Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution

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There has been substantial litigation in the last decade concerning the extent to which individual states may discriminate against nonresidents. The states regularly give preference to state residents in admission to state institutions of higher education, in the fee structure of such institutions, in the fee structure for hunting and fishing licenses, in admission to the practice of law, and in granting subsidies to local...
In addition to simple residency requirements, many states also impose durational residency requirements. The latter require an individual to have been a state resident for a particular period of time before being entitled to benefits or opportunities on the same basis as longer-term residents. For example, mere state residence may not entitle an individual to lower tuition at a state college; he may be required to have been a resident for one year before reduced fees are available. Similar durational residency provisions also have been imposed with respect to resident fees for hunting and fishing licenses, to qualification for state welfare benefits, and to access to state courts for the purpose of getting a divorce.

This type of discrimination raises the question of the extent to which the states may discriminate on the basis of residency or length of residency. Such discrimination has been challenged on various theories, the most frequent being that such state discrimination violates the equal protection clause of the fourteenth amendment. Equal protection analysis will invalidate such discrimination only if the residency requirements are wholly irrational, unless the challenger can establish that the discrimination based on residency has the effect of a penalty on his exercise of the right to travel. When the residency requirement is found to penalize the exercise of the right to travel, the state must dem-
on a compelling state interest in order to uphold the requirement. The difficulty lies in determining whether a penalty exists; that is, whether the result is "sufficiently analogous to a criminal fine to justify strict judicial scrutiny."\(^\text{15}\)

on an equal protection theory are not having as much success as in prior years. The Supreme Court has stated that when durational residency requirements merely affect the desirability of travelling or moving into the state, such requirements are valid if there is any rational basis for them. Sosna v. Iowa, 419 U.S. 393 (1975); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974). Such requirements are not invalid on this ground unless they penalize individuals for exercising their right to engage in interstate travel.

The adoption of the "penalty" theory is of relatively recent vintage, and it is difficult to determine when the courts will say that a residency requirement constitutes a penalty. In Maher v. Roe, 45 U.S.L.W. 4787, 4790 n.8 (1977), the Court discussed the penalty theory:

Appellees' reliance on the penalty analysis of Shapiro and Maricopa County is misplaced. In our view there is only a semantic difference between appellees' assertion that the Connecticut law unduly interferes with a woman's right to terminate her pregnancy and their assertion that it penalizes the exercise of that right. Penalties are most familiar to the criminal law, where criminal sanctions are imposed as a consequence of prescribed conduct. Shapiro and Maricopa County recognized that denial of welfare to one who had recently exercised the right to travel across state lines was sufficiently analogous to a criminal fine to justify strict judicial scrutiny.

If Connecticut denied general welfare benefits to all women who had obtained abortions and who were otherwise entitled to the benefits, we would have a close analogy to the facts in Shapiro and strict scrutiny might be appropriate under either the penalty analysis or the analysis we have applied in our previous abortion decisions. But the claim here is that the state "penalizes" the woman's decision to have an abortion by refusing to pay for it. Shapiro and Maricopa County did not hold that states would penalize the right to travel interstate by refusing to pay the bus fares of the indigent travelers. We find no support in the right to travel cases for the view that Connecticut must show a compelling interest for its decision not to fund elective abortions.

The Court in Maher found the Connecticut funding scheme did not constitute a penalty and upheld the distinction drawn by regulation between childbirth and nontherapeutic abortion as being "rationally related" to a "constitutionally permissible" purpose. See also Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1975); Lindsey v. Normet, 405 U.S. 56, 74 (1972). If it also must be shown that the state's purpose was to discourage migration, it will be even more difficult to successfully challenge discrimination against nonresidents, because purpose may be hard to prove. See, e.g., Washington v. Davis, 96 S. Ct. 2040 (1976).

14. The result of finding no penalty on the right to travel is that the restriction is presumptively constitutional, placing the burden on the challenger to show that the classification is irrational. The law merely need be rationally related to a permissible purpose to be upheld. See Shapiro v. Thompson, 394 U.S. 618 (1969). See also City of New Orleans v. Dukes, 96 S. Ct. 2513 (1976); Sosna v. Iowa, 419 U.S. 393 (1975); City of Charlotte v. Local 660, Int'l Ass'n of Firefighters, 394 U.S. 618 (1969).

15. See note 13 supra.
The commerce clause also has been used to challenge discrimination against nonresidents.\textsuperscript{16} That clause prohibits state discrimination against interstate commerce unless justified by the existence of a compelling state interest.\textsuperscript{17} It also prohibits the states from placing undue burdens on interstate commerce.\textsuperscript{18} Because interstate travel is included in interstate commerce,\textsuperscript{19} a state may not prohibit or regulate interstate travel in a discriminatory fashion.\textsuperscript{20} Most state discrimination against nonresidents, however, is not clearly directed against interstate travel itself. No penalties or special assessments are directly imposed on travel, and no one is excluded from the state. Therefore, such regulation is not presumptively unconstitutional. It also could be argued that regulations restricting an individual's freedom of mobility or discouraging his moving from one state to another constitute undue burdens on interstate commerce and therefore are invalid. These arguments are beyond the scope of this article.

There is a related argument that discriminatory state regulations infringe upon the individual's constitutional right to engage in interstate travel\textsuperscript{21}—a right separate and apart from the protections of the commerce clause and equal protection clause. The source of the constitutional right of travel is somewhat mysterious; it is partially a product of the commerce clause, the Article IV privileges and immunities clause, and the equal protection clause. Challenges based on the right of travel seldom arise for two reasons: states rarely try to keep anyone out of the state,\textsuperscript{22} but merely condition opportunities or receipt of state benefits on

\begin{itemize}
  \item \textit{See} Edwards v. California, 314 U.S. 160 (1941).
  \item \textit{See} Welton v. Missouri, 91 U.S. 275 (1875). This concept has not changed significantly in the last 100 years except for the limitations imposed by Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).
  \item See Comment, \textit{supra} note 12. Although the Court has not clearly indicated the source of this right, it certainly does exist. When a state has tried to totally exclude people from the state, it generally has met with a lack of success. See Edwards v. California, 314 U.S. 160 (1941). The recent cases raising significant problems are those involving limiting city growth and the number of building permits available. \textit{See}, e.g., Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956 (1st Cir. 1972); Construction Indus. Ass'n v. Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), \textit{rev'd}, 522 F.2d 897 (9th Cir. 1975), \textit{cert. denied}, 424 U.S. 934 (1976). \textit{See} Comment, \textit{The Right to Travel: Another Constitutional Standard for Local Land Use Regulation?}, 39 U. Chi. L. Rev. 612 (1972). \textit{See also} Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964).
  \item Edwards v. California, 314 U.S. 160 (1941). This case stopped state efforts to exclude individuals from the state unless the state has a compelling reason.
\end{itemize}
residency of a particular duration; and residence cases usually have been decided on equal protection grounds rather than on a travel theory. However, the emphasis could change; the potential key issue could be whether the limitation on receiving benefits is an undue or impermissible burden on the right to travel. Discrimination by the states also could be challenged under state equal protection clauses.

The article IV privileges and immunities clause provides an alternate means, in addition to the usual theories, to challenge state discrimination against nonresidents. This article will attempt to explore the article IV privileges and immunities clause (hereinafter referred to as article IV P & I) and the extent to which it can be used to challenge such discrimination. Article IV P & I analysis often is overlooked but can be useful, especially since the Supreme Court is retracting the broad coverage provided to nonresidents under the equal protection clause.

II. ARTICLE IV PRIVILEGES AND IMMUNITIES

Article IV, section 2 of the United States Constitution provides in paragraph 1: “The citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states.” It is, and historically was intended to be, a limitation on the power of the states to discriminate against the citizens of other states, and is therefore a provision specifically concerned with discrimination against nonresidents.

The clause is a direct descendent of Article IV of the Articles of Confederation and, although there is some dispute as to the historical

23. See cases cited note 1 supra. Because the state statutes discriminated against those who recently moved into the state, an equal protection argument easily was made and frequently was successful because discrimination which penalized a person for engaging in travel required substantial justification to be upheld.

24. Many state constitutions have equal protection clauses. The state constitutions should not be overlooked as a source of authority to challenge any kind of discrimination.


29. Many take the view that the article IV privileges and immunities clause is a reenactment of article IV of the Articles of Confederation which provided:
meaning of article IV P & I, the generally accepted purpose is:

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 no less, shall be the measure of the rights of citi-
zens of other states within your jurisdiction.30

This application of the privileges and immunities clause is identified as
the comity theory.31 It protects the citizens of state A, who are traveling
or residing in state B, from unreasonable discrimination by state B with
respect to fundamental rights (privileges and immunities).32 As such, it
is similar to the commerce clause which prohibits the states from dis-
criminating against interstate commerce.33 Therefore, cases decided
under the commerce clause are helpful in ascertaining the scope and
application of article IV P & I.34

See Austin v. New Hampshire, 420 U.S. 656 (1975). Draft Two of the proposed
article VI of the Articles of Confederation provided that "[i]nhabitants of each Colony shall henceforth always have the same Rights, Liberties, Privileges, 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." Article VII provided that "[t]he Inhabitants of each Colony should enjoy all the
Rights, Liberties, Privileges, and Advantages in Trade, Navigation, and Commerce in any other Colony and in going to and from the same into any part of
the World in which the Natives of such Colony enjoy." Antieau, supra note 27, at
2, citing 5 JOURNAL OF THE CONTINENTAL CONGRESS 547 (1906). Article IV P & I may
have been derived from all of the above provisions.

30. Butchers' Benevolent Ass'n v. Crescent City Live-Stock and Slaughter-
House Co. [Hereinafter cited as Slaughter-House Cases], 83 U.S. (16 Wall.) 96,
77 (1872).

334 U.S. 385 (1948).

32. See text accompanying notes 66-103 infra; Toomer v. Witsell, 334 U.S.
385 (1948).

33. Id. at 395, 396. In Hughes v. Alexandria Scrap Corp., 426 U.S. 794
(1976) this similarity became clear when the Court relied upon article IV P & I
cases to ascertain the limits of the commerce clause.

34. A comparison of the language used in cases stating the purposes of both
article IV P & I and of the commerce clause is interesting. It is stated that article
IV P & I was taken from the fourth of the Articles of Confederation which was
prefaced as follows: "[t]he better to secure and perpetuate mutual friendship and
intercourse among the people of the different states of the union." In Paul v.
Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) the Court said:

Indeed, without some provisions of the kind removing from the citi-
zens of each State the disabilities of alienage in the other States and
giving them equality of privilege with citizens of those States, the
The comity theory underlying the privileges and immunities clause was thought necessary to satisfy a perceived need to unify the nation as it was developing in the 1800's and to prevent jealous and destructive competition among the states. It was recognized that the states had a tendency to provide benefits to their own citizens but to exclude citizens of other states from such benefits. There was some suggestion that certain rights, such as access to the courts and equal treatment under the laws of each state, ought to be provided to all individuals regardless of their state citizenship. The hope was to form one unified country.

This view of history prompted the adoption and continued application of the comity theory by the Supreme Court. Because this interpretation gives rights to citizens of other states, the clause is often referred to as the interstate privileges and immunities clause. Questions have arisen whether the Supreme Court has been correct in continued use of the comity theory, but the theory recently has been reaffirmed and no change is expected in the near future. It is important to keep the function of the comity theory (the promotion of national unity) in mind when applying and interpreting the words of the privileges and immunities clause.

III. THE SCOPE OF PRIVILEGES AND IMMUNITIES

As is true with many constitutional provisions, the phraseology of the privileges and immunities clause is inherently ambiguous. The clause provides that "the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states." That language raises several questions including the definition of citizen; whether corpora-
tions and aliens are protected as citizens of other states and, if not, what treatment they are due; whether a citizen may protest discrimination against him by his own state; and the nature of the privileges and immunities protected under the clause. Many of these questions have been resolved by the courts.

A. Citizen

The citizens\footnote{A domiciliary of a state usually is deemed a citizen of that state; these two words will be used synonymously unless otherwise indicated. A citizen is "[o]ne, who, under the constitution and law of the United States, or of a particular state, is a member of the political community, owing allegiance and being entitled to the enjoyment of full civil rights." \textsc{black's law dictionary} 310 (rev. 4th ed. 1968). Citizenship primarily relates to domicile, the individual's allegiance and intention to permanently reside in a given state. \textit{See} Douglas \textit{v. New York, N.H. & H.R.R.}, 279 U.S. 377 (1929); Travis \textit{v. Yale & Towne Mfg. Co.}, 252 U.S. 60 (1920); LaTourette \textit{v. McMaster}, 248 U.S. 465 (1919); Blake \textit{v. McClung}, 172 U.S. 293 (1898).} of a state may not use article IV \textit{P & I} to challenge treatment they receive from their own state.\footnote{\textit{See Bradwell \textit{v. Illinois}, 83 U.S. (16 Wall.) 130 (1872); P. Kauper, note 41, supra at 692.} The individual complaining must be a citizen of a state other than the state whose actions are being challenged. In addition, the complainant must be a citizen of some state.\footnote{Residents of the District of Columbia and perhaps residents of territories may not rely on article IV \textit{P & I}. Bolling \textit{v. Sharpe}, 347 U.S. 497 (1954); District of Columbia \textit{v. Brooke}, 214 U.S. 138 (1909).} Neither the United States government nor the citizens of a foreign country\footnote{Aliens are not protected because they are citizens of a foreign country. \textit{See} Takahashi \textit{v. Fish & Game Comm'n}, 334 U.S. 410 (1948).} are protected under the clause.\footnote{\textit{See United States \textit{v. Biloxi Mun. School Dist.}, 219 F. Supp. 691 (S.D. Miss. 1963), aff'd, 326 F.2d. 237 (5th Cir.), cert. denied, 379 U.S. 929 (1964). \textit{See also} Williams \textit{v. Mayor of Baltimore}, 289 U.S. 36 (1933).} Corporations\footnote{\textit{Hemphill \textit{v. Orloff}, 277 U.S. 537 (1928). \textit{See also} Paul \textit{v. Virginia}, 75 U.S. (8 Wall.) 168 (1868).} and associations\footnote{Associations suing as entities rather than as individuals seem to be treated as corporations. \textit{See}, \textit{e.g.}, \textit{Hemphill \textit{v. Orloff}, 277 U.S. 537 (1928).} 51. The equal protection clause clearly covers aliens; in fact, discrimination on the basis of alienage is a suspect classification. \textit{See In re Griffiths}, 413 U.S. 717 (1973); Sugarman \textit{v. Dougall}, 413 U.S. 634 (1973); Graham \textit{v. Richardson}, 403 U.S. 365 (1971). The commerce clause also clearly applies to discrimination against aliens in a commercial setting. The language mentions commerce with foreign nations and among the several states. \textsc{us. const.} art. I, \textsc{s}8, cl. 3.} also are not considered citizens entitled to the protection of article IV \textit{P & I}. The commerce clause and equal protection clause differ significantly from article IV \textit{P & I} in this respect. Both of those clauses protect aliens\footnote{52. Clearly the commerce clause protects corporations. \textit{Bibb \textit{v. Navajo Freight Lines, Inc.}, 359 U.S. 520 (1959); Southern Pacific Co. \textit{v. Arizona}, 325} and entities such as corporations.\footnote{52.} Under the
equal protection and commerce clauses, the individual also need not challenge a foreign jurisdiction; he often can challenge the activities of his own state.53

B. Residency and Citizenship

A problem confronted by the courts is the treatment of residency classifications as contrasted with citizenship classifications. It is rare today to find state legislatures prohibiting noncitizens from receiving benefits granted state citizens.54 It is common, however, to find state legislatures granting benefits solely to residents, avoiding use of the term “citizenship.” This is done by excluding nonresidents or by excluding individuals who have not been state residents for a specific period of time (a durational residency requirement). Courts commonly investigate purported residency classifications to determine whether they are in fact citizenship classifications.55

Durational residency requirements nearly always are treated as citizenship classifications. “Residency” means to reside in or live in. It does not mean to live in for a particular period of time. Therefore, the requirement that a person live in the state for a certain period of time (durational residency) appears to be a method to determine whether the person intends to remain in that state for an indefinite period, an indication of domicile or citizenship. If all state residents receive a benefit denied nonresidents (low tuition in a state university, for example), the question is whether this is due to a true residency classification or whether it is actually citizenship-based discrimination.56


54. For example in the general index to the Missouri Revised Statutes, “citizenship” appears in four sections, two of which are in the Constitution. “Residents” occurs in at least fifteen sections, and the term “domicile” in only one section.


56. The suggestion that the state could get around article IV P & I by setting up a residency classification rather than a citizenship classification has been criticized for quite some time. See Currie & Schreter, Unconstitutional Discrimination in the Conflicts of Laws: Privileges and Immunities, 69 Yale L.J. 1323, 1347 (1960). Most, if not all, durational residency requirements have been deemed citizenship classifications; however, a mere residency classification may be exempted from the parameters of article IV P & I if citizens of the discriminating state are
The effect of the legislation is the important consideration in determining whether a classification is a residency or citizenship classification. The approach taken by the courts is quite clear. The states are not allowed to circumvent the constitutional language merely by using a term which is different but which brings about the same result. The courts carefully scrutinize all residency requirements, as the practical effect of these requirements is to include citizens and to exclude noncitizens. An argument still can be made that if a state actually disallows the benefit to its own citizens residing in other states, the requirement may be treated as a residency rather than citizenship requirement and thus may be valid. In Austin v. New Hampshire, however, the Court indicated that, with respect to taxes, a finding of discrimination against nonresidents was sufficient to invoke the clause and that citizenship did not matter. The actual differences between citizenship and residency classifications may be largely illusory because most states now classify on the basis of residency rather than citizenship; the tendency of the courts is to find that discrimination on the basis of residency is sufficient to invoke the clause.

C. State Action

The courts have consistently held that state action is required in order for a violation of article IV P & I to exist. If a private person, not acting under authority or color of state or local law, denies a privilege or immunity to a citizen of another state, there is no violation of the clause. Although the clause does not by its terms necessarily require state involvement, it has been so construed. The standard of

excluded because they are residents of some other state. See, e.g., Douglas v. New York, N.H. & H.R.R., 279 U.S. 377 (1929) in which the Court seemed to accept the argument that a residency classification is not prohibited by article IV P & I.


58. See note 56 and authorities cited note 57 supra.

59. Few recent cases even raise this argument.

60. 420 U.S. 656 (1975).

61. Id. See also Clarke, supra note 2. The issue has been involved in a number of cases such as Toomer v. Witsell, 334 U.S. 385 (1948); LaTourette v. McMaster, 248 U.S. 465 (1919); Blake v. McClung, 172 U.S. 239 (1898). In Toomer, the statute dealt with fees discriminating against residents; the state did not even claim that article IV P & I was not applicable. It may well be that Currie and Schreter's belief that "the time has come, we believe, for the flat rejection of that idea" is now reality. Currie & Schreter, supra note 56, at 1347.

62. United States v. Harris, 106 U.S. 629, 643 (1882). But see Antieau, supra note 27. Professor Antieau suggests that there is no need for a state action limitation; that the clause confers power on the federal government to insure that all individuals receive the privileges and immunities to which they are entitled.

63. The clause says that the citizens of each state shall not be denied the privileges and immunities of the citizens of the several states; it does not say who it is that is prohibited from denying them those rights. However, see United States v. Harris, 106 U.S. 629, 643 (1882).
state action required is not clear, but it is likely to be the same standard applied in fourteenth amendment cases.\textsuperscript{64} Article IV P & I is only a limit on state action; it does not limit the federal government.\textsuperscript{65}

D. Fundamental Privileges and Immunities

Difficulty arises in the determination whether the state discrimination relates to a matter concerning a "privilege" or an "immunity." Although this is one of the major areas of litigation under the clause, the cases have not provided definitions of the terms. In most cases the courts have assumed that a privilege or immunity is involved and have gone on to the question whether the privilege or immunity is sufficiently fundamental to be protected.\textsuperscript{66}

There appears to be no common thread running through the cases which would provide a standard to determine whether a particular privilege or immunity is fundamental. The courts have used broad categories, \textit{e.g.}, "pursue happiness,"\textsuperscript{67} and "enter into contracts,"\textsuperscript{68} to characterize the basic privileges and immunities and then have asked

\textsuperscript{64} The Court may use different state action considerations depending upon which constitutional provision is in question. \textit{See}, \textit{e.g.}, Gilmore v. City of Montgomery, 417 U.S. 556 (1974); Norwood v. Harrison, 413 U.S. 455 (1973). These cases suggest that there is a different standard of state action depending on whether it is a first or fourteenth amendment case. The standard in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), seems that most likely to be applied.

\textsuperscript{65} As interpreted, article IV P & I probably is not needed with respect to the federal government. If the clause had been interpreted to limit state encroachment on certain fundamental natural rights of the individual, there might have been a danger of federal violation. As it is, however, the federal government has the power to enforce the clause but probably is not limited by it. \textit{See} United States v. Gordon Kiyoshi Hirabayashi, 46 F. Supp. 657 (W.D. Wash.), \textit{aff'd}, 320 U.S. 81 (1942). The clause is not a limitation on the District of Columbia. \textit{See} Duehay v. Acacia Mut. Life Ins. Co., 105 F.2d 768 (D.C. Cir. 1939).

\textsuperscript{66} The most cited case detailing which privileges and immunities are sufficiently fundamental to be entitled to protection is Corfield v. Coryell, 6 F. Cas. 546, 551 (E.D. Pa. 1825) (No. 3,230). In Paul v. Virginia, 75 U.S. (8 Wall.) 68 (1868), the Court clearly adopted the "fundamental" interpretation. \textit{But see} Anti-eau, \textit{supra} note 27, for a historical analysis of the clause and a theory that the fundamental interpretation of privileges and immunities is not proper. \textit{See also} Austin v. New Hampshire, 420 U.S. 656 (1975) in which the Court reiterated the position of \textit{Corfield v. Coryell} and indicated that it would continue to follow the fundamental rights theory of the privileges and immunities clause.

\textsuperscript{67} Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

\textsuperscript{68} \textit{See} Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870).

\textsuperscript{1} It will be sufficient to say the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the states, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens.

\textit{Id.} at 430. It also was suggested that this was not a comprehensive listing of the coverage of the clause.
whether a certain privilege or immunity could be deemed "fundamental" in a particular fact setting.

In 1902, W.J. Meyers attempted to categorize which activities constituted the privileges and immunities of the citizens of the several states. He concluded his study with the comment:

[With substantial uniformity the courts declare these privileges and immunities to consist of what are commonly known as private rights, subject only to the police regulations prescribed for the body of people domiciled within the state . . . considering the condition in which the several states were at the time of adoption of the Constitution of the United States . . . the object of the clause under consideration would seem to be at the very 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.]

69. See Meyers, The Privileges and Immunities of Citizens in the Several States, 1 Mich. L. Rev. 286, 292-308 (1902). Meyers actually worked in reverse order and first listed those activities that were not protected by the privilege and immunities clause. In this category he included:

1. "Political rights" (the right to vote or hold elective office).
2. "Quasi-political rights" (the right to engage in certain professions, e.g., law, insurance, medicine, dentistry, sale of liquor, and slaughtering of animals).
3. "The right to enjoy public property held in common for the benefit of the people of the state, except insofar as such enjoyment is necessary to the enjoyment of the right of migration."
4. "The right of one citizen to attend the same school as that which another citizen is entitled to attend . . ." (upholding the separate but equal doctrine of race discrimination in schools).
5. "The right to any precise form of process for the protection of substantive rights."
6. "Rights incident to a status." (e.g., the right to receive dower).
7. "The right to enjoy in that state, by virtue of contracts made without it, presumptions attached by the law of that state to contracts entered into within it." (e.g., to share in community property where the individuals were married but not living in a community property state).
8. "The right to import into or to enforce within a state, any right or other valuable thing acquired outside that state in contravention of the public policy thereof." (e.g., enforcing the assignment of a claim for property which was in violation of the state law).
9. "The right to the services of common carriers without discrimination as to the territorial origin of the commodities shipped."

Meyers went on to list those things protected as privileges and immunities of citizens of a state. He included:

1. "The right of free ingress and egress."
2. "The right to import and export property."
3. "The right to acquire, hold and enjoy property, real and personal."
4. "The right to contract."
5. "The right to substantial protection of all substantive rights at no greater expense than its own citizens are subject to."


70. Meyers, supra note 69, at 380.
This effort may have categorized every article IV P & I case decided prior to 1902. Although not solving all problems, Meyers' list is beneficial. It provides labels and analogies which can be useful in litigating later cases. The major shortcoming is that state court interpretations of privileges and immunities are conflicting and many such interpretations have changed over time. Another difficulty is that if the categories are broad enough, virtually anything can fit within them. It would be hard to imagine any activity in which an individual desired to engage which could not be included within the "pursuit of happiness," or the right to "engage in business," or the right to travel. The individual denied admission to a state operated school due to discrimination against nonresidents could argue that he was denied his right to enter into a contract with that school and thereby was frustrated in his pursuit of happiness. The difficulty of categorizing privileges and immunities may be the cause of the requirement that the matter be of a fundamental nature to merit article IV P & I protection.

Of the most commonly raised issues in recent years, the following have been held by the courts to be privileges entitled to protection under the privileges and immunities clause: the right to own property, to enter into contracts, to engage in business, to pursue happiness, to enjoy free ingress and egress, to have access to the courts, to have access to medical care (including abortions), to import and export property, to enjoy equal treatment with respect to taxes, to enjoy

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71. For example, Meyers suggests that the right to go to the same school that another citizen is entitled to attend may not be covered under the privileges and immunities clause. Id. at 300. However, it is clear that the separate but equal doctrine is no longer permissible. If a state restricted admissions to all schools, including private schools, for the use of state citizens, the action probably would be invalid under Doe v. Bolton, 410 U.S. 179 (1973).


73. Blake v. McClung, 172 U.S. 239 (1898). Individuals from other states are entitled to own, possess, sell, dispose of, or otherwise deal with real or personal property in any state in the union. See also Brown v. Kentucky Iron Works v. Swift, 531 Ind. App. 630, 100 N.E. 584 (1913).


75. Toomer v. Witsell, 334 U.S. 385 (1948) (engaging in shrimping is a common calling and protected by article IV P & I).


80. Kimmish v. Ball, 129 U.S. 217 (1889). Cases dealing with importing and exporting property frequently arise under the commerce clause because such activities often involve interstate commerce.

remedies similar to those enjoyed by resident creditors, and to rely on the statute of limitations on an equal basis with state residents. Cases specifically involving the term "immunities" usually involved discriminatory taxes against nonresidents; citizens of other states are entitled to immunity from such discriminatory taxes. It also has been held that the privileges and immunities clause does not provide protection from state discrimination against nonresidents regarding the right to sell liquor, to vote in state elections, to get a divorce, to receive dower, or to practice certain professions. These matters were held to be either not included within the privileges and immunities of the citizens of the various states or not sufficiently fundamental to be worthy of protection.


83. See Blake v. McClung, 176 U.S. 59 (1900); Annot., 17 A.L.R. 2d 502 (1951); Annot., 55 A.L.R. 3d 1158 (1974). See also cases cited note 82 supra.


85. See Mulligan v. United States, 120 F. 98 (8th Cir. 1903); Premiere-Pabst Sales Corp. v. McNutt, 17 F. Supp. 708 (S.D. Ind. 1935); Premiere-Pabst Sales Corp. v. Gross Cup, 12 F. Supp. 970 (E.D. Pa. 1935), aff'd, 298 U.S. 226 (1936); Welsh v. State, 126 Ind. 71, 25 N.E. 883 (1890); Austin v. State, 10 Mo. 591 (1847).


89. See Keely v. Evans, 271 F. 520 (D. Ore. 1921), appeal dismissed, 257 U.S. 667 (1922); Brents v. Stone, 60 F. Supp. 82 (E.D. Ill. 1945). But see Hawkins v. Moss, 503 F.2d 1171, 1180 (4th Cir.), cert. denied, 420 U.S. 928 (1974). See also Annot., 42 A.L.R. 3d 1151 (1970), dealing with architect licensing and fees. As to the practice of medicine, see, e.g., People v. Phippin, 70 Mich. 6, 37 N.W. 888 (1888); Ex parte Spinney, 10 Nev. 323 (1875). See also Meyers supra note 69, at 294. Some other activities like selling liquor, Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129 (1874), and the slaughtering of animals are deemed special activities entitled to special regulation. See Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872). Cases involving admission to the practice of law have caused major difficulties. Most cases challenging the validity of bar examination procedures have involved the question of whether reciprocity provisions are constitutional or whether an individual who has a license to practice in another state must be admitted solely on the basis of his license from the foreign state. The reciprocity cases do not raise article IV P & I problems since discrimination is in favor of those who are admitted by reciprocity. Those who are not so admitted are treated like state residents; they must take the local bar exam. Thus, the cases involving the question of whether an individual who has a foreign license ought to be admitted to practice without examination in a state do not raise article IV P & I problems since the challenger cannot show that there is any discrimination against nonresidents. The state merely requires foreign attorneys to do exactly the same thing the local attorneys are required to do in order to be licensed in...
privileges and immunities protection. Also excluded from coverage because not deemed privileges or immunities are political rights\textsuperscript{90} and quasi-political rights.\textsuperscript{91}

If a state activity adversely affects a privilege or immunity, it may be constitutionally invalid if the privilege or immunity concerns a fundamental right. It may be impossible to define the term "fundamental" precisely.\textsuperscript{92} The more essential or important an activity to the preservation and enjoyment of life, liberty, property, and the ability to earn a living, the more likely it will be included in the "fundamental" category due protection under article IV P & I.

that state. See Hawkins v. Moss, 503 F.2d 1171 (4th Cir.), cert. denied, 420 U.S. 928 (1974). However, by requiring residency or citizenship for purposes of being admitted to practice within the state, or for purposes of taking the bar exam, there is discrimination against nonresidents with respect to their seeking lawful employment, and article IV P & I should be considered. See Annot., 53 A.L.R.2d 1164 (1974); Note, Residence Requirements for Admission to the Bar, 36 ALB. L. REV. 762 (1972); Note, Residence Requirements for Initial Admission to the Bar: a Compromise Proposal for Change, 56 CORNELL L. REV. 831 (1971). The courts have rejected a number of arguments which the states have propounded to satisfy the requirement that the regulation be rationally related to the applicant's fitness or capacity to practice law including:

(1) that a lawyer must appreciate the spirit of American institutions; (2) that a lawyer must take an oath to support the constitution; (3) that lawyers must be kept accessible to clients and subject to control of the Bar; (4) that the practice of law is a privilege not a right; (5) that a lawyer is an officer of the court; (6) that it would be difficult to train civil law attorneys in the common law.


Perhaps the best approach to cases involving licensing would be to recognize that the applicant is seeking lawful employment or pursuing a lawful occupation, admit that it comes within the parameters of article IV P & I, admit that it is a fundamental privilege, and ask whether there is a reasonable basis for requiring residency or citizenship.

90. See note 69 supra.


92. In Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1870), Judge Washington stated that listings of privileges and immunities within the clause's coverage were not comprehensive. The courts have never tried to define the exact limits of article IV P & I.
Some of the cases presently being litigated to determine whether the matter is sufficiently fundamental to be protected by article IV P & I are: the doctrine of forum non conveniens, under which a state court refuses to hear cases involving citizens of other states, although access to the courts usually is considered a protected privilege; extradition, which concerns only nonresidents because residents are turned over on detainers; bar examination procedures, which impose residency requirements although practicing law may be considered seeking lawful employment; college admissions, where nonresidents are denied equal access to state institutions of higher education (this could be a restriction on entering into contracts and pursuing happiness); nonresident college tuition; limitations imposed on nonlocal residents by state and federal laws concerning the right to purchase firearms; and preferences to state residents in securing employment and state contracts.

It is apparent that the courts have been reluctant to define in advance those privileges and immunities which are essential or fundamental. The courts have preferred to approach the problem on a case-by-case basis and to determine incrementally which activities are or are not protected by the clause. This approach does not provide advance notice to the states, but does allow the courts to adjust to changing norms of behavior, morality, and social and economic acceptability.

E. Standard of Review

The Supreme Court has indicated that the standard of review applicable in article IV P & I cases is one of reasonableness; the state


94. Sanders v. Conine, 506 F.2d 530 (10th Cir. 1974); U.S. v. Guy, 456 F.2d 1157 (8th Cir. 1972); Arizona v. Turtle, 413 F.2d 683 (9th Cir. 1969), cert. denied, 396 U.S. 1003 (1970).


96. Vlandis v. Kline, 412 U.S. 441 (1973); Bernstein, Residency Laws and the College Student, 1 J. of L. & Educ. 349 (1972). See also Clarke, supra note 2.


98. Vlandis v. Kline, 412 U.S. 441 (1973). The question may be whether the tuition is excessive in light of the fact that nonresidents may have contributed nothing to the state treasury to help pay for the college education. See also authorities cited note 96 supra.


100. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Heim v. McCall, 239 U.S. 175 (1915); City and County of Denver v. Bossie, 266 P. 214 (Colo. 1928); Ebbeson v. Board of Public Educ., 18 Del. Ch. 37, 156 A. 286 (1931).

101. The standard of review concept is similar to that in equal protection analysis. The issue is the extent to which the state activity is suited to ac-
action which treats noncitizens differently from state citizens must bear a
real and substantial relationship to a valid state goal. Noncitizens may be
discriminated against only if it is reasonable to do so. In *Toomer v. Will-
sell* the fee for nonresident fishing licenses was one hundred times
greater than for resident licenses. The Supreme Court invalidated the
nonresident fee because the state was unable to show that it was one
hundred times more expensive to enforce its fisheries laws against non-
residents. Because the only valid justification for the higher fee was the
cost of enforcement, the fee was invalid as it was not reasonably related
to that expense. Under this reasonableness standard, the trial court must
make an independent evaluation of the state's justification for the differ-
ence in treatment and determine whether it is reasonable.

The burden is on the challenger to show that there is in fact dis-
crimination based on state citizenship. In the absence of such a showing,
there is no article IV P & I question. Once discrimination has been
established, the reasonableness of that discrimination is at issue. This
determination of reasonableness involves two considerations: whether the
state is pursuing a valid goal, and whether the means utilized by the
state are reasonably designed to accomplish that goal.

The burden of proof on the reasonableness issue is initially on the
challenger. Some cases have suggested that the burden is on the chal-
lenger to disprove every hypothesis which would justify a finding that the
discrimination is reasonable. This would be an extremely difficult
completing a valid goal but does not rest upon invalid assumptions or cause
improper discrimination. In this regard the standard used in article IV P & I
cases is similar to the reasonableness standard in sex discrimination cases. Clas-
sifications based on citizenship are "valid only if the classification is reasonable
and is relevant to a policy other than one of parochial and hostile discrimination
against the outlander." Currier & Schreter, supra note 56, at 1348. See also *Austin
v. New Hampshire*, 420 U.S. 656 (1975) (it is sufficient if the state has secured a
reasonably fair distribution of burdens and if no intentional discrimination has
been practiced against nonresidents); Perry, *Constitutional "Fairness": Notes on

102. 334 U.S. 385 (1948).
103. See *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113, 121
(1920); *Hawkins v. Moss*, 503 F.2d 1171 (4th Cir.), cert. denied, 420 U.S. 928
(1974); *Borden v. Selden*, 259 Iowa 808, 146 N.W.2d 306 (1966); *Wheeler v.
difficult to determine which party actually bears the risk of nonpersuasion in
these cases. Most cases say that the challenger has the burden of showing both
the discrimination and its unreasonableness. However, in *Austin v. New Hampshire*
the Supreme Court suggested that where the state discrimination is on the basis
of citizenship, a valid justification must be present. It appears that the Court will
not assume that a justification or a substantial relationship between the chosen
means and a valid state interest exists. It can be argued that the state must pre-
sent at least a plausible basis for citizenship-based discrimination. The Court
stated "'something more is required than bald assertion'—by the state court . . .
undertaking, as numerous hypotheses could be envisioned to support citizenship-based discrimination. A better approach is to require the challenger to negate the most likely or plausible hypotheses, e.g., with regard to higher nonresident fishing licenses, that the increased cost is fairly apportioned according to the burden of enforcing fishing laws against nonresidents. When the challenger has met this requirement, the state may attempt to justify the legislation by hypothesizing other considerations which may have led to the passage of the statute. The challenger must then meet these arguments. It seems unlikely that there is or should be a requirement that the challenger anticipate and negate in advance any possible justification the state may be able to envision.

Reasonableness analysis requires the identification of the interest the state is seeking to promote.\textsuperscript{105} If the state is pursuing an impermissible goal, the discrimination will be invalid.\textsuperscript{106} The limits of permissible state goals are being litigated currently; there are few clear-cut guidelines available. However, useful analogies can be drawn from cases decided under the commerce clause.\textsuperscript{107} Both the commerce clause and the privileges and immunities clause are part of the original body of the Constitution and were included for a similar purpose—the promotion of national economic unity. It is logical that the considerations relating to valid state interests would be similar under both clauses.\textsuperscript{108}

105. The valid state interest requirement is only that the state must be seeking to accomplish a goal which is one it may validly pursue. Practically, this limitation is slight; the state may couch whatever it seeks to do in terms of the health, safety, or welfare of its citizens and thereby establish the existence of a valid state interest. The state must be careful, for example, not to couch its statute in terms of promoting local industry at the expense of interstate industry, establishing or enhancing a religion, or keeping out-of-state business from competing with local industry. If the noncitizens are excluded merely because of a policy of "parochial, hostile discrimination against the outlander," it is unlikely that the court will deem the state to have a valid interest. Currie & Schreter, supra note 56, at 1348. The concept of a valid state goal is related closely to the question of reasonableness, in that the means adopted to accomplish the goal must be directly related to and reasonably likely to advance its accomplishment.


108. The similarity of interests is apparent in language from \textit{In re} Schechter, 63 F. 695 (D. Minn. 1894):

\begin{quote}
[When a state undertakes, by statutory regulation, to deprive citizens of other states, who deal in sound articles of commerce produced in other states, of that presumption of honesty and innocence of wrong which it indulges in favor of the dealers in its own products, and which the law raises in favor of every man, it very effectually deprives the citizens of other states of the most valuable privileges and immunities its own citizens enjoy.]
\end{quote}

\textit{Id.} at 697-98.
The Supreme Court recognized this similarity of interests in *Hughes v. Alexandria Scrap Corp.*, by drawing from article IV P & I cases to decide a commerce clause issue. The only clearly impermissible state goal is economic isolation from the other states. Valid state goals include solving local health and safety problems but do not include solving local economic problems by discouraging competition from out of state; that would be inconsistent with the policy of national economic unity. States may conserve natural resources, but may not reserve them solely for the use of their own residents. A state may not prohibit the sale of out of state goods within its borders.

States should not lose cases on the ground that there is not a valid state interest; success or failure often depends on the phrasing of the


If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend upon the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.


115. See Toomer v. Witsell, 334 U.S. 385 (1948). There was an argument made in Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) that the state could reserve those things owned by the state for use by state citizens. See Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976), where the Court addressed that argument and apparently reverted to the *McCreedy* approach, saying that if the state discriminates against interstate commerce with respect to the provision of state money or assets it does not violate the commerce clause. Since *McCready* was also an article IV P & I case, it would seem that such state activity with respect to its own resources would be permissible. On the other hand, if the state seeks to regulate what private entities do with their own or state resources there may be a different result. The state may discriminate against interstate commerce and noncitizens in the disposition of its own money or assets. However, if the state tries to control what others do with state resources, there may be an article IV P & I violation. See Doe v. Bolton, 410 U.S. 179 (1973). But see Hicklin v. Orbeck, 565 P.2d 159 (Alas. 1977), review granted, 46 U.S.L.W. 3283 (No. 77-324, Nov. 1, 1977).

state interest relied upon. The state's attorney should carefully characterize the state interest as one relating to health, safety, or morals, and avoid purely economic justifications.\textsuperscript{117} If the state does desire to protect local economic interests, great caution must be exercised.\textsuperscript{118} Cases such as Toomer v. Witsell,\textsuperscript{119} Pike v. Bruce Church, Inc.,\textsuperscript{120} and Hughes v. Alexandria Scrap Corp.\textsuperscript{121} establish the basic criteria: any plausible purpose or goal not at variance with the unity of the country as an economic entity probably will suffice as a valid state goal under article IV P & I.

The means adopted by the state to move toward a valid goal must be reasonably related to the accomplishment of that goal.\textsuperscript{122} If the means involve different treatment for noncitizens, this discrimination must be reasonable.\textsuperscript{123} Reasonableness is determined by balancing the federal interest in a unified country\textsuperscript{125} and the individual's interests in his right of travel,\textsuperscript{126} his right to engage in a lawful business,\textsuperscript{127} etc., against the state's valid interests\textsuperscript{128} in conserving natural resources,\textsuperscript{129} returning state residents' tax dollars to state residents in the form of state benefits,\textsuperscript{130} or requiring nonresidents to pay their own way.\textsuperscript{131} A state can assess a higher fee for nonresident hunting and fishing licenses, but the fee must be reasonable, \textit{i.e.}, substantially related to the actual cost of program enforcement with respect to nonresidents.\textsuperscript{132} It appears that this standard is similar to that applied in recent sex discrimination cases.\textsuperscript{133} In these cases, the Court has required that the classification or state action serve important governmental objectives and be substantially related to the achievement of those objectives.

\textsuperscript{117} See note 109 supra.
\textsuperscript{118} See cases cited notes 109-117 supra.
\textsuperscript{119} 334 U.S. 385 (1948).
\textsuperscript{120} 397 U.S. 137 (1970).
\textsuperscript{121} 426 U.S. 794 (1976).
\textsuperscript{123} See cases cited notes 103, 111 supra.
\textsuperscript{125} See cases cited notes 30-39 supra.
\textsuperscript{126} See cases cited note 77 supra.
\textsuperscript{127} See cases cited notes 75, 82 supra.
\textsuperscript{128} See cases cited note 109 supra.
\textsuperscript{129} See cases cited note 114 supra.
\textsuperscript{132} Toomer v. Witsell, 334 U.S. 385 (1948).
One of the most surprising methods of achieving a valid state goal to be approved by the Court is the state's right to expend state money for the exclusive benefit of state citizens under both the commerce clause and article IV P & I. In *Doe v. Bolton* the Court invalidated a state prohibition on performing abortions for nonresidents in all hospitals located within the state. The implication was that, if the state regulation had been concerned with the expenditure of state monies, the state could discriminate in favor of its own citizens (residents) without having to concern itself with an article IV P & I problem. The state merely would be denying state funds and the use of state facilities to nonresidents; it would not be depriving them of their privilege of getting an abortion within the boundaries of the state. In *Beal v. Doe*, *Maher v. Roe*, and *Poelker v. Doe* the states merely limited the extent to which state money could be used for non-therapeutic abortions: there was no discrimination on the basis of residency. Therefore, article IV P & I did not come into play. If a state were to take an intermediate position and limit the use of state money to providing abortions for state residents only, article IV P & I also would not apply. When the state is expending state money it appears to be exempt from the strictures of article IV P & I.

It is anomalous that a state may impose the same tax on residents and nonresidents alike, but may provide services supported by state tax money only to state residents. This limitation on article IV P & I may be the cause of increased use of equal protection analysis to protect those who have traveled in interstate commerce. The equal protection clause does cover discrimination in the expenditure of state funds.

This limitation on article IV P & I is not rational if state citizens receive state benefits to the complete exclusion of noncitizens. If the service is not readily available from private sources, and the noncitizen is

137. The issue could arise where there are a limited number of veterinary colleges and a student wishes to attend a veterinary school other than in his home state.
139. 97 S. Ct. 2376 (1977).
140. 97 S. Ct. 2391 (1977).
141. See cases cited notes 122, 130 supra.
143. Many individuals living in border towns work in a state other than that in which they live. Under the expenditure of state money analysis, they can be excluded from the state benefits they have helped finance merely because they live in the wrong place.
willing to pay the cost or a fair share of the cost of providing the service, it is difficult to argue that he should be totally excluded. Many states exclude nonresidents or favor residents when making admissions decisions for state schools\textsuperscript{144} and hospitals.\textsuperscript{145} If receiving education or hospital care is a fundamental privilege, the real issue might be whether the states can totally exclude nonresidents or merely make them pay their own way. Justice Brennan's dissent in \textit{Maher} rejected the suggestion that "there is a basic difference between direct State interference with a protected activity and State encouragement of alternate activity concurrent with legislative policy."\textsuperscript{146} However, the majority of the Court has recognized this distinction and allowed such allocations of state money unless that action violates some other constitutional provision, such as the equal protection clause. Other than the generalization that states need not spend state money to promote the interests of nonresidents, no clear guidelines are available.

\textbf{IV. An Example of the Dilemma: Hicklin v. Orbeck}

The difficulty which develops from the Court's position that the states may discriminate in favor of their own citizens in the distribution of state monies and resources is illustrated by \textit{Hicklin v. Orbeck}.\textsuperscript{147} The Alaska Supreme Court upheld an Alaska hire law requiring recipients of state oil and gas leases to give preferences to Alaska residents for jobs arising out of those leases. Under article IV P & I, the state can give preferences to state residents when the state is doing the hiring and directly expending state money to pay the individuals hired.\textsuperscript{148} However, the state may not require all businesses in the state to give preferences to state citizens, because that would be an unreasonable regulation of the fundamental privilege to seek and engage in lawful employment.\textsuperscript{149} An argument in favor of the Alaska provision is that the state has an interest in solving its own economic problems before providing jobs to individuals from other states. However, as the \textit{Hicklin} dissent pointed out, the concept of federalism (that the states must sink or swim together with respect to economic matters) envisioned by both the commerce clause and article IV P & I must be considered.

The \textit{Hicklin} majority took the view that the state has a valid interest in providing economic benefits to its own residents; however, analysis of

\begin{itemize}
  \item \textsuperscript{144} This issue becomes crucial when similar training is not available in private schools.
  \item \textsuperscript{145} \textit{See} cases cited notes 122, 130 supra.
  \item \textsuperscript{146} 97 S. Ct. at 2388 (Brennan, J., dissenting) \textit{quoting from} Singleton v. Wulff, 428 U.S. 106, 122 (1976).
  \item \textsuperscript{147} 565 P.2d 159 (Alas. 1977), \textit{review granted}, 46 U.S.L.W. 3283 (No. 77-324, Nov. 1, 1977).
  \item \textsuperscript{148} \textit{See} Crane v. New York, 239 U.S. 195 (1915); Hein v. McCall, 239 U.S. 175 (1915). \textit{See also} cases cited note 135 supra.
  \item \textsuperscript{149} \textit{See} cases cited note 135 supra.
\end{itemize}
this problem should go further. In *McCreedy v. Virginia*\(^{150}\) and *Corfield v. Coryell*\(^{151}\) it was held that the state could restrict the use of its own resources to state residents. However, in the Alaska case, the state did not seek merely to limit state resources to state residents; it sold and leased state resources to individuals and required those individuals to give preferential hiring to Alaska residents.

Alaska has chosen a method of solving its economic problems that is neither clearly permissible nor impermissible under article IV P & I. The provision is tied to state resources, but being one step removed, resembles outright regulation. Many of the employers covered by the lease agreements are those who would be most likely to hire nonresidents. Because Alaska has such vast holdings of land and resources, it has a tremendous ability to control employment through its power to sell and lease property with conditions attached favoring state residents. This power may be in many ways as great as its power to regulate.

The *Hicklin* court suggested that many of the cases urged by the defendant were inappropriate because they were commerce clause cases rather than privileges and immunities cases. Commerce clause cases are relevant to an article IV P & I claim because the two clauses promote the same concept of federalism, national economic unity, and the need for the elimination of discrimination against nonresidents. The *Hicklin* dissenters were correct in their suggestion that the court overlooked the basic purpose of article IV P & I.

*Hicklin* could have been upheld on other grounds. It would be plausible for a court to hold that, because the hiring law only discriminated against nonresidents and not against noncitizens (an Alaskan citizen who had not resided in Alaska also would be excluded from the preferential hiring), article IV P & I was inapplicable. That distinction, to some extent, is still upheld in the regulatory field, although the Court clearly has indicated that with respect to taxes, a finding of discrimination against nonresidents is sufficient to make article IV P & I applicable.\(^{152}\)

The concept that the states must sink or swim together is being ignored by Alaska. That state is trying to solve its unemployment problem while disregarding the unemployment problem of the rest of the United States. The regulation upheld in *Hicklin* also inhibits free movement among the states. Unemployed individuals often move to other states in search of jobs; such moves become risky if the job-seeker is precluded from taking a job in a foreign jurisdiction prior to the time he moves. It is a common practice for unemployed individuals to communicate with prospective employers in foreign jurisdictions and to move only after

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150. 94 U.S. 391 (1876).
151. 6 F. Cas. 546 (C.C.E.D. Pa. 1823).
employment is found. Their ability to do this in Alaska is substantially restricted because they must move to the state prior to being able to compete on an equal basis with others. This is exactly the type of problem that article IV P & I was designed to prevent.

Allowing the states to circumvent article IV P & I by tying their regulations to distribution of state benefits would emasculate the clause. The states then could favor their own citizens merely by stating that the favoritism or preference regulations were incident to state benefits. Such a rule also would give the states with substantial natural resources a clear advantage over the states with less resources and allow states to provide tremendous economic benefits to local residents. Such regulations also could give rise to retaliatory action by other states which could include restricting the employment of nonresidents by state contractors, excluding nonresidents from state parks and other state facilities, or imposing substantial user fees on nonresidents for the use of state facilities.

The resolution of these competing issues will be left to the Supreme Court. It is possible that article IV P & I will become the equivalent of a new interstate equal protection clause as it is relied upon more often in the future. Whether article IV P & I will be a substantial limitation on state discrimination against nonresidents may be determined by the final resolution of the issues raised in Hicklin v. Orbeck.

V. Conclusion

There is a tendency to overwork the equal protection clause in dealing with state discrimination because it is the first to come to mind and, in many ways, provides the broadest protection. One must not overlook other constitutional provisions which can be helpful in many situations. If one can show state action that discriminates against noncitizens (a showing of nonresidence often will suffice); that concerns a fundamental privilege or immunity (privilege and immunity may be subject to a broad interpretation); and that is unreasonable, a case of an article IV P & I violation is made out. As the Supreme Court retreats from the utilization of equal protection analysis, article IV P & I will undoubtedly gain new prestige.