know where they will end up. Therefore, the right to travel without being discriminated against is more important than ever as states try to lure residents from other states into their borders. For example, the state of Ohio has launched a campaign encouraging businesses to move to Ohio.[133] Furthermore, almost every law school attends national

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[126] *Impact of COVID-19 on People's Livelihoods, Their Health and Our Food Systems*, World Health Org., (Oct. 12, 2020), https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems (last visited Jan. 30, 2022).

[127] *State of Remote Work – 2019*, Owl Labs, https://resources.owllabs.com/state-of-remote-work/2019 (last visited Jan. 30, 2022).

[128] *Tuition and Fees*, S. Or. Univ., https://sou.edu/financial-aid/cost-of-attendance/tuition-fees/ (last visited Jan. 30, 2022).

[129] *ASU Online*, Ariz. State Univ., *supra* note 22.

[130] *Plans for 2021 Classes and Operations*, Cal. State Univ., Chico, https://www.csuchico.edu/coronavirus/stories/21-2-9-plans-for-2021-classes.shtml (last visited Jan. 31, 2022).

[131] *Cost of Attendance*, Cal. State Univ., Chico, https://www.csuchico.edu/fa/cost/index.shtml (last visited Jan. 31, 2022).

[132] Vlandis v. Kline, 412 U.S. 441, 443 (1973).

[133] Andrew J. Tobias, *New Ohio Ad Campaign Aimed at Attracting Businesses Touts State's Low Taxes, Sparks Online Debate*, Cleveland.com (updated Feb. 11, 2021), https://

recruiting events to entice students from anywhere in the country.[134] Law School Admissions Council ("LSAC") forums, for example, are attended by almost every American Bar Association accredited law school.[135] These LSAC forums take place all over the country in major cities such as San Francisco,[136] Chicago,[137] New York,[138] and Atlanta.[139] At these events, law schools try to attract students to their schools,[140] but many of the state run law schools will charge them extra to attend for no other reason than their out-of-state residency.[141] Therefore, no evil or government interest is being forwarded by this discriminatory practice. As discussed, schools boast of their diversity on their websites[142] and actively recruit out-of-state students,[143] but charge them extra.[144] This clearly violates the Privileges and Immunities Clause.

VI. AMERICA'S STUDENT DEBT CRISIS AND HOW REDUCING OUT-OF-STATE TUITION COSTS COULD HELP STUDENTS AND PUBLIC UNIVERSITIES SUCCEED

Student debt is an issue of major concern for the United States. As discussed, it is estimated that American students have a total of $1.5 trillion in debt.[145] That debt is more than the GDP of Australia,[146] Spain,[147] and Mexico.[148] During President Biden's campaign, he offered to forgive $10,000 in student debt.[149] Presidential candidate and Senator Bernie Sanders promoted forgiving all student debt.[150] Furthermore, in

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www.cleveland.com/open/2021/02/new-ohio-ad-campaign-aimed-at-attracting-businesses-touts-states-low-taxes-sparks-online-debate.html.

[134] *2021–2022 LSAC Law School Forums*, L. SCH. ADMISSIONS COUNCIL, https://www.lsac.org/lawschoolforums (last visited Jan. 31, 2022).

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Tuition and Fees*, UCLA, *supra* note 21.

[142] *JD Class Profile*, UNIV. OF OR. SCH. OF L., *supra* note 21.

[143] *2021–2022 LSAC Law School Forums*, L. SCH. ADMISSIONS COUNCIL, *supra* note 134.

[144] *Tuition and Fees*, UCLA, *supra* note 21.

[145] Whistle, *supra* note 15.

[146] *GDP By Country*, WORLDOMETER, https://www.worldometers.info/gdp/gdp-by-country/ (last visited Jan. 31, 2022).

[147] *Id.*

[148] *Id.*

[149] Cory Turner, *Biden Pledged to Forgive $10,000 in Student Loan Debt. Here's What He's Done So Far*, NPR, (Dec. 7, 2021, 4:53 PM), https://www.npr.org/2021/12/07/1062070001/student-loan-forgiveness-debt-president-biden-campaign-promise.

[150] *College for All and Cancel All Student Debt*, BERNIE SANDERS, https://berniesanders.com/issues/free-college-cancel-debt/ (last visited Jan. 31, 2022).

2021 alone, the Federal Legislature introduced over 30 bills to deal with the student debt crisis.[151]

However, public universities still charge as much as three times to out-of-state students.[152] As articulated by the Supreme Court, the Privileges and Immunities Clause requires that it work to improve the vitality of the nation.[153] Therefore, state residents and nonresidents should be granted equal treatment. The practice of charging out-of-state tuition, however, is contributing to the student debt crisis and imposing burdens on students that universities actively recruit and even promote on their websites. Furthermore, the Supreme Court has held that you cannot discriminate against a means of livelihood.[154] Certainly, pursuing higher education is a means of livelihood. Therefore, the practice of out-of-state tuition must be eliminated.

A counter argument to out-of-state tuition working to fix the student debt crisis is that universities could simply increase their tuition rates on everyone. Increasing tuition overall could make-up for the lost tuition dollars from out-of-state residents. However, universities would likely not be tripling tuition rates on students, which is the burden that out-of-state students bear.[155] Therefore, it would minimize educational debt, but it could result in a revenue loss for universities. However, that is a burden states must bear. This is because the Privileges and Immunities Clause prevents states from burdening residents from other states that are attempting to earn a livelihood.[156] A final point that deserves a mention is whether foreign students should be charged additional fees. The answer to that question is up to the individual university, because a resident from a foreign country is not a citizen of another state as defined by the Privileges and Immunities Clause.[157] Therefore, the arguments advanced in this paper do not apply to international students.

CONCLUSION

Dating back to the Articles of Confederation, this country required that states not discriminate against each other for the good of the Union.[158] Furthermore, important founders Alexander Hamilton[159] and

[151] *Legislative Tracker: Loans & Repayment*, NAT'L ASS'N OF STUDENT FIN. AID ADM'RS, https://www.nasfaa.org/legislative_tracker_loans_repayment (last visited Jan. 31, 2022).
[152] *Tuition and Fees*, UCLA, *supra* note 21.
[153] Supreme Ct. of New Hampshire v. Piper, 470 U.S. 274, 279 (1985).
[154] Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 391 (1978).
[155] *Undergraduate Admissions*, UCLA, *supra* note 17.
[156] *Baldwin v. Fish & Game Comm'n*, 436 U.S. at 391.
[157] U.S. CONST. art. IV, § 2.
[158] Lash, *supra*, note 1, at 1241, 1258.
[159] THE FEDERALIST NO. 80 (Alexander Hamilton).

James Madison[160] in the Federalist Papers, discussed the importance of ensuring that states did not discriminate against each other's citizens. As a result, the Privileges and Immunities Clause is found in the Constitution.[161] After the Civil War, federal strength grew and the nation became more intertwined with the passing of the Fourteenth Amendment, which restated the importance of privileges and immunities to ensure states did not discriminate against each other.[162] Despite this legislative history, universities blatantly discriminate against out-of-state residents for no other reason than being from another state.[163]

As a result of out-of-state tuition, the student debt crisis continues to grow and harm the nation.[164] Furthermore, there is certainly no evil being combated by students coming from out-of-state. To comply with the Constitution's intent and to combat the student debt crisis, the practice of out-of-state tuition must stop.

[160] THE FEDERALIST NO. 42 (James Madison).
[161] U.S. CONST. art. IV, § 2.
[162] U.S. CONST. art. XIV, § 1.
[163] *Tuition and Fees*, UCLA, *supra* note 21.
[164] Whistle, *supra* note 15.