Residents' Property Tax Exemptions: A Modern Analysis under the Privileges and Immunities Clause

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I. Introduction

State tax preferences for residents must be examined to see whether they discriminate against similarly situated nonresidents in a constitutionally impermissible manner. Statutes affording different classes of taxpayers disparate tax treatment based on residency may violate the equal protection clause of the fourteenth amendment of the United States Constitution. However, since the Supreme Court has not held nonresidency a suspect classification, discrimination against nonresidents is generally justified under the equal protection clause if it is rationally related to the furtherance of some legitimate state interest.

Statutes which discriminate against nonresidents may also violate the privileges and immunities clause. That clause is generally considered more powerful than the equal protection clause in combatting discrimination against nonresidents because the state must justify its action under a considerably more rigorous standard of review than a search for mere rationality. Recently, however, the Supreme Court said that the privileges and immunities clause protects only fundamental rights of nonresidents and upheld a discriminatory fee imposed on nonresidents' recreational activities in the state. As a result, divergent views have developed concerning the validity of statutory tax preferences afforded residents for their permanent homes but denied to nonresident taxpayers for their vacation homes within the state. This article examines the constitutionality of state tax statutes that discriminate against nonresidents and their recreational properties. It suggests that the breadth of nonresidents' rights to equal taxation is largely undefined, but that exemptions for a taxpayer's principal residence may pass constitutional muster if the

tax preferences are merely incidental to residency status and do not hinge on it.

II. The Legal Questions

Until recently, the proscriptions of the privileges and immunities clause1 pertaining to the states' taxing power were reasonably well settled. While states have always had broad taxing powers,2 a tax which discriminated against nonresidents had to be reasonably related to achieving substantial equality under the tax scheme viewed as a whole,3 or justified by valid independent reasons.4 Valid independent reasons for discrimination against nonresidents did not exist unless it was demonstrated that nonresidents constituted a peculiar source of the evil at which the statute was aimed and that there was a reasonable relationship between the danger presented by nonresidents as a class and the discrimination practiced upon them.5

In 1978, an added dimension to the law of privileges and immunities emerged in Baldwin v. Fish and Game Commission of Montana.6 In that case, the Supreme Court resurrected a principle that some thought had been discarded decades earlier7 and held that the privileges and immunities clause protects only fundamental or natural rights of nonresidents.

Among the rights always regarded as "fundamental" were the rights to own property, to pursue one's livelihood or common commercial calling, and to be "exempt[] from higher taxes or impositions than are paid by the other citizens of the state."8 However, cases involving discriminatory taxes on nonresidents' commercial activities

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1 U.S. CONST. art. IV, § 2, cl. 1, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."
4 Such a justification is not required with respect to rights that are uniquely tied to an individual's identification with a particular state. See, e.g., Kanapaux v. Ellisor, 419 U.S. 891 (1974) (qualifications for elective state office); Dunn v. Blumstein, 405 U.S. 330 (1972) (voting rights); Shapiro v. Thompson, 394 U.S. 618 (1969) (entitlement to state services).
7 The view of Justice Washington in Corfield v. Coryell, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3,230), that the privileges and immunities clause protects "fundamental" or "natural" rights, was replaced by the view expressed in Hague v. Committee for Indus. Org. 307 U.S. 496 (1939). See text accompanying notes 26-28 infra. However, United Building & Constr. Trades Council v. Mayor of Camden, 104 S. Ct. 1020 (1984), reaffirmed Baldwin's holding that only fundamental rights are protected.
8 Corfield, 6 F. Cas. at 552.
or properties within the state provide little guidance in determining, first, whether a nonresident’s right to be exempt from higher taxes on recreational property must be a fundamental right under the privileges and immunities clause, and second, whether it is in fact such a right. While these particular questions were not involved in Baldwin, some state courts have cited it as authority for upholding discriminatory taxes under the privileges and immunities clause where nonresidents’ recreational properties were involved. Other cases seem to support that result.

III. History of the Privileges and Immunities Clause

The guarantee of privileges and immunities first appeared in the fourth article of the Articles of Confederation. In the Constitution,

9 See, for example, Ward v. Maryland, 79 U.S. 418 (1870), which was applied to invalidate discriminatory taxes and license fees in several subsequent cases: (1) a Tennessee annual privilege tax of $100 on nonresident construction companies as compared to $25 for resident construction companies, Chalker v. Birmingham & N.W. Ry. Co., 249 U.S. 522 (1919); (2) a South Carolina license fee for shrimp boats on coastal waters of $2,500 for nonresidents, but only $25 for residents, Toomer v. Witsell, 334 U.S. 385 (1948); and (3) an Alaska fishing fee of $50 for nonresidents and $5 for residents, Mullaney v. Anderson, 342 U.S. 415 (1952).

10 See, e.g., Rubin v. Glaser, 83 N.J. 299, 416 A.2d 382 (1980) (nonresident denied a rebate of ad valorem property taxes that he paid on his vacation home, rebate available to residents for taxes paid on their homesteads); Baker v. Matheson, 607 P.2d 233 (Utah 1979) (statutory scheme providing for refunds from the state general fund only to resident renters and homeowners did not deal with fundamental rights).

11 See, e.g., Hawaii Boating Ass’n v. Water Transp. Facilities, 651 F.2d 661 (9th Cir. 1981) (higher fees for mooring recreational boats of nonresidents did not involve fundamental rights, and therefore would not violate the privileges and immunities clause); In re Estate of Greenberg, 390 So. 2d 40 (Fla. 1980) (right of a nonresident to act as personal representative of a Florida estate was not a fundamental right for purposes of the privileges and immunities clause, even though a fee would be earned); Northwest Gillnetters Ass’n v. Sandison, 95 Wash. 2d 638, 628 P.2d 800 (1981) (discrimination against sport fisherman held not to involve fundamental rights); Dirksen v. Clark, No. 82-2168 (Fla. Dist. Ct. App. filed Oct. 19, 1982) (Florida Department of Revenue argued that any right of nonresidents to an exemption from higher ad valorem taxes on tangible personal property used in connection with their vacation homes is not “fundamental” and that, under Baldwin, it is not protected by the privileges and immunities clause) (decision pending Florida Supreme Court review of same issue in Herzog v. Colding, 437 So. 2d 226 (Fla. Dist. Ct. App. 1983); oral arguments were heard in Herzog on Apr. 2, 1984).

12 That Article provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, im-
those principles appeared in the commerce clause\textsuperscript{13} and the privileges and immunities clause. Because of their common origin, reference to the commerce clause and the authorities which shaped its contours through the wear of litigation is common when interpreting and applying the privileges and immunities clause.\textsuperscript{14} The difference in the purpose and scope of the clauses, however, was addressed by the Court in \textit{Ward v. Maryland}.\textsuperscript{15}

In \textit{Ward}, a New Jersey resident was convicted in a Maryland criminal court of violating a state statute that required nonresidents, but not residents, to purchase a license before selling merchandise in that state. The Supreme Court characterized the license fee in \textit{Ward} as a form of tax and examined its discriminatory effect under both the commerce clause and the privileges and immunities clause. The Court noted that states have broad powers to lay and collect taxes, but that
taxes levied by a State . . . may, perhaps, be so excessive and unjust in respect to the citizens of the other States as to violate that provision [Article IV. Section 2, Clause 1] of the Constitution . . . .

Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of States to tax will prove to be more efficacious to promote inequality than the regulations which Congress can pass to preserve the equality of right contemplated by the constitution among the citizens of the several States. . . . [T]hat supreme law requires equality of burden and forbids discrimination in State taxation when the powers apply to the citizens of other States.\textsuperscript{16}

The Court then held that the tax in \textit{Ward} violated the privileges and immunities clause without having to decide whether it also violated the commerce clause.

\textsuperscript{9} JOURNAL OF THE CONTINENTAL CONGRESS 908-09 (1777) (Library of Congress ed. 1907).
\textsuperscript{13} U.S. CONST. art. I, § 8 (which provides in relevant part that "Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States").
\textsuperscript{14} \textit{See} Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978); Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 378-79 (1978); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).
\textsuperscript{15} 79 U.S. 418 (1 Wall.) (1871).
\textsuperscript{16} \textit{Id.} at 429-31.
A. Ownership Theory

Because the particular rights embraced by the privileges and immunities clause are not enumerated in the Constitution, the early courts were called upon to define them. In Corfield v. Coryell, the court was required to determine whether nonresidents had the right of equal access to New Jersey oyster beds. Justice Washington, recognizing a special proprietary interest of the state and its citizens in the state's natural resources, said that the privileges and immunities clause did not amount to a "grant of a cotenancy in the common property of the State to the citizens of all other States." Accordingly, he held that New Jersey could limit nonresidents' access to its oyster beds without violating the privileges and immunities clause.

This "ownership theory" surfaced again in McCready v. Virginia. In that case, the Supreme Court recognized the ownership interest of the state and its citizens in the state's tidal waters and sustained a statute which prohibited nonresidents from planting oysters there. The Court stated that the resources "owned" by the state were not subject to paramount national interests, that they remained under state control, and that the state therefore had the right, in its discretion, to appropriate them to the use of its citizens. The Court said that the privileges and immunities clause simply did not invest citizens of one state with any interest in common property of citizens of another state, and they thus could be excluded. However, in Toomer v. Witsell, the court discarded the view that "state owned" resources were beyond the purview the privileges and immunities clause.

B. Fundamental Rights

In Corfield, Justice Washington said the privileges and immunities clause protects only those fundamental rights "which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign." He indicated that the fundamental rights which

18 Id. at 552.
19 94 U.S. 391 (1877); see also Geer v. Connecticut, 161 U.S. 519 (1896).
20 334 U.S. 385 (1947); see text accompanying note 34 infra.
21 6 F. Cas. at 551. But see Varat, State "Citizenship" and Interstate Equality, 48 U. CHI. L. REV. 487 (1981) (immunities clause was to promote political and social cohesion and not merely to prohibit discrimination which frustrates the formation of the union).
are guaranteed to every person by every state may be comprehended under several general heads:

[T]he right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental. . . . [T]hese and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated . . . "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union." 22

Although Justice Washington believed nonresidents had the fundamental right to pass through or reside in a state "for purposes of trade, agricultural or professional pursuits," he did not believe nonresidents had a fundamental right of access to a state's limited resources, even for commercial purposes.

Justice Washington interpreted the privileges and immunities clause as guaranteeing fundamental rights to all citizens of the Union, regardless of the rights afforded by a state to its own citizens. Since that time, the law has undergone three major developments. 23 The first occurred in Paul v. Virginia, 24 where the Court said that the measure of rights secured to nonresidents under the privileges and immunities clause was no more and no less than the rights afforded by a state to its own citizens, and that "[i]t was undoubtedly the object of the clause . . . to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." 25

The second development occurred in Hague v. C.I.O., 26 where the

22 6 F. Cas. at 551-52 (citing portions of article IV of the Articles of Confederation).
24 75 U.S. (8 Wall.) 168 (1869).
25 Id. at 180.
26 307 U.S. 496 (1939).
Court said that the privileges and immunities clause did not allow a citizen to carry the rights he has in his own state into another state, "but . . . [every] citizen of every State is to have the same privileges and immunities which the citizens of that State enjoy. . . . [T]he section, in effect, prevents a State from discriminating against citizens of other States in favor of its own."27 According to Justice Brennan, that statement "signaled the complete demise of the Court's acceptance of Corfield's definition of the type of rights encompassed by the phrase 'privileges' and 'immunities.'"28

The third development occurred in Austin v. New Hampshire,29 where the Court indicated that the privileges and immunities clause "establishes a norm of comity without specifying the particular subjects as to which citizens of each state coming within the jurisdiction of another are guaranteed equality of treatment."30

C. Substantial Equality

Since nonresidents are entitled to equal tax treatment under the privileges and immunities clause, at least when they pursue commercial activities and no "state owned" resources are involved,31 states attempted to justify discriminatory tax statutes by referring to other tax statutes which burdened only residents. The state could then argue that the seemingly discriminatory statute was in fact a compensatory measure designed to achieve equality and uniformity in the allocation of the total burden between residents and nonresidents.

In Travellers' Insurance Co. v. Connecticut,32 the Court was persuaded by such an argument. In that case, the state imposed an ad valorem tax on shares of stock in Connecticut corporations. The tax imposed on resident shareholders, however, was based on the value of stock after it had been reduced by the value of real estate upon which real property taxes were assessed. On its face, the statute imposed a higher tax on the stock owned by nonresidents. However, since resident shareholders paid local property taxes and nonresidents did not, the Court upheld the statute under the privileges and immunities clause because the tax scheme, viewed as a whole, did not discriminate against nonresidents in a meaningful way. The Court recog-

27 Id. at 511.
28 Baldwin, 436 U.S. at 399 (Brennan, J., dissenting).
30 Id. at 660.
31 The fundamental nature of nonresidents' rights to pursue commercial activities was never disputed. State owned resources were considered exempt from the clause.
32 185 U.S. 364 (1902).
nized that the privileges and immunities clause did not require precise equality in the treatment afforded residents and nonresidents, but that substantial equality would suffice.

In *Austin v. New Hampshire*, the state tax on income earned in the state by nonresidents was struck down under the privileges and immunities clause. The Court found that no comparable tax was imposed on residents and that there were no taxes imposed on residents only to offset the discriminatory tax.

**D. Standard of Review**

The ownership theory and the requirement for substantial equality converged in *Toomer v. Witsell*. In that case, a South Carolina statute prescribed a nonresidents' license fee for shrimp boats one hundred times the fee for residents. The state argued that the discriminatory statute was beyond the purview of the privileges and immunities clause since its purpose and effect was to give residents preferred access to the shrimp, a "state owned" resource like the oysters in *McCready*. The Court, however, said that the ownership theory was no more than a "19th-century legal fiction" that

> express[es] in legal shorthand . . . the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. . . . Thus we hold that commercial shrimping in the marginal sea, like other common callings, is within the purview of the privileges and immunities clause.

Even though the ownership theory would not exempt the state's resources, the Court said that the state could "charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay." The Court said that a statute which discriminated beyond that could be justified under the privileges and immunities clause only if it was shown that "noncitizens constitute a peculiar source of the evil at which the statute is aimed, and there is "a [reasonable] relationship between the danger represented by noncitizens, as a class, and the severe discrimi-

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34 334 U.S. 385 (1948).
35 Id. at 402-03.
36 Id. at 399.
37 Id. at 398.
nation practiced upon them" (the "Toomer test"). Since that could not be demonstrated in Toomer, the discriminatory license fee was held to violate the privileges and immunities clause.

IV. Baldwin and Its Aftermath

_Baldwin v. Fish and Game Commission of Montana_ involved a statute which prescribed fees for nonresidents' elk hunting licenses several times higher than those for residents. Based upon the undisputed facts that the quantity of elk was finite and that nonresidents had a purely recreational interest in the elk, a deeply divided Court upheld the statute under the privileges and immunities clause.

In reference to _Corfield_, the Court stated:

> Only with respect to those "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally. Here we must decide into which category falls a distinction with respect to access to recreational big-game hunting.

To decide whether nonresidents' access to big game falls into a category of protected rights, the Court embraced the pre-Toomer notion that a state "own" the wildlife within its boundaries and has the power to preserve this bounty for its citizens alone. The Court expressly rejected the nonresidents' contention that the ownership theory had no remaining vitality. Unlike the decisions in _Corfield_ and _McCready_, however, where "state owned" resources were considered exempt from the privileges and immunities clause, the majority, citing Toomer, said that a state's interest in its resources "must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood in a State other than his own, a right that is protected by the Privileges and Immunities Clause."
Contrasting the nonresidents' right to pursue a recreational interest with the state's interest in preserving its elk, the Court said:

The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.

Appellants' interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause. . . . Whatever rights or activities may be "fundamental" under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.\textsuperscript{44}

In his concurring opinion, Chief Justice Burger emphasized the significance of Montana's special interest in its elk population. He recognized a need to distinguish between cases in which the \textit{Toomer} test should be applied and those, like \textit{Baldwin}, in which a fundamental rights analysis should be applied. He emphasized that South Carolina did not "own" the migratory shrimp in \textit{Toomer}, while Montana did "own" the elk in \textit{Baldwin} because they remained primarily within the state.\textsuperscript{45} In drawing that distinction, he seems to suggest that the application of the fundamental rights analysis is limited to cases involving "state owned" resources, and that the \textit{Toomer} test continues to be the standard by which all other cases should be decided. In pointing out the limits of the Court's holding in \textit{Baldwin}, Chief Justice Burger said:

The Court does not hold that the Clause permits a State to give its residents preferred access to recreational activities offered for sale by private parties. . . . The Clause assures noncitizens the opportunity to purchase goods and services on the same basis as citizens; it confers the same protection upon the buyer of luxury goods and services as upon the buyer of bread.\textsuperscript{46}

In his dissent, Justice Brennan said that the concept of \textit{Corfield}, that the privileges and immunities clause protects only fundamental rights, had properly been interred by \textit{Hague}. He said that the majority superimposed the rule of \textit{Paul v. Virginia} on \textit{Corfield} and emerged with the view that a state could not deny nonresidents the fundamen-
tal rights it affords its own citizens, a view itself lacking in any prece-
dential support.

Justice Brennan said that the principal concern expressed in the
Court's recent decisions "was the classification itself—the fact that
the discrimination hinged on the status of nonresidency," and that
the sole issue was whether the discrimination was justified. In applying the *Toomer* test to the facts in *Baldwin*, he said that the discrimi-
natory treatment must fail because "nothing in the record [indicated]
that the influx of nonresident hunters created a special danger to
Montana's elk or to any of its other wildlife species." Justice Bren-
nan argued that the majority's inquiry into the fundamental nature
of the nonresidents' rights was misplaced.

I think the time has come to confirm explicitly that which
has been implicit in our modern privileges and immunities deci-
sions, namely that an inquiry into whether a given right is "fun-
damental" has no place in our analysis of whether a State's
discrimination against nonresidents violates the Clause. Rather, our primary concern is the State's justification for its
discrimination.

Any questions *Baldwin* raised about the vitality of the *Toomer*
test were resolved in *Hicklin v. Orbeck*, which was decided a month
after *Baldwin*. The Court's opinion was written by Justice Brennan.

In *Hicklin*, the Court invalidated an Alaska statute requiring all
oil and gas leases and easements for oil and gas pipelines to provide
that Alaska residents be hired in preference to nonresidents. While
the fundamental nature of the nonresidents' rights was undisputable,
the state attempted to invoke the ownership theory, contending that
the oil and gas was "owned" by the state and that its appropriation
was therefore subject to any terms and conditions that the state chose
to impose. The Court, however, said that "Alaska has little or no
proprietary interest in much of the activity swept within the ambit of

47 *Id.* at 402.
48 *Id.* at 403. While it was noted that the number of hunting licenses purchased by non-
residents had increased substantially in recent years, the nexus between that fact and the
requisite finding that the elk supply was overburdened because of the nonresidents was in-
deed tenuous. *Id.* at 403 n.6. If the state could establish that the elk supply was over-
burdened because of the nonresidents, presumably, the same result would have been reached
if it had been decided under *Toomer* without the need to resort to the ownership theory, a 19th
century legal principle which, to be applied, depended on the migratory habits of the particu-
lar resource involved, or to the fundamental rights concept of *Corfield*, a principle that was
seemingly discarded in 1939.
49 *Id.* at 402.
PROPERTY TAX EXEMPTIONS

V. One Test or Two?

Prior to Baldwin, any tax statute which discriminated against nonresidents in a manner that did not promote substantial equality under the tax scheme viewed as a whole, and which did not merely compensate the state for any added enforcement burden, was in constitutional jeopardy. Unless it was aimed at an evil of which nonresidents constituted a peculiar source, such as over-burdened resources, the statute could not pass muster under Toomer.

The fundamental rights limitation on the applicability of the privileges and immunities clause, however, provides states the opportunity to avoid the rigid Toomer test. In Baldwin, the fundamental rights analysis relieved the state of the need to demonstrate that the elk supply actually was overburdened by nonresidents. According to Chief Justice Burger’s concurring opinion in Baldwin, it is appropriate to relieve the state of that requirement if it is found to “own” the resources. If the fundamental rights analysis is limited to cases involving “state owned” resources, its applicability to state property

52 437 U.S. at 529.
53 Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Pennsylvania v. West Virginia, 262 U.S. 553 (1923); West v. Kansas Natural Gas Co., 221 U.S. 229 (1911).
54 437 U.S. at 533.
55 Id. at 527-28.
56 See text accompanying note 48 supra.
57 436 U.S. at 392.
tax cases may exist only in theory since such taxes are rarely, if ever, imposed in connection with state resources.\footnote{58} The Court did not discuss the fundamental rights analysis in \textit{Hicklin}. Instead, it cited \textit{Ward} for the proposition that the privileges and immunities clause protects nonresidents in plying their trade. Perhaps the Court thought it was unnecessary to discuss the analysis because the fundamental nature of nonresidents’ rights to pursue employment in a state was a foregone conclusion. On the other hand, the Court may not have applied the analysis because it had determined that the ownership theory did not apply to the oil and gas in \textit{Hicklin} as it did to the elk in \textit{Baldwin}. It is perhaps for that reason that lower courts have expressed uncertainty as to the necessity of a determination that equality in taxation is a fundamental right.\footnote{59}

If the Court considers the \textit{Toomer} test and the fundamental rights analysis mutually exclusive, its application of the \textit{Toomer} test in \textit{Hicklin}, where nonresidents’ undisputable fundamental rights were at issue, may suggest that the fundamental rights analysis was not reached because the ownership theory did not apply to the particular resources involved. This reading of the case would suggest that the fundamental rights analysis applies only in conjunction with the ownership theory; it would rarely, if ever, arise in state property tax cases.\footnote{60} Under this rationale, discriminatory state property taxes must satisfy the stringent \textit{Toomer} test to pass muster under the privileges and immunities clause.


\footnote{59} In Taylor v. Conta, 106 Wis. 2d 321, 335, 316 N.W.2d 814, 822 (1982), the court declared that “[i]n the wake of Baldwin and Hicklin the necessity of a determination that equality in taxation is a fundamental right is unclear.” In Hawaii Boating Ass’n v. Water Transp. Facilities, 651 F.2d 661, 667 (9th Cir. 1981)(citation omitted), the court entertained, but rejected, the contention that “in light of Hicklin v. Orbeck, . . . Baldwin is no longer good law.”

\footnote{60} See note 58 \textit{supra} and accompanying text.
The Court applied the ownership theory in *Baldwin*, but it was not required to decide whether the fundamental rights analysis should ever be applied independently of it. Since the Court held in *Baldwin* that nonresidents had no fundamental right to pursue recreational elk hunting on the same terms as residents, it was not required to decide whether the *Toomer* test should ever be applied in conjunction with the properly invoked ownership theory. Consequently, any guidance in determining whether the Court considers the *Toomer* test and the fundamental rights analysis to be mutually exclusive must be inferred.

Justice Brennan's position appears to be that the *Toomer* test is the standard by which the validity of every discriminatory statute is to be judged. Chief Justice Burger apparently believes that the fundamental rights analysis is proper for cases involving "state owned" resources, and that the *Toomer* test is to be used in others. The majority in *Baldwin* also emphasized the state's "ownership" interest in the elk in applying the fundamental rights analysis. Because the fundamental rights analysis originated with the ownership theory in *Corfield*, and historically has not been applied independently of the ownership theory, such a limitation may have been contemplated by the Court.

Noting in *Baldwin* that "a State's interest in its wildlife and other resources must yield when, without reason, it interferes with a nonresident's right to pursue a livelihood,"61 the Court may have suggested that a lesser standard of review should be applied since the *Toomer* test requires considerably more than rational grounds for discriminating against nonresidents.

Justice O'Connor, on the other hand, apparently believes that the fundamental rights analysis and the *Toomer* test may coexist comfortably, since the former determines the applicability of the privi-

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61 436 U.S. at 386 (emphasis added). The Court's statement raises doubt as to what reasons would suffice. However, the *Toomer* test (nonresidents must constitute a peculiar source of evil at which the statute is aimed and there must be a reasonable relationship between the danger presented by nonresidents, as a class, and the discrimination practiced upon them) requires much more than "some" reason for the discrimination. The Court, in United Building & Constr. Trades Council v. Mayor of Camden, 104 S. Ct. 1020, 1029 (1984), noted that the privileges and immunities clause "does not preclude discrimination... where there is a 'substantial reason' for the difference in treatment." In various circumstances, a number of courts have held that a rational basis standard of review should be applied. See, e.g., Taylor v. Contra, 106 Wis. 2d 321, 316 N.W.2d 814 (1982); Baker v. Matheson, 607 P.2d 253 (Utah 1979); Rubin v. Glaser, 83 N.J. 299, 416 A.2d 382, *appeal dismissed*, 449 U.S. 977 (1980). Cf. Salorio v. Glaser, ("Salorio I"), 82 N.J. 482, 414 A.2d 943, *cert. denied*, 449 U.S. 874 (1980)(summary judgment), Salorio v. Glaser ("Salorio II"), 93 N.J. 447, 461 A.2d 1100, *cert. denied*, 104 S. Ct. 486 (1983)(substantial relationship standard applied).
leges and immunities clause, while the latter concerns the state's justification for the discriminatory treatment once the privileges and immunities clause is found to apply. She apparently interprets the majority's opinion in Baldwin as according little or no weight to the state's "ownership" interest in the elk.

A. Do Nonresidents Have a Fundamental Right to Equal Taxation?

Once the fundamental rights analysis is determined to apply in a state property tax case (either because the tax relates to a "state owned" resource or because this analysis is ultimately held to apply in all cases), the question then becomes whether the nonresidents' interest in an exemption from higher taxes or impositions on their recreational properties is a fundamental right.

In Baldwin, the Court indicated that the privileges and immunities clause prohibits states from exercising their legislative powers in a manner that interferes with the rights of nonresidents and bears upon the vitality of the nation as a single entity. While a discriminatory tax or imposition on nonresidents' commercial activities or commercial properties interferes with rights protected by the privileges and immunities clause, the Court upheld a discriminatory license fee in Baldwin that was imposed on nonresidents' recreational activities. Implicitly, the Court held that nonresidents do not have a fundamental right to equal taxes or impositions per se, and that their right to equal treatment depends on the fundamental nature of the activities with respect to which they are imposed.

Some courts have said that the right to acquire and own recreational property is not a fundamental right. In Baker v. Matheson, for example, the Utah Supreme Court said that the right of nonresident homeowners and renters to the same tax treatment afforded resident homeowners and renters was not a fundamental right because it was not of the "same magnitude of importance as the right to engage in a legitimate vocation for income essential to the maintenance of life."

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63 607 P.2d 233 (Utah 1979).

64 Id. at 247; see also Godfrey v. Montana State Fish & Game Comm'n, 631 P.2d 1265
This opinion, however, can hardly be reconciled with Justice Washington's view that fundamental rights include the right to acquire and possess property "of every kind," or with Chief Justice Burger's view that the privileges and immunities clause protects purchasers of luxury goods and recreational activities, except where "state owned" resources are involved.

B. Standard of Review for Fundamental Rights

If the fundamental rights analysis is determined to apply and the rights of nonresidents are held not to be fundamental, the privileges and immunities clause will not invalidate a statute, however invidious the discrimination it works against nonresidents. If nonresidents' rights are held to be fundamental, the privileges and immunities clause will apply, but discrimination against them is permissible if it is justified. The standard of review by which a discriminatory tax statute must be tested under the fundamental rights analysis is unclear, but the Court may have intimated that a less stringent standard than the Toomer test is appropriate. If the fundamental rights analysis is to be limited to cases involving "state owned" resources, a less stringent standard of review may be warranted.

In some cases, lower courts have applied the lower, rational basis standard of review to test discriminatory tax statutes, but not in conjunction with the fundamental rights analysis. For example, the Wisconsin Supreme Court upheld a discriminatory tax statute in Taylor v. Conta, for example, the Wisconsin Supreme Court upheld a discriminatory tax statute in Taylor v. Conta, (Mont. 1981) The denial of a nonresident fishing outfitter's license renewal application does not involve fundamental rights; Kuhn v. Vergiels, 558 F. Supp. 24 (D. Nev. 1982) The right to participate in a state administered professional education financial assistance program is not fundamental.

Indeed, the assurance that the privileges and immunities clause would be applied to noncommercial situations was probably among the objectives of the drafters of the Constitution in bifurcating article IV of the Articles of Confederation between the commerce clause and the privileges and immunities clause.

In none of these cases was the application of the rational basis standard of review predicated on a determination that Baldwin prescribed that standard in conjunction with the fundamental rights analysis. Instead, those courts interpreted Toomer as requiring only a rational basis standard of review. In Baker v. Matheson, 607 P.2d 233 (Utah 1979), the court inquired into the nature of nonresidents' rights to equal taxation, held they were not fundamental, and then applied a rational basis standard of review. If the fundamental rights analysis had applied and the rights were held not to be fundamental, the privileges and immunities clause would not apply. In that case, no justification under any standard of review would have been required.

106 Wis. 2d 321, 316 N.W.2d 814 (1982).
tax scheme requiring taxpayers moving out of the state to include, for state income tax purposes, the gains they realized on the sale of their old residence in the state. Taxpayers remaining in the state were allowed to exclude such gains. The tax scheme also denied deductions for moving expenses if the taxpayer moved out of state. The court said that under Toomer, the "test for constitutionality is whether the means employed bear a substantial relation to legitimate state objectives." It then found two legitimate state objectives to which the discrimination was substantially related:

First, the legislature was concerned that unless the gain was taxed immediately the state would lose jurisdiction to tax the gain realized on the sale of the Wisconsin residence when the taxpayer left the state. Second, the legislature was concerned with the administrative problems to the state and to the former residents which would arise if the state were forced to keep track of the former residents until the taxability of the "deferred gain" was conclusively determined.

In Baker v. Matheson, a Utah statute was upheld under this lower standard of review. Refunds of general fund revenues were allowed for resident homeowners and renters but not for nonresident homeowners and renters who also had contributed to the fund. The court said that such discrimination against nonresidents is not barred per se if it furthers "a legitimate state interest to which the classification is reasonably related." Since the discriminatory treatment was "reasonably related to alleviating the increased costs of living produced in part by increased property taxes," it was sustained.

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70 316 N.W.2d at 824.
71 Id. at 825. Since these legislative concerns involve only the state's ability to collect, without administrative problems, the tax imposed on nonresidents, the sustainability of the discriminatory tax under even the rational basis standard of review is dubious. Note also that the court presumes that the gains deferred by residents will eventually be recognized. However, if recognition for state tax purposes depends on recognition for federal tax purposes, this will generally not be the case. I.R.C. § 121 allows the exclusion of $125,000 of gain for individuals over age 55. I.R.C. § 121 (West Supp. 1983). I.R.C. § 1014(a) provides for a stepped-up basis in property acquired from a decedent. I.R.C. § 1014(a) (West Supp. 1983). Consequently, no gains will be recognized if the resident defers recognition under I.R.C. § 1034 until he attains age 55 or dies. I.R.C. § 1034 (West Supp. 1983).
72 607 P.2d 233 (Utah 1979).
73 Id. at 247. The court cited Toomer and Hicklin as authority for this proposition after determining that the right of nonresidents to equal tax treatment was not a fundamental right under Baldwin because the benefits were not of the "same magnitude of importance as the right to engage in legitimate vocation for income essential to the maintenance of life." Id.; see notes 64 and 68 supra.
74 607 P.2d at 247. Even if, as the court held, a legitimate state interest is furthered when residents are protected from the additional tax burden, that would be true of every tax that
PROPERTY TAX EXEMPTIONS

In *Rubin v. Glaser*, the New Jersey Supreme Court upheld a statute providing rebates of taxes paid on properties constituting the taxpayer's primary residence, but not for nonresidents who paid such taxes on their summer homes in the state. The court said that "state taxing statutes, conferring a benefit or advantage on residents, do not run afoul of the Privileges and Immunities Clause, provided they bear a 'close' or 'substantial' relationship to a legitimate purpose independent of discrimination against nonresidents." In finding that the rebate was a means to assist "the taxpayer in times of escalating property taxes to keep a roof over his head," and that "[t]he Legislature did not intend to foster ownership of property for a second home to be used for vacations or for purposes other than maintaining a principal residence," the court held that a legitimate state purpose was furthered by the discrimination and that it was therefore justified under the privileges and immunities clause.

VI. Conclusion

If the fundamental rights analysis of *Baldwin* is limited to cases involving "state owned" resources, its application to state property tax cases is doubtful since such taxes are rarely, if ever, imposed in respect to such resources. If the fundamental rights analysis does not apply, a discriminatory tax statute will be tested by *Toomer*. 

To be justified under *Toomer*, the state must demonstrate that nonresidents constitute a peculiar source of evil at which the statute was aimed. Discriminatory taxes that are not imposed with respect to overburdened state resources will probably not satisfy the *Toomer* test, since the state will not be able to demonstrate the existence of any evil of which nonresidents constitute a peculiar source. Consequently, a discriminatory state property tax will generally pass constitutional muster only if the Supreme Court ultimately holds (1) that the fundamental rights analysis is not limited to cases involving discriminatory taxes so as to render all constitutional limitations merely academic.

75 83 N.J. 299, 416 A.2d 382 (1980).
76 Id. at 386. *Hicklin* and *Toomer* were cited in support of that proposition.
77 Id.
78 Id.

79 *See also* Maland v. Commissioner, 331 N.W.2d 486 (Minn. 1983) (state inheritance tax marital exemption available only to residents upheld); Lung v. O'Chesky, 94 N.M. 802, 617 P.2d 1317, 1320 (1980) (state permitted to make distinctions between residents and nonresidents in respect to a program of grocery and medical expense rebates, since the distinction was "rationally related to a legitimate state purpose" of granting relief from gross receipts and property taxes to low income individuals who actually pay those taxes). 617 P.2d at 1320.
“state owned” resources, and (2) that nonresidents’ rights to exemptions from higher taxes on their recreational properties are not fundamental, or, if fundamental, that the discrimination may be justified by a rational basis standard of review.

Since the Court was not required to address those concerns in Baldwin, that case is of limited aid to the state in justifying a discriminatory property tax. However, in cases involving tax preferences afforded residents in respect to their permanent homes, the state may have another, albeit untested, argument. If the tax preference is an exemption or rebate of taxes imposed on property constituting the taxpayer’s principal residence, the state may argue that any discrimination does not "hinge on" but is merely "incidental to" the status of nonresidency. Even Justice Brennan acknowledges that incidental discrimination against nonresidents is generally not entitled to constitutional protection. Although such tax preferences are necessarily limited to those having their "permanent residence" within the state, any disparate treatment is due to the failure of the particular property to satisfy the definition of "permanent residence." Residents' properties which fail to satisfy those definitional requirements are taxed in exactly the same manner as nonresidents’ properties. While nonresidents may never be able to satisfy the requirements for such preferential tax treatment, neither will residents who rent their homes and pay property taxes indirectly through their landlords. Furthermore, no resident could ever own more than one property entitled to the benefit.

Tax preferences afforded one property only are distinguishable from those afforded residents on all properties of a particular type. The denial of benefits in the latter case is due solely to the owner’s nonresident status. The benefit attaches to the person, rather than the property, and therefore hinges on his residency status. Where the benefit attaches to a particular property, however, and residents are treated in the same manner as nonresidents, any discrimination attendant upon nonresidents’ inability to own such property is arguably incidental and permissible under the privileges and immunities clause.

80 See text accompanying note 47 supra.
81 See, for example, the Florida statute, which exempts from tangible personal property taxes all household goods and personal effects of "every person residing and making his or her permanent home in this state." FLA. STAT. ANN. § 196.181 (West 1971). "Household goods" are defined as "[w]earing apparel, furniture, appliances, and other items ordinarily found in the home and used for the comfort of the owner and his family. . . ." Id. § 191.001(11)(a).