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Recommended Citation
Charles H. Clarke, Validity of Discriminatory Nonresident Tuition Charges in Public Higher Education under the Interstate Privileges and Immunities Clause, 50 Neb. L. Rev. 31 (1971)
Available at: https://digitalcommons.unl.edu/nlr/vol50/iss1/5
VALIDITY OF DISCRIMINATORY NONRESIDENT TUITION CHARGES IN PUBLIC HIGHER EDUCATION UNDER THE INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSE

Charles H. Clarke*

That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one . . . .

—Chief Justice John Marshall

Shapiro v. Thompson decided that the Equal Protection Clause of the Fourteenth Amendment forbids a state from requiring its residents to reside there for a certain period of time before they can receive public welfare assistance from the state. The majority opinion contains an interesting footnote which reads:

We imply no view of waiting period or residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth. Such requirements may promote compelling state interests on the one hand, or, on the other, may not be penalties upon the exercise of the right of interstate travel.

If the text of that footnote, apart from the implications of the opinion as a whole, does not acknowledge the existence of substantial constitutional questions concerning participation by non-residents as well as new residents of a state in the matters that it mentions, then the acknowledgement of a substantial constitutional question must require the express use of those three words.

Nonresidents, like other persons, are entitled to equal protection of the laws. Limiting the enjoyment of state benefits to persons who have satisfied waiting period requirements can exclude non-residents as well as new residents from state benefits in a way that violates the equal protection guaranty, because the exclusion does not observe permissible standards of classification. Although Chief Justice Warren and Mr. Justice Black, dissenting, gave the footnote an undeserved compliment when they stated "the Court takes pains to avoid acknowledging the ramifications of its decision,"

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3 Id. at 638 n. 21.
4 Id. at 655.

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they correctly said that "[t]he Court's decision reveals only the top of the iceberg. Lurking beneath are the multitude of situations in which the States have imposed residence requirements including eligibility to vote, to engage in certain professions or occupations or to attend a state-supported university."\(^5\)

The cluster of substantial constitutional questions created by *Shapiro v. Thompson* about state discrimination against nonresidents with respect to the enjoyment of state benefits may turn out to be the most phantom iceberg that the fundamental law has ever met. The Supreme Court already has postponed, on the grounds of mootness, a decision on the right of new state residents to vote in state elections without observing a waiting period requirement.\(^6\) One can legitimately wonder whether the matter has been tabled indefinitely like some proposed bill in the legislature.

Moreover, whether nonresidents are entitled to attend a state college or university free of the higher, invidiously discriminatory nonresident tuition charge, if the local educational needs of a state's citizens have been completely satisfied, may prove to be the most short-lived substantial constitutional question in the history of the Court. Four short months after *Shapiro* the Court denied certiorari in a federal court case which had decided the question adversely to nonresident students in Iowa.\(^7\) Later the Court summarily dismissed, for lack of a substantial federal question, an appeal from the California state courts where judgment had been entered adversely to the claim of a new resident student who unsuccessfully challenged a tuition regulation requiring a year's residence in the state before a student could become eligible to attend a state institution of higher learning without paying higher nonresident tuition.\(^8\) And so it is that basic constitutional issues that reach into every nook and cranny of the land occasionally are decided, summarily like the drop of the guillotine and as automatically as the entry of a default judgment in a lawsuit to collect the purchase price of a used television set.

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\(^5\) *Id.*


\(^7\) *Twist v. Redeker*, 396 U.S. 853, *denying cert. from* 406 F.2d. 878 (8th Cir. 1969). The author was counsel in this case and its companion, *Johns v. Redeker*, which followed in the aftermath of *Clarke v. Redeker*, 259 F. Supp. 117 (S.D. Iowa 1966). In *Clarke*, the writer's brother, then a law student, was held to be a resident of Iowa for tuition purposes. Consequently, the author's bias about the matters discussed herein is admitted. Others must determine whether the article is as biased as the writer.

The disposition of the tuition cases promises to give everlasting life to a segment of invidious discrimination by the states against citizens of other states, whose legality, but not practice, had been vestigial for a considerable time. This article is written in the hope of preventing the perpetuation of that kind of constitutional error by keeping the issues alive for discussion because, as the Shapiro footnote indicates, they have a broad reach. At least one can hope that the footnote's as yet unnamed "and so forth" will fare better than the going forth of the late Mrs. Goforth. She died in a hurry.9

I. THE GENERAL CASE FOR A LIMITED MEASURE OF EQUAL PROTECTION FOR NONRESIDENT STUDENTS

Most states have surplus educational facilities in the sense that their facilities exceed the demand of their migrating and nonmigrating citizens, when demand is measured by current admission and tuition standards which determine who is eligible for a state-supported education.10 Under such a measure of demand, a majority of states have a larger inflow than outflow of students and consequently have surplus educational facilities which exceed the demand of their migrating and nonmigrating citizens. Moreover, a state that has a substantial nonresident student population in its schools has surplus educational facilities in the sense that it has more educational facilities than are needed by its citizens who qualify for and want to receive a state-supported education at home under current conditions.

Such surplus educational facilities exist either because a state has decided to participate in interstate education extensively, or for other reasons. If a state deliberately decided to let its surplus facilities go to waste rather than share them with citizens of other states, it would violate the Interstate Privileges and Immunities Clause,11 which prohibits state "discrimination against citizens of other States where there is no substantial reason for the discrimi-

9 Mrs. Goforth was the leading character in a play written by Tennessee Williams entitled The Milk Train Does Not Stop Here Anymore (1964).
10 Appendix, Tables 1 and 2.
11 "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2. The Interstate Privileges and Immunities Clause protects citizens of a state from discrimination by other states and is not to be confused with the National Privileges and Immunities Clause in the first section of the Fourteenth Amendment which protects privileges and immunities of national citizenship from state abridgement. The National Privileges and Immunities Clause reads: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1.
nation beyond the mere fact that they are citizens of other States.” Thus, in *Toomer v. Witsell*, the clause prohibited South Carolina from excluding citizens of other states from its commercial fishery in the marginal sea by charging $2500 annually for a non-resident fishing license when the charge for a resident license was $25. The state's licensing law was not a conservation measure; the fish in the fishery that would have escaped catch as a result of the exclusion of nonresidents would have been wasted by the state. Therefore, even if a state wants to participate in interstate education to the smallest possible extent, it must share its surplus educational facilities, like its fish, with citizens of other states rather than deliberately let them waste.

Furthermore, under such circumstances a state cannot collect higher tuition from nonresidents for the use of limited surplus educational facilities. The fixed costs of a state's educational facilities would be paid by the state's taxpayers and resident students if nonresidents did not attend the state's schools. Resident tuition or educational expenditures can be lowered to some extent merely by admitting nonresident students at an equal tuition charge. The collection of a higher, discriminatory tuition charge from nonresidents permits a state to reduce resident tuition or educational expenditures even more. Consequently, a higher nonresident tuition charge requires nonresidents to pay more of the fixed costs of governmental benefits so residents can receive the same benefits at a smaller charge. That kind of discrimination is forbidden by the precedents giving the Interstate Privileges and Immunities Clause a construction which prohibits the states from imposing discriminatory tax levies upon nonresidents for the general benefits provided by state government. A state is absolutely forbidden from reducing tax burdens or other costs to its citizens by forcing nonresidents to make good all of the reduction.

The underlying considerations are much the same when a state adopts and follows a policy of maximum feasible participation in interstate education. However, there is one significant difference. Since interstate education in state schools is financed by a discriminatory fee system, the state compounds the wrong done to nonresidents by making a sacrificial offering of its own migrating students to other states for discrimination. Thus, the states deliberately participate in a discriminatory scheme by which their institutions

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13 *Id.*
14 *Id.* at 397–98.
for higher education, not just interstate education, are financed by exacting a greater contribution for their support from migrating students, simply because they migrate. That is so because, with a few exceptions, a severe imbalance between in-migration and out-migration of students to state colleges and universities does not exist in most of the states.\(^\text{16}\)

No one has attempted to learn whether any state tries to use the higher nonresident tuition charge as a means of spending less revenue from resident tuition and the state’s treasury than the cost of educating its resident students. In order to accomplish that purpose, a state would have to charge nonresidents more than the cost of educating them. Although the states probably do not make a profit from nonresident students if the cost of educating them is determined by dividing the total outlay for all students who attend a state’s schools by the total number of such students, the marginal costs of educating nonresidents may be substantially less than the amount of tuition collected from them. In any event, the higher nonresident tuition charge and extensive participation in interstate education permit the states collectively to provide for the education of a larger number of their citizens than the number that could be educated with the funds now provided by resident tuition and the states’ treasuries. Nonmigrating students in a state now receive an education at home, at a lower charge, without being displaced by a state’s migrating citizens who might return home for an education if other states did not collect the higher nonresident tuition charge but also refused to increase tuition or outlays from their treasuries. In that respect, nonresident students are charged more so that resident students will be assured of a state-supported education at less expense to themselves and the state’s taxpayers.

The validity of such a system of planned, interstate discrimination certainly should be suspect. In *Wheeling Steel Corp. v. Glander*,\(^\text{17}\) where a state ad valorem property tax levied upon certain intangibles owned by nonresidents was invalidated by the Equal Protection Clause because residents were exempted from the tax, the state argued that equal protection would be observed if each state were permitted to discriminate against citizens of other states in the exercise of the taxing power.\(^\text{18}\) Since the state’s proposal was rejected out of hand, it would appear that a state cannot offer its citizens as a sacrifice to other states for discrimination in

\(^{16}\) See Appendix, Tables 1 and 2.

\(^{17}\) 337 U.S. 562 (1949).

\(^{18}\) Id. at 573–74.
exchange for a reciprocal power to discriminate against citizens of those states.\textsuperscript{19}

It is very difficult to make a persuasive argument in support of the discriminatory nonresident tuition charge even if the states are allowed the benefit of extreme assumptions of fact that are favorable to their case. It can be assumed for the purpose of discussion that the tax resources of the states are exhausted, the states want to provide an education for the same number of their citizens as the number who now attend state schools, the same amount of money will be needed for that purpose as the amount now raised, and the states cannot equalize tuition at a higher level and collect more from all students who are educated at home. Under those circumstances, if migrating students were not charged more simply because they migrate, the states still could collect the same total amount of tuition that is now raised if tuition were fixed by students’ and their parents’ ability to pay, provided students who could afford to pay more would not attend private schools after tuition was raised. But even if all who could leave would leave, the states could simply reduce the resources that they have committed to the education of such students. The loss in revenue caused by their absence would be offset by the absence of its need. A refusal to charge all students on the basis of ability to pay, while only migrating students pay higher tuition, cannot be justified on the grounds that nonmigrating children of the rich would not attend public schools unless they received an education at a bargain price.

In establishing tuition rates by ability to pay, the states could, if they so desired, consider a student’s property, borrowing power, opportunity for part-time and summer work, and any other factor that sensibly constitutes a financial resource. Some student loan and other financial assistance programs are administered in a way that takes such factors into account. Nevertheless, ability to pay would have to be determined primarily by the resources of the students’ parents because the resources of most students are not large and also are substantially the same after an adjustment is made for those who have working spouses, usually but not always wives, who are not students. The use of parents’ resources as a yardstick occasionally could cause severe injustice to a few students whose parents adamantly refuse to provide their children with any help whatever in obtaining a higher education even though they are well enough endowed to furnish a lot of assistance. The injustice could be ameliorated to a large extent by establishing

\textsuperscript{19} The race restrictive land covenant cases said that equal protection of the laws “is not achieved through the indiscriminate imposition of inequalities.” Shelley v. Kraemer, 334 U.S. 1, 22 (1948).
tuition scales which do not have steep rates of progression. Setting tuition rates by ability to pay certainly would not require the large disparity in absolute amounts paid by individuals that is accomplished by the federal income tax. If the discriminatory, nonresident tuition charge were eliminated and ability to pay were considered in establishing tuition rates, educational expenditures from the state treasury should be increased. The absolute dollar amount of the increase would be large in most states, but hardly oppressive in relation to a state's tax resources. In any event, it seems fairly certain that state systems of higher education could be supported at their present scale with the resources of persons who pay tuition, without equalizing resident and nonresident tuition at a much higher level or increasing taxes, if the tuition charge were determined by the ability to pay of all persons who pay tuition. At present only migrating students are effectively charged tuition on the basis of ability to pay, since the higher tuition collected from them excludes many students from an interstate education because they do not have the ability to pay for it.

If the states eliminated the discriminatory tuition charge to nonresidents and fixed tuition for all students on the basis of ability to pay, seats available to nonresidents probably still would be sold to the highest bidders if the states could give an admission preference to nonresidents who could pay higher tuition. However, the admission preference would be unconstitutional if the thesis of this article, that a state must give equal treatment to nonresident students to the extent that it has surplus educational facilities, is correct. The preference would not prevent any of a state's qualified citizens from attending school if the state had surplus educational facilities. Since it would not operate in fact among the state's own citizens, it could not be applied to nonresidents.20

The same defect would exist if the state applied the preference to only one of its schools where nonresidents were concentrated, even if the state limited the number of its residents who could attend the school to make room for nonresidents. The purpose and effect of the preference to nonresidents who could pay higher tuition under those circumstances would be to admit to the school many more low income residents than nonresidents with smaller resources, because the preference would exclude all such nonresidents. Thus, nonresidents would not have substantially the same access to a state's surplus educational facilities that residents had to the state's facilities available to them.

20 Observance of equal protection depends upon the application as well as the letter of the law, and a law that is fair on its face cannot be used to mask unconstitutional discrimination. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1885).
Moreover, an admission preference for the children of the well-to-do because of the comparative wealth of their parents would be unconstitutional even if the preference affected residents and non-residents alike and was acceptable politically to the people of a state. *Harper v. Virginia State Board of Elections*\(^{21}\) holds that the Equal Protection Clause forbids a state from requiring a poll tax to be paid before the right to vote can be exercised, principally because a state cannot confer a voting preference among its citizens on the grounds "of wealth or affluence or the payment of a fee."\(^{22}\) Those bases for distinction do not have any relationship to voting requirements in the sense that those words mean "standards designed to promote intelligent use of the ballot."\(^{23}\) However, as Mr. Justice Black observed, dissenting, the Court did not deny that disenfranchising delinquent taxpayers could not assist the collection of state revenue, which is a permissible governmental objective.\(^{24}\) Consequently, *Harper* decided that a state's means of collecting taxes from delinquent taxpayers who can pay them are so ample that disenfranchising delinquent poll and other taxpayers was a denial of equal protection of the laws because the adverse consequences of the disqualification would primarily be visited upon the poor for the reason that they were poor rather than because of the state's need for an expeditious way of collecting revenue. Therefore, *Harper* holds that a state cannot treat the poor worse than others to accomplish a permissible governmental objective when other means of realizing the objective are admittedly adequate.

Consequently, in operating its schools, a state could not confer an admission preference upon persons who could afford to pay higher tuition if the state fixed tuition by ability to pay and declared that it could educate any given number of students who could pay any amount of money that would be raised by a particular tuition scale. In such a case, the state has declared that its resources are adequate for the announced undertaking. Therefore, the admission preference would discriminate against the relatively poor student because of his lack of wealth, not because of a lack of state fiscal resources.

A policy of providing a more largely subsidized education to their citizens at home with smaller outlays from their treasuries is the reason the states charge nonresidents more tuition than residents. The matter can be better understood if consideration is given

\(^{22}\) Id. at 666.
\(^{23}\) Id.
\(^{24}\) Id. at 674.
to what might happen if all migrating students suddenly came home to claim a perch upon which they could roost. Citizens of Arizona, California, Colorado, Indiana, and Michigan probably would find seats aplenty because in 1963 and 1968 those states had large imbalances of student in-migration over student out-migration, requiring surplus educational facilities which educational planners might be hard pressed to explain as a maximization of educational benefits with a minimization of cash outlays for the people of the states which they serve. On the other hand, students who were citizens of Alaska, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania, some of which must be nearly the richest states in the Union, might find that a ride on a San Francisco cable car during the rush hour was the ultimate in lebensraum, while experiencing none of the cable car's thrills. In 1963 and 1968, those states had imbalances of out-migration over in-migration respecting public higher education that were more than ten percent of the number of students in their state schools. In 1963, the ratio of students in state colleges and universities in New Jersey to that state's imbalance of outflow over inflow respecting state schools was 56,617 to 11,767. The ratio was 85,452 to 27,883 in 1968. The ratios for Massachusetts were 30,425 to 6,378 in 1963, 67,998 to 8,457 in 1968. As in 1963 and 1968, other states that had more student out-migration than in-migration might be able to provide seats for all of their citizens who were students by overusing their present facilities.

For the states as a whole, however, the galling problem would be finding more money, not more seats, even though more money could be found. More money would be needed for the states' educational institutions even if enough seats existed. That would be the case because the higher, nonresident tuition charge has become a delightful fixation in state budgets for higher education, and the revenue that it now yields would have to come from somewhere. If all migrating students came home, it could not come from them because nobody has ever suggested that a state could discriminate against its own repatriated citizens. Actually, there is no mystery about where the lost item of revenue would come from. It would come from each state's beleaguered taxpayers or from resident students by a general tuition increase or from both sources, although the impact of those effects could be reduced considerably if tuition was fixed by ability to pay after a minimum charge was set as a floor.

25 See Appendix, Tables 1 and 2.
26 Id.
27 Id.
Fortunately, however, state legislators are spared the fear-laden task of telling their constituents about an increase in taxes or resident tuition at the state university or the extremely radical proposal that tuition should be determined by ability to pay. Many students in the country want to migrate even when the exercise of that fundamental right means a higher, discriminatory tuition charge that at some state schools approaches full cost, and everybody knows that migrating students are leaving, not coming home. Consequently, everything can continue as it now is. Provision can be made for the number of students now in state schools. Tuition need not be raised for a state's citizens who are educated at home. All state educational establishments can continue to operate at their present magnificent scale. And all of these wonderful things can be done without raising taxes. Larger contributions for the support of the states' systems of higher education can be exacted from migrating students simply because they migrate. Each state can provide a less expensive education for its citizens who are educated at home by making outlanders foot the bill for its full cost when the market permits.

It is unfortunate that such a marvelous plan, which produces so much happiness and contentment, obviates the need for solving sensitive political problems, and victimizes such a superficially small number of people, is flawed by the circumstance that it is patently unconstitutional. But on the other hand, perhaps it would be a shame to mar such an ingenious device for invidious discrimination with the slightest taint of any legality at all.

The number who suffer from the discriminatory tuition charge exacted from nonresidents probably is far greater than meets the eye. Certainly many more than those who now are well off enough to pay it are among its victims. The discriminatory charge makes an interstate education impossible for the student who barely can manage the resident rate of tuition. The desire of a student to go to school in another state is not determined by the wealth of his

Michigan State University at East Lansing, Michigan recently tried a very mild program based on ability to pay, under which tuition for a resident student ranged from $369 to an astronomical $552 a year, depending upon his parents' income. The program, said to have been the only one of its kind in the country at the time, was killed before it was two years old when some legislators served as willing conduits to transmit irate pressure from unspecified sources to the school. Naturally, the school's administration then, perhaps sadly, announced that it would try to meet the needs of students from low income families with a new formula. The school had to face realities. The legislature funds the school even though the school is otherwise autonomous under the state constitution. The Detroit News, May 19, 1969, at 11A.
parents. If the discriminatory tuition charge disappeared, inter-
state education might become much more extensive than it is, and
state universities that now boast they are truly national centers
of higher learning might see their boast come true.

If interstate education could not exist on a fairly extensive
scale without the discriminatory fee, then both should remain as
they are. However, the higher charge to migrating students cannot
be supported on the ground that interstate education cannot exist
without it. Even if the tax resources of the states were exhausted,
the same amount of money in relation to need that now is raised
by tuition could still be raised by that means if tuition were de-
termined by ability to pay. But the tax resources of the states are
not exhausted. A state can participate in interstate education exten-
sively even though it charges residents and nonresidents the same
tuition. All that a state has to do is determine the number of its
citizens to whom it wants to give a state-supported education and
establish facilities for them at home. Those of that number who
desire and can get a tax-supported education in other states would
be charged equal tuition there. The seats that were built for them
at home could be used by citizens of other states at an equal tuition
charge. Expenditures from a state's treasury that were not recov-
ered by tuition charges to nonresidents, in effect, would be spent
for the benefit of its migrating citizens who would receive a tax-
supported education in other states. No migrating student would
ask for a handout from the treasury of the state where he went to
school. Each state would spend from its own treasury for its citizens
only.

The fact that the parents of resident students usually pay taxes
to the state where their children attend school, whereas the parents
of nonresident students ordinarily do not, ought to be completely
immaterial to the issue of whether the higher nonresident tuition
charge is constitutionally permissible. The equalization of resident
and nonresident tuition need not result in a state's taxpayers pay-
ing more for the education of its citizens than nonresident tax-
payers must pay for the education of nonresident students simply
because the tuition rates made no adjustment for the much greater
amount of taxes that the citizens of a state pay to its treasury. A
state's taxpayers would pay more only if they did not receive sub-
stantially the same benefits in exchange for their subsidy to non-
residents who attended their schools. However, each state would
receive a substantial equivalent from other states for its expendi-
tures upon nonresident students if it eliminated the discriminatory
nonresident tuition charge and balanced student in-migration and
out-migration. Under those circumstances, the number of a state's
migrating students who would receive a largely subsidized education in other states' schools would be the same as the number of nonresidents in that state's schools. Thus, the issue is whether a state can discriminate against nonresidents who receive services provided by state revenue when there is a nondiscriminatory means by which the state can recover from nonresident taxpayers substantially all of its expenditures for the services received by the nonresidents.

Interstate education could be administered feasibly if the states would eliminate the higher nonresident tuition charge and balance student in-migration with student out-migration. Of course, the states would have to exchange information about nonresident student populations. However, that hardly would be beyond the capacity of data processing machines in the age of the computer. Consequently, it cannot be seriously argued that a limited equality of treatment for nonresident students should be overridden by administrative convenience.

The nonresident's case for a limited measure of equal treatment depends upon the existence of state surplus educational facilities respecting students who are educated at home. However, if the states were required to observe a limited equality of treatment toward nonresident students, the faint possibility exists that some state might mulishly withdraw from interstate education completely and declare that instead of a horde of fellow Americans from other states in its midst, the state preferred a lower teacher-student ratio for its students and increased opportunity for its faculty to engage in independent research, so that instruction at its schools would be enriched. Who then would say that surplus educational facilities available for use by nonresidents existed in the state? The answer is that nobody would. However, if a state wanted to withdraw from interstate education for those reasons, it certainly could be required to adhere to them after the withdrawal was made or else participate in interstate education on the basis of a limited equality of treatment to nonresidents. In other words, after the policies in support of a withdrawal were announced, a state could be forbidden from brushing them aside for the purpose of meeting any increased demand by its own citizens for a higher education.²⁹

²⁹ When South Carolina said that conservation was the reason for the exclusion of nonresident fishermen from its commercial fishery in the marginal sea, the Supreme Court said: "It is relevant to note that the statute imposes no limitation upon the number of resident boats which may be licensed, and it was stipulated that while the number of non-resident boats fell from 100 to 15 between 1946 and 1947, the total number of boats licensed increased during that time from 254 to 271." Toomer v. Witsell, 334 U.S. 385, 397 n.30 (1948).
If a state tried to do that, a court of equity could compel the state to restore conditions that prevailed before it withdrew from interstate education or enter some other appropriate judgment.

However, if the states were compelled to charge nonresidents an equal rate of tuition for the use of their limited surplus educational facilities, the possibility that a state deliberately would withdraw from interstate education completely would be extremely remote. If a state decided to provide no room in its state schools for citizens of other states, then other states surely would arrange their facilities to return the favor in kind to migrating students from the particular state, and the withdrawal would accomplish nothing more than mass repatriation. Instead of mass repatriation, each state could adopt measures by which its migrating students would receive a substantial equivalent from other states in exchange for that state's equal treatment of nonresident students from its sister states.

II. THE EQUALITY GUARANTIES OF THE CONSTITUTION ASSURE ALL CITIZENS EQUAL OPPORTUNITY TO ENJOY THE ADVANTAGES OF ANY STATE

The Commerce Clause assures a large measure of equal treatment by the states to citizens of other states. Since it usually forbids discrimination adverse to the flow of interstate commerce and favorable to intrastate or local commerce, the clause in effect prevents a state from discriminating in favor of its own locality and against other states. Naturally, citizens of other states are the principal beneficiaries of that kind of protection.

Thus, the Commerce Clause forbids a state from discriminating against consumers in other states for the purpose of giving local consumers a preferential right to purchase the products of the state. Producers in other states are given similar protection from discrimination favorable to local producers with respect to access to markets within a state for the purpose of sale. Furthermore, the Interstate Privileges and Immunities and Equal Protection Clauses

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30 West v. Kansas Nat. Gas Co., 221 U.S. 229 (1911) (a state cannot prohibit the transportation of natural gas produced in the state to other states for the purpose of providing consumers in the state with a supply of natural gas); Pennsylvania v. West Virginia, 262 U.S. 553 (1923) (a state where natural gas is produced cannot require that local demand for gas be satisfied at a reasonable price before any of the product is transported to another state); H. P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949) (a state cannot deny a license for a milk facility in order to prevent diversion of milk from local to outstate consumers).

forbid a state from discriminating against citizens of other states with respect to the enjoyment of benefits within its borders by prohibiting discriminatory business tax levies against citizens of other states.\textsuperscript{32}

Equal protection of the laws is not an all or nothing proposition. If a group otherwise qualifies for equal protection, but absolute equality of treatment would preclude the creation of important benefits, cause them to disappear completely or severely curtail their enjoyment, the group is still not stripped of all right to equal protection. Instead, equal protection of the laws must be observed to the extent that the circumstances permit when absolute equality of treatment is impossible to administer.

For example, the Supreme Court has indicated that giving political subdivisions a voice in the state legislature is an important state objective.\textsuperscript{33} However, an absolute observance of the one man, one vote principle might cause the elimination of that objective. Consequently, the Court has said that slight deviations from the one man, one vote principle are permissible to realize the objective "as long as the basic standard of equality of population among districts is maintained."\textsuperscript{34} Apart from necessary deviations of that kind,\textsuperscript{35} voting power is distributed according to numbers as equally as the circumstances permit. Similarly, although a state is not obliged to incur the expense of providing an indigent criminal defendant with the kind of defense attorney that only a small fortune can purchase, rich and poor criminal defendants must be treated as equally as the circumstances permit, even though the large cost to the state for the best that it can do brings the indigent much less than a rich man can buy.\textsuperscript{36}

\textsuperscript{34} Id.
\textsuperscript{35} Kirkpatrick v. Preisler, 394 U.S. 526, 533-34 (1969) and Wells v. Rockefeller, 394 U.S. 542 (1969) may not permit any deviation for that purpose or may hold that the permissible size of that kind of deviation must be so slight that the deviation would be virtually imperceptible. \textit{See} Dixon, \textit{The Warren Court Crusade For the Holy Grail of One Man-One Vote}, \textit{The Supreme Court Review} 219, 229-31 (1969).
\textsuperscript{36} Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963) (counsel must be assigned for the first appeal so that the possibility of discovering hidden merit in the accused's case will not be missed); Anders v. California, 386 U.S. 738 (1967) (counsel assigned for the appeal must file a brief that mentions anything in the record which arguably might support an appeal even though assigned counsel believes that an appeal would be wholly frivolous).
A state cannot protect a local interest by a discriminatory law that severely curtails the interests of persons located in other states when the local interest can be protected effectively without severe discrimination. Thus, if a city provides for a supply of pure milk by inspecting farms, it cannot minimize its administrative burdens by prohibiting the sale of milk in the city from farms in other states because it does not want to inspect beyond a short radius from the city limits, when the alternatives of charging the reasonable cost of distant inspections or relying upon inspections by a federal agency are available. Similarly, if nonresidents as a class are the source of a peculiar risk, a state cannot eliminate the risk by a severe discriminatory imposition upon nonresidents when a less severe, nondiscriminatory means is available for that purpose. Consequently, the use of injurious equipment or methods by nonresident fishermen would not justify their exclusion from a state's commercial fishery, because the less drastic means of prohibiting the use of offensive equipment or methods can be used.

However, some local values can be created or preserved only by discriminating against persons in other states. The difficulty of policing nonresident insurance brokers in matters of trustworthiness and competency has permitted a state to limit insurance brokerage to its residents. The prompt elimination of a health hazard justifies commercial discrimination against outstate buyers of dead farm animals because the curtailment of affected interstate interests is slight and the purpose of the discrimination is not to create a local trade preference. Similarly, the Commerce Clause does not prohibit a state from restricting the commercial and industrial uses of water from its streams to ordinary riparian users when that is necessary to preserve the streams for navigation, even though the restriction discriminates against persons who would like to use the water for commercial and industrial purposes in other states. Naturally, the equality clauses of the Constitution do not force a state to make the ridiculous choice of destroying either a highway or the water interests of riparian users.

The Commerce Clause cases show that when state discrimination against persons in other states upon some grounds other than state citizenship is necessary to accomplish an important governmental

37 Dean Milk Co. v. Madison, 340 U.S. 349 (1951) (the discrimination against outstate farmers was invalidated by the Commerce Clause).
38 Toomer v. Witsell, 334 U.S. 385, 389 (1948) (the more severe means of discrimination would have violated the Interstate Privileges and Immunities Clause).
objective, the value of the protected local interest must at least be equal to the value of the outstate interests curtailed.\textsuperscript{42} However, when it is necessary to promote a local interest by using state citizenship as the basis for classification, the nature of the local interest must be compelling.

Discrimination on the basis of race is always "constitutionally suspect . . . and subject to the most rigid scrutiny."\textsuperscript{43} The same is true of lack of wealth.\textsuperscript{44} A similar suspicion attaches to discrimination on the grounds of state citizenship, where "bald assertion"\textsuperscript{45} or a mere mention of supporting reasons "without further elucidation"\textsuperscript{46} will not justify the classification. Unlike the case of classification for regulation of business, where the state is allowed to make the most of the worst possibilities that may be imagined from a situation,\textsuperscript{47} possibilities alone will result in invalidation of the classification when it rests upon state citizenship. Instead, the state must precisely identify a compelling local interest and clearly establish that its existence would be precarious unless discrimination against nonresidents is permitted.\textsuperscript{48}

Classification on the grounds of state citizenship frequently infringes the right to travel from one state to another. That was true in \textit{Shapiro v. Thompson}\textsuperscript{49} because the restriction upon welfare benefits there discriminated against new residents who recently had arrived in the regulating state as citizens of other states. The right to travel includes more than mindless mechanical movement,\textsuperscript{50} and it reaches beyond the right to settle permanently in a state. As stated in \textit{Shapiro}, state governmental benefits whose enjoyment is protected from impermissible state discrimination include "schools, parks, and libraries . . . police and fire protection,"\textsuperscript{51} in short almost all of the benefits that state government provides. Admittedly there are some situations where nonresidents must be restricted to a more limited equal access to state governmental benefits than are residents or even denied access completely. In those situations, severe imposition upon nonresidents can be justified because preferential treatment of its residents by a state may

\begin{itemize}
\item \textsuperscript{42} Cf. Southern Pac. Co. v. Arizona, 325 U.S. 761, 784 (1945).
\item \textsuperscript{43} McLaughlin v. Florida, 379 U.S. 184, 192 (1964).
\item \textsuperscript{44} Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966).
\item \textsuperscript{45} Mullaney v. Anderson, 342 U.S. 415, 418 (1951).
\item \textsuperscript{46} Toomer v. Witsell, 334 U.S. 385, 398 (1947).
\item \textsuperscript{47} Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Zemel v. Rusk, 381 U.S. 1 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Kent v. Dulles, 357 U.S. 116 (1958).
\item \textsuperscript{51} 394 U.S. at 632.
\end{itemize}
be necessary for the existence of some governmental benefits. However, no governmental benefit is excluded automatically and arbitrarily by the protection secured by the right to travel or the Interstate Privileges and Immunities Clause.

The right to travel is so fundamental to the effective functioning of our federal union that its existence was implied as a right of national citizenship by the Constitution, although its express provisions do not mention it. The right derives in part from the Interstate Privileges and Immunities Clause. The Supreme Court has said that, like the right to travel, the right to freedom from state discrimination on the grounds of state citizenship, secured by the Interstate Privileges and Immunities Clause, is indispensable to the Constitution's conception of a federal union of states and to its practical existence. Moreover, Sherbert v. Verner, which was cited in Shapiro, held that a state cannot deny unemployment compensation benefits to persons who will not work on Saturday because their religion forbids it even though a refusal to work on Saturday hinders the reemployment of the unemployed. As with freedom of religion, a state must adjust its institutions to accommodate the right to travel and the right to freedom from discrimination on the grounds of state citizenship when accommodation is possible.

Naturally, a state can provide an admission preference for its own citizens in its own schools. If a state could not do that, the ratio of a state's citizens to the student body in some state schools of national excellence or other attractiveness might be the same as the state's share of the national population. That condition might destroy some state schools because their cost of operation without the discriminatory tuition charge would greatly exceed the value of any educational benefits that the state's citizens would derive from the school's existence. Nevertheless, since equal protection is not an all or nothing proposition, nonresident students must be given equal protection as fully as the circumstances permit.

52 Id. at 630-31.
53 Id. at 630 n.8.
54 "It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

"Indeed, without some provision of this kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868) (footnotes omitted).
III. NONRESIDENTS ARE NOT EXCEPTED FROM THE PROTECTION GIVEN BY THE EQUALITY GUARANTIES OF THE CONSTITUTION TO RIGHTS AND PRIVILEGES RELATING TO STATE PROPERTY

*Shapiro* should have eliminated any doubt about nonresidents' rights and privileges relating to state property that might have been lingering from one or two of the older precedents. The case applied the Equal Protection Clause to a state's treasury for the benefit of residents of the state who recently had come to the state as citizens of other states. The state treasury is an item of state property in which the states always have had the most constant special interest. Moreover, *Shapiro* was consistent with the development of the fundamental law by the precedents.

For example, *Geer v. Connecticut*[^56] recognized that a state has a qualified rather than an absolute ownership interest in things *ferae naturae* within its borders, and held that the Commerce Clause did not forbid a state from discriminating against nonresident consumers in other states, respecting game birds killed within its borders, by prohibiting their removal from the state. However, the case did not authorize blanket discrimination by a state against citizens of other states when a state controls the disposition of resources that it owns. A later case decided that the Commerce Clause prohibits a state from requiring shrimp caught in its waters to be processed for food within its territory when the purpose of the requirement is to favor the state's food processing industry at the expense of competing industries in other states, rather than to preserve a food supply for local consumption only.[^57] Afterwards, the validity of the discrimination in *Geer* was questioned[^58] and in *Geer* itself the discrimination was justified on the grounds that it was necessary to preserve a local food supply.[^59] Unless a state lets all persons apply for a recreational hunting license and issues licenses to a limited number of applicants chosen by lot, equal sharing of a state's game birds with citizens of other states might cause the birds' extinction, even if the state limited the kill. Naturally, equal sharing to any degree need not be observed when there would be nothing to share if it were required.[^60] Moreover, in

[^56]: 161 U.S. 519 (1896).
[^57]: Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928).
[^58]: Instead of affirming the proposition that a state can forbid the removal of game killed within its territory, the court correctly remarked in a later case that "[t]here is considerable authority, starting with *Geer v. Connecticut*, 161 U.S. 519 (1896), to support the contention. . . ." *Toomer v. Witsell*, 334 U.S. 385, 404 (1948).
[^59]: 161 U.S. at 534.
the context of a discussion treating instances of qualified and abso-
lute ownership of property by a state interchangeably, \textit{Toomer v. Witsell}^{61} said that the "whole ownership theory, in fact, is now
generally regarded as but a fiction"^{62} with respect to the protection
secured to citizens of other states by the Interstate Privileges and
Immunities Clause.

\textit{Toomer v. Witsell} contains a dictum which says that when a
state supports one of its facilities by using taxes which \textit{only resi-
dents pay} and license fees collected from all users of the facility,
it may charge nonresidents a differential respecting the expendi-
tures from tax funds to which nonresidents make no contribution.
The Court did not say how such a differential could be determined.^{63}
However, two ways suggest themselves immediately and there
may be more, depending upon a state's system of taxation. One way
is to divide the amount that the state spends from funds to which
only residents contribute by the number of licensed residents who
use the facility. That method of making the calculation might result
in a comparatively large differential if a state subsidized its facility
extensively from such funds. The other way of making the determi-
nation is to ascertain on some average basis the amount of the
contribution in the form of taxes not collected from nonresidents
that is made by a resident, regardless of whether he is a licensed
user of the facility. That calculation would result in a small or
nominal differential. Since equality of treatment was the basic
theme of \textit{Toomer}, the differential which the court referred to must
have been the smaller one.

However, the assumption in \textit{Toomer} that a differential charge
was permissible respecting the use of a state facility, a commercial
fishery there, overlooked the fact that all states maintain public
facilities like roads and parks, even though all do not have com-
mmercial fisheries. Furthermore, if they are enjoyed without any
kind of difference in treatment, when that is possible, a substantial
equivalent of public benefits, rather than an exact amount measured
by a jeweler's scale, will be exchanged among the citizens of the
states even though the exchange will not be in kind. Consequently,
the differential mentioned in \textit{Toomer} is of doubtful validity. The
case actually did not raise the issue of whether it was valid. In
any event, it could be collected from nonresidents only when the
state spends from taxes which only residents pay.

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^{61} 334 U.S. 385 (1948).
^{62} \textit{Id.} at 402.
^{63} \textit{Id.} at 399.
Moreover, Shapiro holds that when a state deals with its own citizens, especially its new citizens, the Equal Protection Clause forbids state apportionment of "all benefits and services according to the past tax contributions of its citizens," with an exception allowed for insurance and perhaps similar programs financed by individuals' contributions. Consequently, the absence of tax contributions by nonresidents, especially when they are beyond a state's jurisdiction to tax, cannot automatically justify discrimination against them with respect to a state's benefits and services. Nonresidents, like residents, are entitled to equal protection of the laws under either the Interstate Privileges and Immunities Clause, the Equal Protection Clause, or both.

One Supreme Court precedent, and perhaps another, excepts rights and privileges relating to property in which a state has an absolute ownership interest from the protection given to nonresidents by the Interstate Privileges and Immunities and Equal Protection Clauses. Heim v. McCall says that those clauses do not prohibit a state from giving a preference to its citizens in hiring labor for public construction contracts performed for the state or its municipal subdivisions. That is all that the case decided with respect to discrimination on the grounds of state citizenship. It did not declare that a state can pay a workman it chooses to hire less than its own citizens simply because he happens to be a citizen of another state. Public construction contracts have been used by the states for poverty and unemployment relief. Undoubtedly, a state still can hire the poor and unemployed within its territory before advertising for workmen in other states. It is doubtful whether a preference beyond that should be permissible after Shapiro.

McCready v. Virginia held that the Interstate Privileges and Immunities Clause did not forbid a state from restricting the right to use its oyster beds, which it owned absolutely, to its own citizens. The facts in McCready did not disclose the extent of the state's oyster beds in relation to the actual or potential needs of its citizens for that kind of property. Moreover, the nonresident there proposed unqualified equal treatment, such as is observed in the use of a state's public ways, rather than limited equality of treatment. Since such a standard of equality is impossible to observe for all kinds of state aid, it is hardly surprising that the restriction concerning the use of the oyster beds was upheld.

64 394 U.S. at 632-33.
65 239 U.S. 175 (1915).
66 94 U.S. 391 (1876).
Nevertheless, the Court in McCready apparently misunderstood the relationship between the Equal Protection and Interstate Privileges and Immunities Clauses, and it was seriously mistaken about the scope and kind of protection secured by both clauses. The Court erroneously held that the Interstate Privileges and Immunities Clause protected only those rights that were fundamental and incident to general rather than state citizenship and that the clause did not protect special rights and privileges at all. As might be expected, gathering oysters on state land was a special, not a fundamental, right or privilege.

IV. THE SPECIAL RIGHTS AND PRIVILEGES EXCEPTION TO THE INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSE SHOULD BE EXPRESSLY REPUDIATED

The erroneous fundamental rights construction of the Interstate Privileges and Immunities Clause, with its special rights and privileges exception, first appeared in the lower federal court case of Corfield v. Coryell, decided before the Civil War. Like McCready, Corfield held that a state could permit all of its citizens to gather oysters in its fishery and severely limit or completely deny that right to citizens of other states. Recognition of such a power in a proper case is of little consequence because in certain limited situations a state ought to be able to discriminate against citizens of other states under any standard of equal protection that is workable. If a state had to open the use of any of its land to citizens of other states as a condition to letting its own citizens use it, the principal beneficiaries of a state's land policy in some situations might be citizens of other states, and a state would simply decide to deny the use of some of its land to help its own citizens rather than share it with citizens of other states in accordance with the ratio of its population to the nation's population. Considerations of that sort were recognized very early. The Court in Corfield said that: "[O]yster beds belonging to a state may be abundantly sufficient for the use of the citizens of that state, but might be totally exhausted and destroyed if the legislature could not so regulate the use of them as to exclude the citizens of other states from taking them, except under such limitations and restrictions as the laws may prescribe." However, the Court in Corfield did not deny citizens of other states equal access to the state's oyster beds because equal access might cause the oyster beds to disappear. Instead, the Court decided that the right to gather oysters on state

68 Id. at 552.
land was a special right or privilege and that the Interstate Privileges and Immunities Clause did not give citizens of other states any protection from discrimination respecting special rights or privileges.

Before the Fourteenth Amendment, the purpose of the Interstate Privileges and Immunities Clause was to secure imperfectly to citizens of a state "equal protection of the laws" by other states. A state was required to observe only an imperfect kind of equal protection toward citizens of other states then because prior to the Fourteenth Amendment a state had unlimited power to discriminate against its own citizens, and when it exercised that power, the Interstate Privileges and Immunities Clause did not put citizens of other states in a better position than citizens of the regulating state. As one author has said:

Under the more orthodox view, taken by [Chief Justice Taney and Justice Curtis] in the Dred Scott case, the theoretically primitive power of each of the states to create inequalities in rights among its own citizens, or among them and outsiders who were not citizens of any other of the United States, was deemed to survive, under the Interstate Privileges and Immunities Clause, completely. Each state had the power, too, according to this more orthodox view, to create inequalities in rights, even as against citizens of other American states, provided only that it did not deny to these any privilege or immunity that it accorded to its own citizens generally. For the right to "equality" under the Interstate Privileges and Immunities Clause was deemed to confer a right merely to that minimum privileges and immunities which each particular state, in the exercise of its power to create special privileges and immunities, might choose to accord its own citizens as a group.

Consequently, the erroneous special rights and privileges exception from the Interstate Privileges and Immunities Clause that was announced in *Corfield v. Coryell* offered to make a bad situation worse. Comparatively, it had a more odious impact upon citizens of other states than that which resulted when a state conferred special privileges upon a favored few by discriminating invidiously against all other persons, including its own citizens. The erroneous exception reduced the very limited measure of equal protection secured to citizens of other states by the Interstate Privileges and Immunities Clause. States were permitted to discriminate invidiously against citizens of other states exercising "special rights and privileges" by simply applying the impermissible standard of state

citizenship, even though their own citizens enjoyed equal protection in the exercise of such rights and privileges as a matter of policy.\textsuperscript{72}

The fundamental rights construction of the Interstate Privileges and Immunities Clause, with its special rights and privileges exception announced in \textit{Corfield}, had not been accepted by the Supreme Court prior to the Fourteenth Amendment. \textit{Conner v. Elliott}\textsuperscript{73} was the only case in which the clause had been used by the Court as the basis for a decision.\textsuperscript{74} In \textit{Conner}, a widow who was domiciled in Mississippi during her marriage contended that the Interstate Privileges and Immunities Clause compelled Louisiana to confer community property rights upon her with respect to property in Louisiana acquired by her husband during their marriage because Louisiana conferred such rights upon parties to marriages governed by its law. The Court rejected her claim because Louisiana's law "does not discriminate between citizens of the [state] and other persons; it discriminates between contracts only."\textsuperscript{75}

After the Civil War, the Fourteenth Amendment's Equal Protection Clause gave the citizens of each state the fundamental right to receive equal protection of the laws from their state. A right that is fundamental between a state and its own citizens is also fundamental between a state and citizens of other states for the purpose of the protection provided by the Interstate Privileges and Immunities Clause even if that clause is given a fundamental rights construction. Thus, as a result of the Fourteenth Amendment, the Interstate Privileges and Immunities Clause conferred upon citizens of a state the fundamental right to receive full equal protection of the laws from all other states.

However, the special rights and privileges exception to the Interstate Privileges and Immunities Clause violates the guaranty of full equal protection to citizens of other states. The exception permits a state to deny equal protection to citizens of other states even though the state must observe equal protection among its own citizens in the matter of so-called special rights and privileges. Consequently, the special rights and privileges exception to the Interstate Privileges and Immunities Clause could not have sur-

\textsuperscript{72} The fundamental rights gloss put upon the Interstate Privileges and Immunities Clause by the two judges who sat in \textit{Corfield v. Coryell} has been described as "a little meaningless rhetoric to excuse their failure to apply the clause strictly as the clause was written." \textit{Id.} at 1125.

\textsuperscript{73} \textit{59 U.S. (18 How.) 591 (1855).}

\textsuperscript{74} \textit{2 W. Crosskey, note 71 supra, at 1126.}

\textsuperscript{75} \textit{59 U.S. (18 How.) at 594.}
vived the adoption of the Fourteenth Amendment unless the Equal Protection Clause received a construction that left a state's power to engage in invidious discrimination against all persons largely intact. That is exactly what the early precedents construing the Equal Protection Clause did.

The Slaughter-House Cases decided that the Fourteenth Amendment did not prohibit state legislation conferring a monopoly upon a favored few to conduct a slaughterhouse or butchering business although that was previously a common calling. The majority of the Court also approved a fundamental rights construction of the Interstate Privileges and Immunities Clause which continued the limited measure of equal protection that the clause secured to citizens of other states before the Fourteenth Amendment. The majority said that the "sole purpose [of the clause] was to declare to the several States, that whatever those [fundamental] rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction." The quoted language shows that the Interstate Privileges and Immunities Clause by itself would not have helped the butchers who were the victims of the monopoly even if they had been citizens of other states, and therefore entitled to the protection of the clause. The Court doubted "very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview" of the Equal Protection Clause.

Moreover, the Court made its thinking about that matter unmistakably clear when it said:

The proposition is, therefore, reduced to these terms: Can any exclusive privileges be granted to any of its citizens, or to a corporation by the legislature of a State? ... But we think it may be safely affirmed, that the Parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies in this country, have from time immemorial to the present day, continued to grant to persons and corporations exclusive privileges, ... privileges which come within any just definition of the word monopoly, as much as those now under consideration; and that the power to do this has never been questioned or denied.

The creation of the monopoly in the Slaughter-House Cases may well have violated the very indulgent standards for the permissible

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76 83 U.S. (16 Wall.) 36 (1872).
77 Id. at 77.
78 Id. at 81.
79 Id. at 65-66.
classification of business activities which now are required by the Equal Protection Clause and which usually allow classification on any rational basis that might exist. Mr. Justice Field, dissenting, seems to have remarked correctly that:

It is plain that if the corporation can, without endangering the health of the public, carry on the business of landing, keeping, and slaughtering cattle within a district below the city embracing an area of over a thousand square miles, it would not endanger the public health if other persons were also permitted to carry on the same business within the same district under similar conditions as to the inspection of the animals.

Thus, the Equal Protection Clause was construed in the *Slaughter-House Cases* in a way that virtually limited its protection to Negroes and that authorized a state to grant exclusive privileges without observing any standards for classification. A case that is near the *Slaughter-House Cases* in the reports permitted the states to prohibit women from practicing law because of their sex. It is clear that the states' primitive power to engage in invidious discrimination largely survived the adoption of the Fourteenth Amendment as construed in the *Slaughter-House Cases*. Therefore, in *McCready*, which arose after the Fourteenth Amendment and held that the Interstate Privileges and Immunities Clause did not prevent a state from denying nonresidents access to its oyster beds, it is hardly surprising to hear the Court say that the right to use a state's oyster beds "is not a privilege or immunity of general but of special citizenship. It does not 'belong of right to the citizens of all free governments' . . . ." *McCready* was a contemporary of the *Slaughter-House Cases*.

The unwarranted fundamental rights gloss affixed to the Interstate Privileges and Immunities Clause in those two cases made the scope of the clause uncertain because of the limitless possibilities for construction offered by the words fundamental rights, as verified all too well by the history of the Due Process Clause of the Fourteenth Amendment. However, it is fairly certain that the fundamental rights gloss did not mean those substantive rights which until *Griswold v. Connecticut* were protected by due process of law, even though they were not mentioned in nor derived from

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80 Cf. Morey v. Doud, 354 U.S. 457, 468 (1957), which invalidated an effective monopoly to the American Express Company of the sale of money orders in retail stores in Illinois by businesses that were defined as currency exchanges because of an absence of reasons for conferring such preferential treatment upon a single person.

81 83 U.S. (16 Wall.) at 87.


83 94 U.S. at 396.

84 381 U.S. 479 (1965).
specific guaranties in the Constitution. The Slaughter-House Cases rejected that conception of fundamental rights with respect to the Fourteenth Amendment as a whole. Instead, the words fundamental rights as used in the context of the Interstate Privileges and Immunities Clause apparently meant the immense bundle of civil rights that citizens in the community customarily enjoyed. Rights that did not meet that description were apparently not fundamental rights. Thus, the privilege of doing business in the corporate form, once conferred by special enactment of the legislature rather than by general laws, was said to have been "a grant of special privileges to the corporators." Similarly, the right of a person to help himself to valuable resources on land owned by a state was hardly a right that citizens in the community customarily enjoyed.

Naturally, the uncertain meaning of the words special privileges and fundamental rights led to unwarranted attempts to restrict the scope of the Interstate Privileges and Immunities Clause by arbitrarily assigning only a few rights to the clause for protection. The concurring opinion in Toomer v. Witsell said that it was "fair to summarize the decisions which have applied Art. IV, § 2, by saying that they bar a State from penalizing the citizens of other States by subjecting them to heavier taxation merely because they are such citizens or by discriminating against citizens of other States in the pursuit of ordinary livelihoods in competition with local citizens." That limited construction of the clause was not only rejected by a majority of the court in Toomer, but also by the judge who made those remarks when he later wrote an opinion reaffirming the proposition, established much earlier, that access to a state's courts by nonresidents is a right protected by the clause. The exercise of that right is scarcely an ordinary livelihood.

Furthermore, as might have been expected, the tendrils of the special privileges exception to the Interstate Privileges and Immunities Clause wrapped themselves around the Equal Protection Clause itself. For example, what was fortunately the minority opinion in Ex Parte Virginia, an early case concerning racial discrimination in the selection of state jurors, stated that the Equal Pro-

86 83 U.S. (16 Wall.) 36, 77-78, 80-81 (1872).
87 Id. at 76; Corfield v. Coryell, 6 F. Cas. 546, 551 (No. 3230) (C.C.E.D. Pa. 1823).
89 334 U.S. at 408.
90 See, e.g., Canadian N. Ry. v. Eggen, 252 U.S. 553, 560 (1920).
92 100 U.S. 339 (1879).
tection Clause "extends only to civil rights as distinguished from those which are political [or social]." In time, the special privileges exception to the Interstate Privileges and Immunities Clause acquired a twin brother, the special interest exception to the Equal Protection Clause. States occasionally asserted that the special interest exception to the Equal Protection Clause should include subjects which would permit a state to deny equal protection of the laws to persons who unmistakably were within the scope of the clause. Thus, in *Truax v. Raich*, Arizona unsuccessfully proposed a special interest exception to the Equal Protection Clause that would have permitted it to deny equal protection to aliens residing in the state with respect to private employment. Nevertheless, the *Truax* Court affirmed a special interest exception for "the public domain . . . [and] the common property or resources of the people of the State, the enjoyment of which may be limited to its citizens as against both aliens and citizens of other States."

In *Toomer v. Witsell*, the special rights and privileges exception to the Interstate Privileges and Immunities Clause, which had automatically permitted a state to deny equal protection of the laws to citizens of other states in the matter of these rights and privileges, was finally repudiated. It is true that *Toomer* explained how *McCready* might be distinguished. However, the Court in *Toomer* refused to admit that *McCready* had created any exception at all to the Interstate Privileges and Immunities Clause, even though *McCready* had created an exception in the clearest possible language. In *Toomer*, the Court said that "the *McCready* exception to the Privileges and Immunities Clause, if such it be, should not be expanded to cover this case." Moreover, the Court correctly observed that "in only one case, *McCready v. Virginia*, . . . has the Court actually upheld State action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination." However, the Court made it quite clear that a state is no longer free to discriminate against citizens of other states, unless persuasive independent reasons justifying the discrimination are advanced, by its statement that the Interstate Privileges

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93 *Id.* at 367.
94 239 U.S. 33 (1915).
95 *Id.* at 39-40.
96 At the same time, *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948), decided that the Equal Protection Clause prohibited a state from excluding aliens residing in the state from its commercial fishery, notwithstanding the state's special interest in the fishery.
97 334 U.S. at 401.
98 *Id.* at 402.
99 *Id.* at 400.
and Immunities Clause "does bar discrimination against citizens of other States where there is no substantial reason for the discrimina-
tion beyond the mere fact that they are citizens of other States.\textsuperscript{109} Consequently, the special rights and privileges exception to the Interstate Privileges and Immunities Clause should no longer exist, and citizens of other states should now receive the same standard of equal protection as a state's own citizens.

As one author has observed:

So, a third clause was added to the amendment: the clause which provides that "no state shall deny to any person within its jurisdic-
tion the equal protection of the laws." Read in the light of the prior law, these words seem perfectly plain in intention: they were intended to supplement the old, inadequate Interstate Privileges and Immunities Clause of Article IV, by destroying utterly the state power which had survived thereunder, of discriminating between "persons" in the predicament which this Equal Protection Clause describes; that is, "person[s] within [a state's] jurisdiction" \ldots And if "equality in protection" were accorded to these, it would have likewise to be accorded to all other "citizens", also, under the Interstate Privileges and Immunities Clause of the original Constitution.\textsuperscript{101}

The special rights and privileges exception to the Interstate Privileges and Immunities Clause should be repudiated expressly because it did not survive the adoption of the Fourteenth Amendment and because it has been rejected by the precedents.

V. CONCLUSION

The equality clauses of the Constitution would permit a state to give an admission preference to citizens from states that want to participate extensively in interstate education on terms of equality to nonresidents. This kind of participation in interstate education cannot exist without some kind of reciprocal sharing among the states. Classification with consequential differences in treatment is permissible to realize objectives that otherwise could not be accomplished.

Naturally, adjustments by the states would be required to balance in-migration with out-migration. A few states have a comparatively large imbalance of in-migration over out-migration. The imbalance for Michigan was 11,978 in 1963, 16,618 in 1968.\textsuperscript{102} However, most schools are crowded today. A state ordinarily could rectify an imbalance of in-migration over out-migration by admitting more of its citizens to its schools.

\textsuperscript{100} Id. at 396.
\textsuperscript{101} 2 W. Crosskey, note 71 supra, at 1097.
\textsuperscript{102} See Appendix, Tables 1 and 2.
On the other hand, a few states have a large imbalance of out-migration over in-migration. In 1963, Alaska, Connecticut, Illinois, Massachusetts, New Jersey, Nevada, New York, and Pennsylvania had imbalances of out-migration respecting state schools that were more than ten percent of the enrollment in their state schools.\textsuperscript{103} In 1968, the same condition persisted in those states except Connecticut and Nevada.\textsuperscript{104} Such states may not have enough state-supported schools to educate all of their citizens who qualify in every way for a higher education and who can afford the resident rate of tuition.

In 1963, the population of New York was more than twice the population of Michigan, 16,782,304 to 7,823,194.\textsuperscript{105} Nevertheless, in 1963 Michigan had almost as many students in its state colleges and universities as New York had, 146,065 to 154,715, although those conditions had changed drastically by 1968, 244,817 to 362,453.\textsuperscript{106} A similar disparity exists when Michigan is compared with Pennsylvania and New Jersey. In 1960, the population of Pennsylvania was 11,319,366, almost half again as large as Michigan’s population of 7,823,194.\textsuperscript{107} However, in 1963 Michigan had almost three times as many students in its state colleges and universities as Pennsylvania had, 146,065 to 56,356.\textsuperscript{108} The disparity had diminished in 1968 to 244,817 to 177,953.\textsuperscript{109} New Jersey had 56,617 students in its state schools of higher learning in 1963 and 85,452 in 1968.\textsuperscript{110} The population of New Jersey in 1960 was 6,066,782.\textsuperscript{111} In 1963, Illinois’s net out-migration of students was 14,482 and in 1968 it was 23,896.\textsuperscript{112}

The discriminatory tuition charge against nonresidents permits some states to establish fewer education facilities than its qualified citizens need at a saving to its taxpayers, to its students who are educated at home, or to both groups. Since the discriminatory nonresident tuition charge is unconstitutional, those states should be induced to build more educational facilities or to refuse an education to a number of their citizens equal to the number of their \textit{émigrés} who would return home after other states had phased

\begin{itemize}
\item \textsuperscript{103} See Appendix, Table 1.
\item \textsuperscript{104} See Appendix, Table 2.
\item \textsuperscript{105} \textit{The World Almanac and Book of Facts} 593 (L. Long ed. 1969).
\item \textsuperscript{106} See Appendix, Tables 1 and 2.
\item \textsuperscript{107} Note 105 supra.
\item \textsuperscript{108} See Appendix, Table 1.
\item \textsuperscript{109} See Appendix, Table 2.
\item \textsuperscript{110} See Appendix, Tables 1 and 2.
\item \textsuperscript{111} Note 105 supra.
\item \textsuperscript{112} See Appendix, Tables 1 and 2.
\end{itemize}
them out of interstate education. Each state should be made responsible for the education of its own citizens. No state, especially not some of the Union's richest states, should be allowed to use a discriminatory tuition charge against migrating students as a substitute for an obligation to its own citizens that should either be met or repudiated. The reaction of states that have surplus educational facilities would not likely be immediate. Instead, they might wait until states with deficits of educational facilities decided what to do about these deficits. In the meantime, the deficit states could consider making direct cash payments, in amounts agreeable to both sides, to the states now accommodating the deficit states' students.

Interstate education can be administered to migrating students with equal tuition charges if the states wishing to participate extensively in interstate education balance out-migration with in-migration at whatever number they select. If that was done, a state would not have to be concerned about the circumstance that its in-migration from a particular state was more than its out-migration to that state because that particular imbalance would be offset by imbalances in the other direction with other states. Furthermore, the states would not have to be concerned with the fact that resident tuition rates are different among the states; that condition exists among various state schools within a state. A migrating student could weigh that fact as he weighs other facts when he applies to the school of his choice.

Of course, some states might insist on exchanging students on the basis of a one to one ratio, or states whose tuition is relatively low might try to obtain its worth to the penny respecting its citizens who migrate to a state whose tuition is comparatively high. On the other hand, a state whose tuition is relatively high might look askance at the education of its migrating citizens at a comparatively low tuition in other states if the state with the higher charge were asked to make up the difference to the lower tuition states on some reciprocal basis. The short answer to all such possibilities is that since each state is free to withdraw from interstate education completely, it should be free to administer interstate education in a difficult rather than easy way if it prefers difficulty to ease, as long as that state observes equal protection of the laws.

A higher tuition state could legally stipulate that its migrating citizens could be charged the average rate of tuition in its state schools even though that average rate would be higher than the resident rate in the lower tuition states, provided the latter states expressed willingness to hold the difference for the purpose of
settling accounts. The Interstate Compacts Clause of the Constitution\(^\text{113}\) would not stand in the way.\(^\text{114}\) A liberal reciprocity is permitted among the states because they are expected to cooperate in many matters. It is true that such a policy would permit a state to collect higher tuition than its resident rate from some nonresidents. However, the difference would be held to settle accounts between the higher and lower tuition states. Since each state in effect would be using other states' schools as its own in a limited way, a higher tuition state would charge its citizens its own average rate of tuition when they migrated to other states' schools, so that its migrating citizens would pay the same rate of tuition as their fellow citizens who remained at home.

A state is permitted to measure a person's rights by the more restrictive rule of the state where he is domiciled, if the latter state agrees, rather than by its own more liberal rule when his domiciliary state may be deemed to have a greater interest in the matter.\(^\text{115}\) The state where a person is domiciled has the greatest interest in his education. If Alaska, Illinois, Massachusetts, New Jersey, New York, and Pennsylvania decided to measure tuition by ability to pay, they could permit other states to charge migrating students from those six states the same average tuition that the students would have paid if they had remained at home, provided the other states manifested a willingness to hold the tuition difference to settle accounts. However, if such a policy were followed, a state could not give an admission preference to students who could pay higher tuition since states cannot give such a preference to their own citizens.

Furthermore, if the states should foolishly decide to exchange students one to one, they should be permitted to do so. If the matter should turn out that way, the interstate migration of students probably would not decrease after adjustments were made, even though existing patterns of in-flow and out-flow between some states would change. However, nettlesome account keeping, inefficient bureaucratic regulation, and a one-to-one exchange ratio need not occur. Each state could balance its in-migration with a desirable out-migration. If the states should want to try to do more, then they should make the attempt. The effort would at least create jobs for data processors without doing any real harm. An interstate education would be put within the reach of every student in the country.

\(^{113}\) U.S. Const. art. I, § 10.
who could manage the resident rate of tuition if they, their parents, and others would make the necessary sacrifices. The states should not be permitted to single out migrants for discriminatory treatment simply because they, like nonmigrants, cause problems that governments were created to solve. The states should be forbidden from exacting unequal and unfair contributions to public higher education from migrating students simply because they migrate.

APPENDIX

Table 1 for 1963 is an excerpt from a survey made by the U.S. Department of Health, Education and Welfare and entitled: Residence and Migration of college students, Fall 1963 State and regional data.

Table 2 for 1968 is an excerpt from a pre-publication copy of a similar survey, and minor modifications of the 1968 table still could be made. In both tables, the column for “Students Enrolled” has the number of students who attended public institutions of higher learning in each state, and the column for “Student Residents” contains the number of each state's residents who attended public institutions of higher learning in the United States.

TABLE 1.—Residence and Migration of All Students: Publicly-Controlled Institutions, Fall 1963.

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