HAVE GUN, CAN’T TRAVEL:
THE RIGHT TO ARMS UNDER THE PRIVILEGES
AND IMMUNITIES CLAUSE OF ARTICLE IV

Nelson Lund*

David Bach is a former Navy SEAL, a commissioned officer in the Naval Reserve, an experienced firearms instructor, and an attorney.1 He is now employed by the Department of Defense, where he holds a Top Secret security clearance.2 This model citizen resides in the Commonwealth of Virginia, where he is licensed to carry a concealed weapon.3

Bach periodically takes his wife and three young children to upstate New York by car in order to visit his parents.4 This lengthy journey goes through several high-crime areas in New York, and he wants to carry a defensive firearm on his person, either openly or concealed, in case of a criminal assault during one of these trips.5 New York issues licenses to carry firearms to its own citizens who meet certain statutory criteria, and to nonresidents who have their principal place of employment or business in the state, but not to visitors like Bach.6 If he carried his personal weapon with him, he would be committing a felony.7

Believing this discriminatory treatment violates his constitutional rights, Bach filed an action for declaratory and injunctive relief in federal district court.8 The Second Circuit has now rejected his claims that New York’s statute violates the Second Amendment and the Privileges and Immunities Clause of Article IV.9 In this brief essay, I will argue that Bach’s Privileges and Immunities claim is valid, and that the nature of the claim throws an interesting light on a provision of the Constitution whose importance exceeds the amount of attention it has received from the Supreme Court.10

---

* Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law. For helpful comments, thanks to Dave Bach, Steve Gilles, and Kevin Miller. Financial assistance from the Law and Economics Center at George Mason is gratefully acknowledged.

1 Bach v. Pataki, 2005 WL 105265 (2d. Cir). I have provided informal advice to David Bach and his attorneys, David C. Frederick and Kevin J. Miller, and I am indebted to their research and insights about this case.

2 Id.

3 Id.

4 Id.

5 Id.

6 Bach, 289 F. Supp. 2d at 221-22; N.Y. PENAL LAW § 400.00.3(a) (Consol. 2004).

7 N.Y. PENAL LAW § 265.02(4).

8 Bach, 289 F. Supp. 2d at 219.

9 Bach v. Pataki, 408 F.3d 75 (2d Cir. 2005); U.S. CONST. art. IV, § 2, cl. 1.

10 I will not discuss the issues raised by Bach’s Second Amendment claim. My focus here on the Privileges and Immunities Clause should not be taken to carry any negative implications about the merits of Bach’s Second Amendment arguments.
I. COMITY AND THE COURTS

A. Origin of the Privileges and Immunities Clause

Article IV of the Constitution provides: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”\(^\text{11}\) Often called the Comity Clause,\(^\text{12}\) this provision has generally been interpreted to require every state to refrain from invidious discrimination against citizens of other states.\(^\text{13}\) For most modern readers, that interpretation probably does not leap immediately to mind from the bare words of the Constitution.\(^\text{14}\) It is, however, consistent with what we know about the origin and purpose of the clause, which was barely discussed at the Constitutional Convention.\(^\text{15}\) Charles Pinckney apparently drafted the language, and he mentioned in a contemporaneous pamphlet that the provision was modeled on Article IV of the Articles of Confederation.\(^\text{16}\) The Articles provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.\(^\text{17}\)

Assuming, as Pinckney suggested, that our Privileges and Immunities Clause was meant to convey more concisely the substance of this parallel provision in the Articles,\(^\text{18}\) four significant consequences follow. First, the purpose of the Clause is to foster comity among the states, rather than to secure such other conceivable aims as economic growth or efficiency.\(^\text{19}\) Second, “the privileges of trade and commerce,” which are given special emphasis in the Articles, do not exhaust the privileges and immunities covered by the Privileges and Immunities Clause.\(^\text{20}\) Third, the right to travel freely among the states is one

\(^{11}\) U.S. CONST. art. IV, § 2, cl. 1. For purposes of this provision, residency and citizenship are almost always treated interchangeably. Hicklin v. Orbeck, 437 U.S. 518, 524 n.8 (1978); Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975).
\(^{12}\) See, e.g., Austin, 420 U.S. at 660.
\(^{14}\) U.S. CONST. art. IV, § 2, cl. 1.
\(^{15}\) Simson, supra note 14, at 384.
\(^{16}\) See, e.g., id. at 383-84.
\(^{17}\) Arts. of Confederation art. IV.
\(^{18}\) Simson, supra note 14, at 383-84.
\(^{19}\) U.S. CONST. art. IV, § 2, cl. 1.
\(^{20}\) Id.
of the rights protected by the Clause.\footnote{Id.} Fourth, the states are left free to define the rights of their own citizens as they see fit, at least with respect to commercial privileges and presumably with respect to others as well; in other words, the Privileges and Immunities Clause is an antidiscrimination provision rather than a source of particular substantive rights.\footnote{Id.}

The special attention to commercial rights in the Articles probably reflected the fact that this is the area in which state governments have the most obvious incentives to grant unjust preferences to their own citizens. These same incentives, and the corresponding interests of those who are disadvantaged by such preferences, make it easy to see why many cases decided under the Privileges and Immunities Clause have involved commercial regulations.\footnote{See, e.g., Hicklin, 437 U.S. at 518; Toomer v. Witsell, 334 U.S. 385 (1948).} Notwithstanding these incentives, however, case law interpreting the Privileges and Immunities Clause is sparse. This is not necessarily the result of self-restraint by state governments. Rather, a great deal of litigation that might have arisen under the Privileges and Immunities Clause has been decided instead under the judicially invented dormant commerce clause doctrine.\footnote{See generally, Brannon P. Denning, Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Clause Doctrine, 88 MINN. L. REV. 384 (2003).} This doctrine, which purports to be derived from the Interstate Commerce Clause, forbids many forms of state discrimination against interstate commerce.\footnote{Trailer Marine Transp. Corp. v. Rivera Vazquez, 977 F.2d 1, 6 (1st Cir. 1992).} Much of this discrimination involves preferences for a state’s own citizens, and many regulations that are invalid under the dormant commerce doctrine would no doubt also violate the Privileges and Immunities Clause.\footnote{See, e.g., Denning, supra note 25, at 393-94.} The dormant commerce protections for free trade, however, generally have a broader sweep, and they have generated a far richer body of case law.\footnote{For a useful summary of the main differences between dormant commerce doctrine and the Privileges and Immunities Clause, see Denning, supra note 25. There are some forms of economic discrimination that may violate the Privileges and Immunities Clause without violating the Commerce Clause. Compare White v. Mass. Council of Constr. Employers, 460 U.S. 204 (1983) (Commerce Clause does not constrain city’s freedom to discriminate against nonresidents in contracts for public works projects), with United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984) (Privileges and Immunities Clause requires city to provide adequate justification for discriminating against nonresidents in contracts for public works projects).}

Although the dormant commerce doctrine forbids more forms of commercial discrimination than the Privileges and Immunities Clause, the Article IV prohibition is broader in a different way, for it is not limited to economic regulations.\footnote{U.S. CONST. art. IV, § 2, cl. 1.} Thus, for example, states are forbidden to impose residence requirements on outsiders seeking medical services within their borders (including elective procedures such as abortions),\footnote{Doe v. Bolton, 410 U.S. 179, 200 (1973).} or on those seeking senior positions in the state’s National Guard.\footnote{Nelson v. Geringer, 295 F.3d 1082, 1090 (10th Cir. 2002).} Similarly, the noncommercial aspects...
of giving access to out-of-state attorneys have been stressed in cases invalidating residence requirements for the practice of law.\footnote{See, e.g., Sup. Ct. of N.H. v. Piper, 470 U.S. 274, 281 (1985).}

\section*{B. Judicial Interpretation}

Although the purpose and general nature of the Privileges and Immunities Clause have been relatively noncontroversial, it has not proved easy to create a coherent legal doctrine that can decide concrete cases. The first significant discussion of the provision came from Justice Bushrod Washington, sitting as a circuit justice.\footnote{See \textit{Corfield v. Coryell}, 6 F. Cas. 546 (C.C. E.D. Pa. 18230 (No. 3230).} In \textit{Corfield v. Coryell},\footnote{\textit{Id.}} he upheld a New Jersey law forbidding citizens of other states to harvest oysters in New Jersey waters, saying:

\begin{quote}
[W]hat are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: 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. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) “the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union.” But we cannot accede to the proposition which was insisted on by the counsel, that, under this provision of the constitution, the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens; much less, that in regulating the use of the common property of the citizens of such state, the legislature is
\end{quote}
bound to extend to the citizens of all the other states the same advantages as
are secured to their own citizens. A several fishery, either as the right to it
respects running fish, or such as are stationary, such as oysters, clams, and
the like, is as much the property of the individual to whom it belongs, as dry
land, or land covered by water; and is equally protected by the laws of the
state against the aggressions of others, whether citizens or strangers. Where
those private rights do not exist to the exclusion of the common right, that of
fishing belongs to all the citizens or subjects of the state. It is the property of
all; to be enjoyed by them in subordination to the laws which regulate its use.
They may be considered as tenants in common of this property; and they are
so exclusively entitled to the use of it, that it cannot be enjoyed by others
without the tacit consent, or the express permission of the sovereign who has
the power to regulate its use."

Read carefully, this passage raises more questions than it answers. Justice
Washington, for example, says that the Privileges and Immunities Clause protects
only “fundamental” rights, without explaining either how this limitation can be
reconciled with the Constitution’s reference to “all” privileges and immunities or
how fundamental and non-fundamental rights can be distinguished. Conversely,
Washington appears to say that the clause covers “the elective franchise,” although this is among the most obvious examples of a right that one
would not expect states to make equally available to citizens and non-citizens. The holding in the case, moreover, is in considerable tension with the stated
theory. Commercial fishing appears to be a “fundamental” right (subsumed
under “the right to acquire and possess property of every kind”) that Washington
was unwilling to protect in this case only because the fishery in question was the
“property” of the New Jersey citizenry. The courts of New Jersey, however,
were even more obviously “owned” by the state’s citizens—who presumably
used tax dollars to create and operate them—yet Washington insists that non-
citizens are guaranteed the right “to institute and maintain actions of any kind in
the courts of the state.”

Although Corfield has been cited approvingly in subsequent cases, it has
sometimes been ignored, and its theory even disparaged. For a long time, the
Court proceeded in a case-by-case fashion, without attempting to formulate a
general test. During this period, the Court took it for granted that the right to
have weapons for self-defense was protected by the Privileges and Immunities

34 Id. at 551-52.
35 Id. at 551.
36 Id. at 552.
37 Corfield, 6 F. Cas. at 552.
38 Id.
39 Id.
U.S. 230, 233 (1934); McCready v. Va., 94 U.S. 394, 395 (1876); Slaughter-House Cases, 83 U.S.
36, 75-76 (1873).
41 E.g., Toomer, 334 U.S. 385; Ward v. Md., 79 U.S. 418 (1870); Conner v. Elliot, 59 U.S. 591
(1855).
42 E.g., Piper, 470 U.S. at 282 n.10 (1985).
Clause. In the *Dred Scott* case, Chief Justice Taney concluded that blacks could not be citizens, in part because that would mean that if free blacks traveled to a slave state, the federal Constitution “would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.” As Justice Curtis’ dissent suggested, Taney’s argument was defective because the Privileges and Immunities Clause left untouched the authority of every state to impose qualifications and restrictions (including racial restrictions) on such rights. But Curtis did not challenge Taney’s assumption that the Privileges and Immunities Clause would forbid a state from discriminating against nonresidents as such in the exercise of such fundamental rights as freedom of speech and freedom to carry arms.

Finally, in its 1948 decision in *Toomer v. Witsell*, the Court attempted to synthesize a general framework:

The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.

In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

This framework reflects an approach quite different from *Corfield’s*. Justice Washington appeared to think that the limiting principle in the Privileges and Immunities Clause was a distinction between fundamental and non-fundamental rights, and that there would not be much disagreement about how to

---

44 Id. at 417.
45 Id. at 583-84 (Curtis, J., dissenting).
46 Id.
47 334 U.S. 385.
48 Id. at 395-96 (footnotes omitted).
49 Corfield, 6 F. Cas. 546.
classify particular rights.\textsuperscript{50} The \textit{Toomer} approach begins instead by distinguishing permissible from impermissible legislative purposes, and scrutinizes challenged laws for an adequate means/end nexus with a permissible purpose.\textsuperscript{51}

\textit{Toomer}'s approach recognizes a real difficulty in the application of the Privileges and Immunities Clause. The Clause was meant to foster comity among the states, but not to eliminate the states as independent, self-governing entities. Like many other general antidiscrimination provisions in the law, the Privileges and Immunities Clause cannot quite be read to ban all forms of discrimination.\textsuperscript{52} Perhaps most obviously, the literal language of the Clause seems to require states to allow non-citizens to vote in state elections, and indeed in the elections of more states than one, or to hold elective office in the state.\textsuperscript{53} Similarly, the language seems to imply that if a state taxes its own citizens to raise funds for public schools for their children, it must allow out-of-staters to send their children to these schools without paying for the privilege.\textsuperscript{54} That


All of the state governments guaranteed the fundamental rights of property and person in their state constitutions. Furthermore, these privileges and immunities were embodied in the English common law and adopted by the colonists in America. The Framers of the Constitution and the framers of the Fourteenth Amendment thought that these rights flowed from the principles of natural law and that therefore they would be embodied in the fundamental law of all “free governments.” All free governments would respect these rights of citizens . . . . The Privileges and Immunities Clause may have been designed to forbid discrimination in whatever rights were granted, and the rights that happened to be granted were practically identical in the several states because of the common heritage of the states.

\textit{Id.} (footnotes omitted).

\textsuperscript{51} Something like the \textit{Toomer} means/end analysis may have been implicit in \textit{Corfield}'s allowance for “such restraints as the government may justly prescribe for the general good of the whole,” and in \textit{Corfield}'s denial that “the citizens of the several states are permitted to participate in all the rights which belong exclusively to the citizens of any other particular state, merely upon the ground that they are enjoyed by those citizens.” \textit{Corfield}, 6 F. Cas. at 552. If so, however, it becomes difficult to see any analytically useful purpose that might be served by \textit{Corfield}'s reference to “fundamental” rights.

\textsuperscript{52} One well known example is the principle of constitutional law according to which the Fourteenth Amendment is a “a pledge of the protection of equal laws.” \textit{Yick Wo v. Hopkins}, 118 U.S. 356, 369 (1886). Because all laws treat some people differently than others, the Court has been required to undertake an unending project of distinguishing between permissible and impermissible forms of inequality.

\textsuperscript{53} The Supreme Court has not interpreted the Privileges and Immunities Clause to lead to these counterintuitive results. \textit{See Baldwin v. Fish & Game Comm'n of Mont.}, 436 U.S. 371, 383 (1978).

reading of the Clause would point toward the destruction of the states as states. On the other hand, the purpose of the Privileges and Immunities Clause would easily be defeated if states were able to deny outsiders every right whose existence is made possible only by contributions from the states’ own citizens. That would mean that visitors from out of state could be denied access to the courts, police protection, the right to travel on public highways, and so forth. That would spell the end of any meaningful constitutional demand for comity among the states.

*Toomer*’s solution to this problem has the advantage of enabling courts to make reasoned decisions about particular cases, and to apply the same kind of analysis to all privileges and immunities without any need to determine which are “fundamental.” In *Toomer* itself, South Carolina required licenses to trawl for migratory shrimp in the state’s coastal waters, and the fee for a nonresident license was a hundred times greater than the fee charged to residents, effectively excluding nonresidents from the fishery. Rather than rejecting or approving discriminatory licensing fees as a general matter, the Court concluded that South Carolina was permitted “to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.” Because the state had not shown that the enormous fee differential in this case had any reasonable relationship to such cost differentials, the Court invalidated the regulation on the ground that there was no substantial reason for the higher fee beyond the mere fact that the targets of the discrimination were citizens of other States.

The corresponding disadvantage of the *Toomer* approach is that the kind of judicial reasoning it requires is relatively undisciplined. Deciding which forms of discrimination are reasonable, and which are not, entails a kind of balancing that invites courts to make essentially political decisions. It was apparently for this reason—and especially because they feared that the majority’s approach could undermine “the continued retention by the States of powers that historically belonged to the States, and were not explicitly given to the central government or withdrawn from the States”—that Justices Frankfurter and Jackson rejected the *Toomer* approach. Instead, these justices supported the bright line ownership-of-natural-resources theory that had been applied in *Corfield* and later was adopted by the Court itself in *McCready v. Virginia*.

---

55 *Toomer*, 334 U.S. at 385.
56 Id. at 395.
57 334 U.S. at 399.
58 Id. at 403.
59 See *Toomer*, 334 U.S. at 407-09 (Frankfurter, J., concurring in part).
60 94 U.S. at 395-96. The *Toomer* majority distinguished *McCready* on the ground that it involved non-migratory oysters found in the state’s inland waters whereas *Toomer* involved migratory shrimp in the state’s coastal waters. More generally, however, the majority added:

The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional
Although there have been disputes within the Court about the reasonableness of particular forms of state regulation, Toomer’s analytic approach has generally been followed in subsequent cases. There is, however, one remarkable exception. In Baldwin v. Fish and Game Commission of Montana, the Court suddenly reverted to the Corfield fundamental rights approach. In this case, Montana had imposed a licensing fee for elk hunting by nonresidents that was several times higher than the fee charged to residents. Rather than analyze the state’s justifications for the differential, the Court simply declared that no analysis was needed:

Does the distinction made by Montana between residents and nonresidents in establishing access to elk hunting threaten a basic right in a way that offends the Privileges and Immunities Clause? Merely to ask the question seems to provide the answer. We repeat much of what already has been said above: Elk hunting by nonresidents in Montana is a recreation and a sport. In itself—wholly apart from license fees—it is costly and obviously available only to the wealthy nonresident or to the one so taken with the sport that he sacrifices other values in order to indulge in it and to enjoy what it offers. It is not a means to the nonresident’s livelihood. The mastery of the animal and the trophy are the ends that are sought; appellants are not totally excluded from these. The elk supply, which has been entrusted to the care of the State by the people of Montana, is finite and must be carefully tended in order to be preserved.

Appellants’ interest in sharing this limited resource on more equal terms with Montana residents simply does not fall within the purview of the Privileges and Immunities Clause. Equality in access to Montana elk is not basic to the maintenance or well-being of the Union. Appellants do not—and cannot—contend that they are deprived of a means of a livelihood by the system or of access to any part of the State to which they may seek to travel. We do not decide the full range of activities that are sufficiently basic to the livelihood of the Nation that the States may not interfere with a nonresident’s participation therein without similarly interfering with a resident’s participation. Whatever rights or activities may be “fundamental” under the Privileges and Immunities Clause, we are persuaded, and hold, that elk hunting by nonresidents in Montana is not one of them.

command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

Id. at 402 (footnote omitted). Thus, the majority appeared to reject the use of the ownership theory to create the kind of bright-line rule favored by Frankfurter and Jackson.

62 See, e.g., Toomer, 437 U.S. at 527-28; Piper, 470 U.S. at 280-81.
64 Id. at 392-93.
65 Id. at 372-74.
66 Id. at 388.
To the extent that there is a rationale implicit in this statement, it might seem to lie in the fact that sport hunting is “not a means to the nonresident’s livelihood.”\textsuperscript{67} But the Court had previously held that the Privileges and Immunities Clause in fact does apply to activities that are not a means to a livelihood.\textsuperscript{68} Nor could the Court have seriously meant to suggest that all, or perhaps even any, of the forms of discrimination previously struck down under this Clause involved some sort of imminent threat to the “maintenance or well-being of the Union.”\textsuperscript{69}

Justice Brennan’s dissenting opinion (joined by Justices White and Marshall) argued that it made no sense to combine the \textit{Toomer} and \textit{Corfield} approaches, and contended on the basis of an extensive analysis that the Court had already implicitly and correctly rejected \textit{Corfield}’s approach in favor of \textit{Toomer}’s.\textsuperscript{70} These arguments, however, were apparently no match for the majority’s conviction that sport hunting by wealthy visitors is not sufficiently “fundamental” to merit protection from unreasonably discriminatory treatment by state governments.\textsuperscript{71} Thus, the law as it currently stands allows the states to discriminate against noncitizens with respect to some undefined class of activities that are deemed to be trivial or frivolous. Accordingly, courts now apply a two-step analysis, generally asking first whether a challenged form of discrimination falls within the \textit{Baldwin} exception for non-fundamental rights; if not, courts then proceed to determine whether the discrimination is justified under the \textit{Toomer} test.

\section{II. The Right to Arms and the Privileges and Immunities Clause}

Perhaps in recognition of the \textit{ipse dixit} at the heart of \textit{Baldwin}, subsequent courts have restricted the \textit{Baldwin} exception to closely analogous forms of amusement such as recreational boating,\textsuperscript{72} participation in high school interscholastic sports,\textsuperscript{73} and sunbathing, picnicking and snorkeling at the beach.\textsuperscript{74} David Bach’s desire to protect his life and the safety of his family from the threat posed by armed criminals has nothing in common with these activities. The right of self-defense is the most basic of all rights in our liberal tradition.\textsuperscript{75} Indeed, Bach’s right to the means of defending himself and his family is more

\textsuperscript{67} Id.
\textsuperscript{68} \textit{E.g.}, Doe, 410 U.S. 179 (1973).
\textsuperscript{69} \textit{Baldwin}, 436 U.S. at 388.
\textsuperscript{70} Id. at 394-402 (Brennan, J., dissenting).
\textsuperscript{71} Id. at 388.
\textsuperscript{72} Haw. Boating Ass’n v. Water Transp. Facilities Div., 651 F.2d 661, 666-67 (9th Cir. 1981). The court seems to have regarded this as an alternative holding because it also concluded, more fundamentally, that the plaintiffs lacked standing to raise a Privileges and Immunities claim. \textit{Id.} at 666.
\textsuperscript{73} Alderding v. Ohio High Sch. Athletic Ass’n, 779 F.2d 315 (6th Cir. 1985).
\textsuperscript{74} Daly v. Harris, 215 F. Supp. 2d 1098, 1112 (D. Haw. 2002).
\textsuperscript{75} For a more detailed discussion of this point, see Nelson Lund, \textit{The Second Amendment, Political Liberty, and the Right to Self-Preservation}, 39 Ala. L. Rev. 103 (1987).
HAVE GUN, CAN’T TRAVEL

2005

961

fundamental than any of the rights that the Supreme Court has already deemed worthy of protection under the Privileges and Immunities Clause, such as the right to pursue a common calling,\textsuperscript{76} to engage in commercial fishing,\textsuperscript{77} to practice law,\textsuperscript{78} or to purchase medical services.\textsuperscript{79} Whatever the extent of New York’s authority to restrict the possession and carrying of handguns through nondiscriminatory laws may be, that authority in no way undermines the proposition that the right involved is fundamental for purposes of the Privileges and Immunities Clause. If it did, the states’ unquestioned police power authority over such matters as employment, professional practice, and commercial relations would bring virtually all of the rights protected by the Privileges and Immunities Clause within the Baldwin “exception” for non-fundamental rights.

One aspect of Bach’s case that makes it look somewhat different from most other Privileges and Immunities cases is that New York’s discriminatory licensing scheme does not seem to confer any significant benefit on New York residents. Unlike fishermen who compete in a common pool, or lawyers who compete for clients, Bach’s exercise of a right to protect himself from violent criminals would not obviously diminish the ability of New York citizens to protect themselves in the same way.\textsuperscript{80} It is possible to imagine a jurisprudence of the Privileges and Immunities Clause that would have made this a significant factor, and treated discrimination differently depending on whether or not it appeared to be part of a zero-sum game. The Supreme Court, however, foreclosed this approach when it decided that states may not forbid nonresidents to purchase medical services within their borders.\textsuperscript{81} In this case, the state government was affirmatively disfavoring the commercial interests of an important class of its own citizens, namely the medical industry, and was not conferring any material benefit on any class of its own citizens.\textsuperscript{82} It follows, \textit{a fortiori}, that the right to the means of defending one’s life from criminals is a type of right to which the Privileges and Immunities Clause applies.

The Court’s insistence on applying the Privileges and Immunities Clause to state laws that do not involve rent-seeking in the classic sense is quite appropriate. It is almost certainly true that commercial preferences represent the kind of discrimination most likely to trigger retaliatory regulations from sister states, and thus to engender a spiral of ill will that would threaten the “maintenance or well-being of the Union.”\textsuperscript{83} But it is not true that this is the only

\textsuperscript{76} \textit{Piper}, 470 U.S. at 280 n.9.
\textsuperscript{77} \textit{Toomer}, 334 U.S. 385.
\textsuperscript{78} \textit{Friedman}, 487 U.S. 59.
\textsuperscript{79} \textit{Bolton}, 410 U.S. 179.
\textsuperscript{80} It is possible that in some situations the denial of handgun licenses to nonresidents might confer some benefit on a state’s own citizens. After Florida liberalized its concealed carry laws in 1987, anecdotal evidence suggested that armed robbers began targeting tourists because they knew that visitors from out of state would be unarmed. \textit{Wayne LaPierre, Guns, Crime, and Freedom} 22-23 (1994). If violent criminals are given an incentive to prey on nonresidents because these visitors are much less likely to be armed, that could be expected to reduce the number of attacks on the state’s own citizens.
\textsuperscript{81} \textit{Doe}, 410 U.S. at 200-01.
\textsuperscript{82} \textit{Id.} at 200-01.
\textsuperscript{83} \textit{Baldwin}, 436 U.S. at 388.
kind of discrimination that can generate resentment and retaliation. Nor is there any reason to confine the reach of the Privileges and Immunities Clause to those forms of discrimination likely to lead directly to major interstate disputes. Whatever the motive for New York’s decision to give its own citizens greater protection from armed criminals than it gives to visitors from other states, that decision conveys at least a message of relative indifference to the lives and safety of its visitors. Had New York enacted a statute forbidding its law enforcement officials to investigate and prosecute crimes against nonresidents, no one could argue with a straight face that the Privileges and Immunities Clause would not apply. The statute at issue in David Bach’s case differs from this hypothetical statute only in degree, which confirms that the Baldwin exception for nonfundamental rights is inapplicable here.

The Second Circuit avoided deciding whether the right to arms is fundamental under Baldwin. Assuming, arguendo, that it is fundamental, Judge Richard C. Wesley’s opinion held that New York’s discriminatory treatment of out-of-state citizens is justified nonetheless. Invoking Toomer’s exception for cases in which there is “something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed,” the Second Circuit concluded that the challenged regulation is justified by administrative convenience. To appreciate the extraordinary nature of this conclusion, one must begin by noting that the New York handgun statute gives officials a remarkably wide range of discretion in granting and revoking licenses on the basis of “good character, competency and integrity,” a discretion that is so broad as to raise serious constitutional questions on that basis alone. New York courts have, for example, upheld revocations where a licensee appeared to be “agitated” while in possession of a handgun, and where a licensee showed “poor judgment” by failing to safeguard his weapon while accompanying a Boy Scout troop. The

---

84 The fact that such a law might also violate the Equal Protection Clause does not imply that the Privileges and Immunities Clause is inapplicable. First, the original Constitution did not contain an Equal Protection Clause, and the framers of the Privileges and Immunities Clause obviously could not have expected this aspect of equal protection to be somehow “reserved” for treatment under a then-nonexistent constitutional provision. Second, the Supreme Court has never suggested that if a law violates some other provision of the Constitution, then it cannot violate the Privileges and Immunities Clause. Third, it may well be that a law like this should not be held to violate the Equal Protection Clause unless it violates the Privileges and Immunities Clause. See Baldwin, 436 U.S. at 406 n.8 (Brennan, J., dissenting) (“[W]here a State discriminates solely on the basis of noncitizenship or nonresidency in the State, it is my view that the Equal Protection Clause affords a discriminee no greater protection than the Privileges and Immunities Clause”) (cross-reference omitted).

85 Bach v. Pataki, 2005 WL 1052565, *8 (quoting Hicklin v. Orbeck, 437 U.S. at 526, which was in turn quoting Toomer, 334 U.S. at 398).

86 See Bach v. Pataki at *3 n. 9 (citing Suzanne Novak, Why The New York State System For Obtaining A License To Carry A Concealed Weapon Is Unconstitutional, 26 Fordham Urb. L.J. 121, 165-66 (1998) (arguing that “[t]he sole proper cause standard for the issuance of a carry license is the equivalent of a standardless delegation, which, in effect, grants . . . officials the discretion to apply their own public policy on gun control”)).

87 Bach v. Pataki at *4 (citing Finley v. Nicandri, 272 A.D.2d 831, 831 (3d Dep’t 2000)).

88 Bach v. Pataki at *4 n.12 (citing Lang v. Rozzi, 205 A.D.2d 783, 783 (2d Dep’t 1994)).
Bach court held that information about such incidents is more likely to find its way to New York licensing authorities in the case of New York residents than in the case of out-of-staters. According to the Second Circuit, this difference is enough to meet Toomer's “substantial reason” test, which requires valid independent reasons for discrimination against out-of-staters, as well as proof that the degree of discrimination bears a close relationship to those reasons.\(^9\)

Under the Second Circuit’s approach, there is probably no regulation on any subject that could not be upheld under the Toomer test. The court did not claim that New York has any organized system for monitoring its licensees for behavior exhibiting characteristics such as “agitation” or “poor judgment.” Rather, New York licensing officials simply happen to hear about such things from time to time, and they sometimes exercise their virtually unbounded discretion to revoke somebody’s license. Based on the (rather plausible) assumption that these officials are somewhat more likely to hear about behavior they don’t like when it involves New York residents than when it involves out-of-staters, the Second Circuit found the Toomer test satisfied.

Under such reasoning, however, Toomer itself must have been wrongly decided. In that case, South Carolina imposed a much higher license fee on out-of-state shrimp fishermen than it did on its own citizens, and the state responded with a barrage of allegedly important distinctions between in-state and out-of-state fishermen. The Supreme Court pointedly declined to defer to the state:

[The State defendants] mention, without further elucidation, the fishing methods used by non-residents, the size of their boats, and the allegedly greater cost of enforcing the laws against them. One statement in the [state defendants’] brief might also be construed to mean that the State’s conservation program for shrimp requires expenditure of funds beyond those collected in license fees—funds to which residents and not non-residents contribute. Nothing in the record indicates that non-residents use larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State’s general funds is devoted to shrimp conservation. But assuming such were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion. The State is not without power, for example, to restrict the type of equipment used in its fisheries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.\(^9\)

Similarly, in Bach v. Pataki, New York made no showing that the serendipitous “monitoring” effects on which the Second Circuit based its holding plays any significant role in serving the legitimate goals of the state’s licensing system. Nor did New York show that it was unable to monitor out-of-state license holders.

\(^9\) 334 U.S. at 396.

\(^9\) Toomer, 334 U.S. at 398-99 (emphasis added; footnotes omitted).
in ways that were sufficient to serve those legitimate goals. Nor did New York show that it could not provide for monitoring of out-of-state residents, financed if necessary by higher license fees on the out-of-staters, that would be at least as effectual as the serendipitous, and apparently very minor, effects of in-state residency. There is, in short, no “reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them.”

Toomer is not the only Supreme Court decision rejecting administrative convenience arguments that were at least as strong as the one on which the Second Circuit relied in Bach v. Pataki. In Doe v. Bolton, for example, the Court invalidated a statute forbidding out-of-staters to purchase abortions, notwithstanding the Court’s acknowledgment that “[a] requirement of this kind, of course, could be deemed to have some relationship to the availability of post-procedure medical care for the aborted patient.” In Supreme Court of New Hampshire v. Piper, the state defended its refusal to license out-of-state attorneys on the ground that they would be less likely to be available for judicial proceedings. The Court acknowledged the plausibility of this assumption, but concluded that the problem would probably not be severe, and could in any event be addressed through less restrictive means.

Ironically, and serendipitously, the Supreme Court has recently had occasion to review another case in which the Second Court relied on an administrative convenience argument similar to the one on which it relied in the Bach case. Even more ironically, but perhaps not serendipitously, the same judge was the author of both Second Circuit opinions. In Swedenburg v. Kelly, the Second Circuit upheld a New York statute forbidding out-of-state wineries to sell their product to New York consumers unless the out-of-state winery establishes a physical presence in New York. Judge Wesley’s opinion rejected a challenge under the Privileges and Immunities Clause on the ground that the statute did not discriminate against out-of-state wineries, notwithstanding his

---

91 Id. at 399.
92 410 U.S. at 200.
93 470 U.S. at 286-87. The court used a similar analysis in refusing to uphold discrimination based on the state’s similarly plausible suggestion that out-of-staters would be less likely to perform an appropriate amount of pro bono work. Id. at 287.
95 Id. at 239-40. Judge Wesley’s opinion contains an odd “cf.” cite to Supreme Court of Virginia v. Friedman, 487 U.S. 59, 70 (1988), which Wesley incorrectly describes as “invalidating a Virginia Supreme Court rule permitting Virginia residents entrance to the state bar without an examination.” The actual holding was that Virginia may not withhold this privilege from nonresidents while offering it to residents. In any case, neither the actual holding nor Wesley’s mischaracterization of the holding supports the Second Circuit’s conclusion in Swedenburg—if anything Friedman’s holding undermines it. Although he doesn’t mention it, there is one passage in Friedman that might be read to lend support to Wesley’s analysis. Near the end of the Friedman opinion, the Supreme Court says that Virginia’s residency requirement was largely redundant because of a different and less restrictive rule requiring attorneys admitted without examination to maintain a full-time practice and office in the state. Perhaps the Second Circuit saw an analogy between Virginia’s office requirement and the physical presence requirement at issue in Swedenburg. Even so, this would not support
recognition that “out-of-state wineries will incur some costs in establishing and maintaining a physical presence in New York, costs not incurred by in-state wineries.” The court acknowledged that the statute raised serious issues under the dormant commerce doctrine, but held that because the physical presence requirement made it easier for New York to monitor the behavior of out-of-state wineries, the statute was a valid exercise of the state’s authority under Section 2 of the Twenty-First Amendment.97

In Granholm v. Heald,98 the Supreme Court reversed the Second Circuit’s Swedenburg decision, rejecting its interpretation of the Twenty-First Amendment and holding that New York’s physical presence rule violated the Commerce Clause. Whatever one may think about the disagreement between these two courts about the Twenty-First Amendment, the more significant point for the Bach case is that the Supreme Court rejected a variety of monitoring and administrative arguments pressed by New York. Contrary to Judge Wesley’s opinion, the Supreme Court accepted the rather obvious conclusion that the New York statute did discriminate against out-of-state wineries, and stressed that “[o]ur Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods,” namely a finding based on “concrete record evidence” that nondiscriminatory alternatives are unworkable.99 No such “concrete record evidence” existed in Bach v. Pataki, and the Second Circuit’s reliance on monitoring by serendipity is not a substitute for such evidence. Although the Supreme Court did not grant certiorari on the Privileges and Immunities Clause claim in Granholm, the analyses used under that Clause and under the dormant commerce approach are substantially similar with respect to the questions at issue here.100 Accordingly, Granholm strongly suggests that the Second Circuit’s holding in Bach v. Pataki was error, and that it was an error the Supreme Court should correct.

96 358 F.3d at 238.
97 Id. at 237-39.
99 Id. at 1907.
100 “Although appellants raise no Commerce Clause challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV, § 2, and the Commerce Clause—a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation, and their shared vision of federalism, renders several Commerce Clause decisions appropriate support for our conclusion [in this Privileges and Immunities Clause case].” Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978) (footnote and citation omitted).
III. CONCLUSION

The principal defense of diversity jurisdiction in *The Federalist Papers* consists of Alexander Hamilton’s claim that this feature of Article III would prove vital in preserving the nation from violations of the Privileges and Immunities Clause:

> It may be esteemed the basis of the Union that “the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.” And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority*, it will follow, that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which, having no local attachments, will be likely to be impartial between the different States and their citizens, and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.101

The Supreme Court has recognized that state governments can have a variety of motives for the “evasion and subterfuge” that Hamilton foresaw, and the Court has accordingly insisted that discrimination against the residents of sister states be scrutinized with a skeptical eye.102 This has not led to anything like a *per se* rule forbidding such discrimination. A simple-minded rule of nondiscrimination, for example, could have the practical effect of giving nonresidents an unjust advantage over residents, as in cases where a state has taxed its own citizens in order to provide a public good that would invite free-riding by outsiders. Nor has the Court interpreted the Clause to require states to treat non-citizens as if they were citizens with respect to political rights such as voting and holding public office. Nor, it is important to stress, has the Privileges and Immunities Clause been interpreted to require states to give visitors the same substantive rights that they enjoy in their home states, or the substantive rights that a federal court thinks all Americans should have. The Privileges and Immunities Clause created a rule of nondiscrimination, not a license for federal courts to impose on the nation some uniform judicially-created scheme of personal liberties.

Although the Privileges and Immunities Clause is “not an absolute,”103 neither is it a precatory invitation to “be nice” or a green light for discrimination that falls short of provoking civil war. Under existing Supreme Court precedent,

103 Toomer, 334 U.S. at 396.
New York has failed to adequately justify its decision to grant handgun licenses to its own citizens and selected groups of nonresidents, but not to other nonresidents who meet all the statutory criteria except for residency. The Second Circuit’s decision to uphold New York’s discriminatory regulation is a reminder that the lower federal courts have not been purged of what Hamilton called “local attachments.” Perhaps such attachments have contributed, no doubt subconsciously if at all, to what looks rather like “evasion and subterfuge” of the Privileges and Immunities Clause.

If so, perhaps the U.S. Supreme Court—which Hamilton recognized as the one tribunal free of local attachments—will correct the Second Circuit’s error. The Baldwin decision, however, sounds a disquieting note. For reasons that its opinion left quite murky, the Baldwin Court created an exception from the Privileges and Immunities Clause for the right to engage in elk hunting. One cannot help suspecting that the ruling may have been driven at least in part by a cultural prejudice against a form of recreation that is distasteful to many people in the social class from which federal judges are overwhelmingly drawn. Such prejudices evince a different kind of parochialism than the geographic provincialism on which Hamilton focused in The Federalist, but they are no less a threat than “local attachments” to an impartial application of the Constitution. Given the widespread misgivings about the value of an armed citizenry among the elite social class that provides us with our federal judges, it is at least conceivable that the Supreme Court itself would engage in something like what Hamilton condemned as “evasion and subterfuge.” Were that to happen, it would be a reminder that Hamilton only thought that the Supreme Court will never be “likely to feel any bias inauspicious to the principles on which [the Union] is founded.” Unlikely is not the same as impossible.