

Clausola sui privilegi e sulle immunità: Articolo IV

From Federalism in America

La clausola sui privilegi e le immunità dell'articolo IV stabilisce che "i cittadini di ogni Stato hanno diritto a tutti i privilegi e le immunità dei cittadini nei diversi Stati". Secondo Alexander Hamilton in *The Federalist* No. 80, questa era "la base dell'Unione". La clausola forgia un senso di cittadinanza nazionale richiedendo a ogni stato di trattare i cittadini di altri stati come cittadini piuttosto che come stranieri. Tuttavia, la clausola sui privilegi e le immunità protegge solo contro la discriminazione ingiustificabile basata sullo stato di cittadinanza. Non richiede a uno stato di concedere ai propri cittadini alcun diritto o di fornire ai cittadini di altri stati alcun diritto che i propri cittadini non possiedono.

Condividere |

La clausola dei privilegi e delle immunità è nata nei primi charter dalla Corona ai coloni nel Nuovo Mondo che potrebbero aver temuto che loro o i loro figli potessero perdere il loro status di inglesi. La corona ha assicurato loro che sarebbero stati trattati come se fossero nati in Inghilterra. I coloni erano tutti sudditi del re e quindi non dovevano essere trattati come alieni in nessuna parte del regno.

ARTICOLO IV, SEZIONE 2

Clausola 1: I cittadini di ogni Stato hanno diritto a tutti i privilegi e le immunità dei cittadini nei diversi Stati.

La rivoluzione americana ha posto fine alla relazione del soggetto con il re e ha evocato la necessità di un nuovo meccanismo per creare una cittadinanza comune. Dopo la guerra, gli stati alla fine adottarono gli articoli della Confederazione come struttura di governo e gli articoli riaffermarono la cittadinanza comune che esisteva sotto il re. L'articolo IV degli Articoli della Confederazione iniziava: "E per assicurare e perpetuare l'amicizia e il rapporto reciproci tra le persone dei diversi stati in questa unione, esclusi gli abitanti liberi di ciascuno di questi stati, i poveri, i vagabondi e i fuggitivi dalla giustizia. , avrà diritto a tutti i privilegi e le immunità dei liberi cittadini nei diversi stati ".

The first sentence of Article IV of the Articles of Confederation was the direct ancestor of the Privileges and Immunities Clause of Article IV of the Constitution. Because everyone was familiar with the virtues of the clause in the Articles of Confederation, there was very little debate on it either in the Constitutional Convention of 1787 or in the ratification process. The creation of a stronger national government with a federal court system and a national legislature that could regulate individuals transformed the aspiration for common citizenship into a reality.

INTERPRETATION

Only citizens of a state are entitled to "all privileges and immunities of citizens" in other states. "Privileges and immunities" refer to the rights and protections for individuals that exist under state law; however, the privileges and immunities "of citizens" are limited to those whose denial to citizens of other states would show disrespect for the nature of the union. Citizens of a state are entitled to them "in the several states."

James Madison argued in *The Federalist* No. 42 that Article IV of the Constitution improved on the Articles of Confederation because it specified that "citizens of each state" rather than "free inhabitants" were entitled to the privileges and immunities of citizenship. This eliminated the possibility that the clause could be interpreted to mean that states must afford the privileges of citizenship to aliens who resided in other states. Consequently, alien residents of a state are not protected by the Privileges and Immunities Clause of Article IV of the Constitution, but must look elsewhere for protection from discrimination, primarily to guarantees of due process and equal protection in the Fourteenth Amendment.

Prior to the Constitution, each state determined who would be its citizens. That changed with the constitutional grant of the power of naturalization to Congress. Thus, citizenship was defined nationally and the citizen of a state was a citizen of the United States who resided there. The Supreme Court determined the citizenship of persons who were not naturalized, and Chief Justice Roger Brooke Taney declared in *Dred Scott v. Sandford* (1857) that African Americans were not citizens. The Fourteenth Amendment reversed this outcome by defining citizenship in the Constitution. It declared that persons born or naturalized in the United States and subject to its jurisdiction are citizens of the United States and of the state wherein they reside.

Only natural persons are citizens of a state entitled to the benefits of the Privileges and Immunities Clause of Article IV. Corporations cannot claim Article IV rights. When the clause was adopted, corporations were rare. Business was conducted by individuals or through partnerships. Thus, the Privileges and Immunities Clause protected the Illinois businessman doing business in Ohio from Ohio laws that discriminated against businessmen from other states. Because the clause did not apply to corporations, the rise of the corporation threatened to render obsolete this function of protecting out-of-state businesses from discrimination. Consequently, critics argue that the Court should apply the Privileges and Immunities Clause to corporations, but the Court insists that the clause applies only to human beings.

The Court prefers to use other provisions of the Constitution to invalidate discrimination against interstate commerce. For example, Article I provides that “Congress shall have power to regulate commerce among the several states.” The Court has held that state regulations that discriminate against interstate commerce violate this clause in the absence of congressional authorization. Unlike the Privileges and Immunities Clause, this “dormant Commerce Clause” interpretation leaves Congress in ultimate control of whether the state law is valid because it is based on a clause granting legislative power over commerce to Congress. Further, the Commerce Clause is a more appropriate basis for invalidating protectionist laws, because discrimination is usually based on the out-of-state origin or destination of goods or services rather than on the “citizenship” of the person engaging in trade.

Although some forms of economic protectionism may offend both the Commerce Clause and the Privileges and Immunities Clause, the offense is grounded in different reasons. The Commerce Clause is concerned with the regulation of commerce, while the Privileges and Immunities Clause of Article IV is designed to protect the ideal of common citizenship. In one situation, however, the Privileges and Immunities Clause offers the nonresident more rights against economic discrimination than the Commerce Clause. The Court has held that the dormant Commerce Clause does not apply to state preferences for its own citizens when it acts as a participant rather than a regulator in the market. Nevertheless, in *United Building and Construction Trades Council v. Camden* (1984) the Court held that the Privileges and Immunities Clause does apply. Consequently, the state must justify its preferences by a showing that citizens of another state are a peculiar source of the evil at which the statute is aimed.

The Court has not defined “privileges and immunities of citizens,” preferring instead to determine them in specific cases. The Court’s interpretation determines whether a state violates the Constitution when it distinguishes between its citizens and citizens of other states. This involves an inquiry into the reasons for the distinction, and the Court is reluctant to define “privileges” in general terms before it has considered fully the arguments for the particular difference.

In *Corfield v. Coryell* (1823), an early U.S. Circuit Court case, Supreme Court Justice Bushrod Washington tried to explain this difference between the rights that must be the same and those where the state may treat its citizens differently. He stated that the privileges and immunities of citizens in Article IV are those “which are in their nature, fundamental; which belong of right, to the citizens of all free Governments.” He said these included “protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government may justly prescribe for the general good of the whole.” Discrimination in protecting the person or property of a nonresident, in human rights, in opportunities to own property, to work, and to travel would undermine the union.

Justice Washington's use of the term "fundamental" was misleading. It led the framers of the Fourteenth Amendment to believe that the words "privileges and immunities" in Article IV referred to all the rights that citizens ought to have. They tried to secure fundamental rights for the newly freed African American by prohibiting a state from denying the privileges or immunities of citizens of the United States. In the *Slaughterhouse Cases* (1873), the Court distinguished between the privileges and immunities of citizens that Article IV entitled citizens of a state to claim and the privileges or immunities of citizens of the United States that the Fourteenth Amendment refers to. The privileges and immunities of citizens protected by Article IV, the Court said, were those rights that are fundamental in the relationship of any citizen to government. The privileges or immunities of citizens of the United States, however, applied only to privileges that arose from the relation of the citizen to the nation—rights of federalism such as the right to travel through other states and to move to another state and become a citizen of it—rather than fundamental rights such as property. The Supreme Court stressed that, unlike the rights in the Fourteenth Amendment, the fundamental rights in Article IV were only protected against discrimination based on the state of citizenship.

The Court continues to characterize rights that must be afforded under Article IV as "fundamental" to distinguish them from those where discrimination does not violate Article IV; however, it has made it clear that "fundamental" does not refer to natural law concepts as Justice Washington may have thought. In *Baldwin v. Montana Fish and Game Commission* (1978), the Court said, "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." It held that differential charges for recreational elk hunting licenses did not constitute such a privilege or immunity.

The Court has said that there is a two-part test for determining whether a law violates of the Privileges and Immunities Clause of Article IV: (1) whether it burdens a privilege or immunity protected by the clause, and (2) whether the differential treatment is justified. It is hard to think of an unjustified discriminatory state law that would not "bear upon the vitality of the nation as a single entity." However, the level of justification needed may vary according to the right involved. Fee differentials for recreational elk hunting need far less justification than the same differentials for commercial fishing licenses, because the latter strike at the basic concerns of the clause.

In *Ward v. Maryland* (1870), the Court said the clause protects the right of a citizen of one state "to pass into any other state of the Union, for the purpose of engaging in lawful commerce, trade, or business, without molestation, to acquire personal property, to take and hold real estate, to maintain actions in the courts of the states, and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens."

Equal taxation of resident and nonresident has been a core command of the Privileges and Immunities Clause. The Supreme Court struck down different taxes on salesmen from out of state in the nineteenth century and continued to scrutinize taxes carefully ever since. For example, when a state attempted to tax out-of-state workers in a way that would simply shift the incidence of taxation from their state of residence to the state where they worked, the Court found the result would violate the clause. Although the tax did not affect the amount of taxes the citizen of another state might pay, it did result in taxing nonresidents while working residents were not taxed. That, the Court held, was denying them a privilege or immunity afforded citizens.

Taxation poses peculiar problems because the basis for taxing the nonresident may differ from that for taxing the resident, even though the resulting tax is identical. Thus, the Supreme Court has analyzed a variety of cases to decide whether the incidence of the tax discriminated against the out-of-state resident.

In drawing a line between permissible and impermissible distinctions, the clause reflects the tensions of federalism. Each person is a citizen of the nation, entitled to be respected as having rights in each state in common with all citizens, and yet each state is an independent entity, which can make laws to govern itself and its own citizens.

The independent political structure of the states supports laws that exclude citizens from other states from direct participation in governance. The state can decide that state policy shall be established by the citizens of the state and no one else. Thus a state may limit the right to vote in state elections to its own citizens, and require public

officials to be citizens of the state.

There are ways, of course, in which every person in a state affects policy. They provide the substance on which the law operates, so laws change as the context for their operation changes. Further, businesses lobby for policy changes, and lawyers argue for change, so these pleas and the economic realities behind them mean that the policy mechanism cannot justify all discrimination without destroying the effect of the Privileges and Immunities Clause. Thus, the Court has held that states cannot impose residency requirements on lawyers. The line is drawn at whether the individual has a position that can exercise the policy-making function of the state, not just influence it.

The citizen resident of a state not only is a member of the polity, but also is subject to its power to both bring him or her into court and tax him or her on income and assets wherever earned or wherever owned. Consequently, the citizen is likely to have contributed a disproportionate share to the assets of the state compared to the visitor. If the state must distribute those assets to nonresidents, they would pour over state lines to collect cash, goods, and services supplied by the state's citizens and remove them from the state. This would discourage providing such benefits. In that sense, the citizen of another state is often a "peculiar source of the evil" at which a statute providing tangible benefits from the state treasury is aimed. Therefore, when the state spends the money it collects, it may limit some public expenditures to its citizens; for example, the state may require residence as a condition of providing schools, public welfare, grants, and subsidies. The exclusion would not be permissible if it deprived the citizens from another state of the basic protections of life, liberty, and property necessary to function in the society—thus, police, fire, roads, and courts must be available on a nondiscriminatory basis. To pay for those services that the state must provide equally to the nonresident, the state may tax the nonresident who comes there.

Although the Privileges and Immunities Clause of Article IV applies only to privileges in the several "states," Congress has required that territories of the United States comply with the command of the provision. Therefore, higher fees for nonresidents for commercial fishing licenses and residency requirements for the practice of law in the territories have been struck down.

States and municipalities cannot avoid the impact of the clause by restricting rights to residents of only a portion of the state. Preferences for city residents will be judged under the same standards as preferences for state citizens, because otherwise the state could cumulate local preferences with the effect of barring the citizen of another state from opportunities that in one place or another within the state would be open to the citizens of that state.

All privileges and immunities in the several states are the rights of positive law in each state. The Privileges and Immunities Clause secures for U.S. citizens all the rights that the state provides for its own citizens that are important to provide equally to citizens of other states in order to secure a common national citizenship.

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