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# CARLSON V. STATE AND THE PRIVILEGES AND IMMUNITIES CLAUSE: THE ALASKA WRINKLE IN NONRESIDENT FISHING FEE DIFFERENTIALS

*Under U.S. Supreme Court precedent, a state can charge nonresident commercial fishermen more for commercial fishing fees where the state shows the differential merely compensates the state for expenditures from resident-only taxes. In Carlson v. State, the Alaska Supreme Court held that certain funds used for fisheries expenses were the analytical equivalent of resident-only taxes because the money was raised by the state from oil revenues. This Note argues that the unique structure of the Alaska state economy in its use of oil revenues creates a wrinkle in the Federal Privileges and Immunities Clause.*

### I. INTRODUCTION

When people hear that I am a member of the Alaska Law Review, the most frequently asked question is “Why is the Alaska Law Review at Duke University?” Inevitably, the question that follows is “Why does Alaska need a review of its law?” One could argue that every state should have its own publication where legislators can debate with the practitioners to hash out legal issues. However, Alaska has a unique need for a law review because of its inherent “differentness” from the contiguous states.<sup>1</sup> First, even

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though Alaska is one of the least populous states in the union, it is the largest and the richest in natural resources.<sup>2</sup> The overwhelming presence of the oil industry in Alaska affects Alaska's economic structure, environmental laws, and tax system.<sup>3</sup> Second, Alaska is a relatively new state and therefore does not have the same depth of legal precedent possessed by many other states.<sup>4</sup> Finally, after the oil industry boom during the 1970s, the State created the Alaska Permanent Fund, which gathers a percentage of annual oil revenues and reinvests the money, distributing dividends to residents, and paying for economic development within the state.<sup>5</sup> Even beyond the Permanent Fund, oil revenues make up approximately eighty percent of the state's economy,<sup>6</sup> making Alaska unique among other states in that "most of [the] costs of state government (including fisheries management) come from oil revenues belonging to only residents."<sup>7</sup> In *Carlson v. State, Commercial Fisheries*

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1. S. Michael Gray, *Can State Regulation of Renewable Electricity Achieve Discriminatory Effects on Interstate Trade without Triggering the Dormant Commerce Clause?*, 44 S. TEX. L. REV. 783, 790-91 (2003).

2. *Id.* at 790.

3. *Id.* at 791.

4. See David G. Stebing, *Insurance Regulation in Alaska: Healthy Exercise of a State Prerogative*, 10 ALASKA L. REV. 279, 296 n.76 (1993) ("As a young state, Alaska has had the benefit of drawing upon legislation which evolved through the hard work of other states."); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 779 n.64 (1993) (omitting Alaska from the study because it was a young state unlikely to "have had the time necessary to develop a substantial body of constitutional law").

5. See generally Alaska Permanent Fund Corp., *An Alaskan's Guide to the Permanent Fund* at 6-7 (2001), available at <http://www.apfc.org/library/2001guide.cfm> (last visited Feb. 16, 2004).

6. ALASKA DEPARTMENT OF REVENUE, TAX DIVISION, REVENUE SOURCE BOOK, FALL 2003 2 (Dec. 2003), available at <http://www.tax.state.ak.us/sources-book/2003/fall2003/f03index.htm> ("Oil revenues continue to dominate the revenue picture—providing over 80% of Unrestricted General Purpose Revenue."); see also *Carlson v. State*, 798 P.2d 1269, 1278 (Alaska 1990) [hereinafter *Carlson I*] (noting that Alaska derived 86% of its revenues from oil production in 1986). Only Louisiana has comparable reliance on oil revenues. See Louisiana Mid-Continent Oil and Gas Association, *LA Oil & Gas Industry Overview*, at <http://www.lmoga.com/home.html> (last visited Feb. 9, 2004) ("The direct taxes and royalties paid by the industry to the state, along with fees and other taxes account for approximately 13 percent of all the general fund revenues collected by the state. At one time the industry accounted for nearly 40 percent of all state general fund revenues.").

7. E-mail from Steve White, Assistant Attorney General, Natural Resources Section, State of Alaska, and counsel for the State in *Carlson* (Jan. 12, 2004) (on file with author).

*Entry Commission*, the oil revenues serve to create another legal issue unique to Alaska: a wrinkle in the Privileges and Immunities Clause of the U.S. Constitution.

This Note addresses how the Alaska Supreme Court dealt with the unique nature of the Alaska state economy within the strictures of the Privileges and Immunities Clause. The court allowed the State to charge nonresident commercial fishermen more for commercial fishing fees than resident commercial fishermen as long as the fee differential merely compensated the State for the added expense of the nonresidents or balanced out expenses borne by residents to which nonresidents do not contribute.<sup>8</sup> Part I of the Note looks at the long procedural road the case has taken and explains the holdings of each case. Part II examines how the Privileges and Immunities Clause limits discriminatory licensing fees such as the one at question in *Carlson*. Part III explains the importance of oil revenues to the Alaska government and why Alaska residents have a personal stake in the spending of oil revenues. Finally, Part IV examines how Alaska's economy creates a wrinkle in the Privileges and Immunities Clause, allowing Alaska to charge nonresident fishermen more than residents.

## II. PROCEDURAL HISTORY

*Carlson* has been before the Alaska Supreme Court three times and has twice been denied certiorari by the U.S. Supreme Court.<sup>9</sup> The case has a long and complicated history that began when the Alaska legislature amended its commercial fishing license law to provide that “[t]he amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.”<sup>10</sup> The 3:1 ratio was developed through state statutes, ad-

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8. *Carlson I*, 798 P.2d at 1275, 1278.

9. *Carlson v. State*, 65 P.3d 851, 853 (Alaska), *cert. denied*, \_\_ U.S. \_\_, 124 S. Ct. 387 (2003) [hereinafter *Carlson III*]; *Carlson v. State*, 919 P.2d 1337, 1339 (Alaska 1996), *cert. denied*, 519 U.S. 1101 (1997) [hereinafter *Carlson II*]; *Carlson I*, 798 P.2d at 1275, 1278. In both the duration of the case and the tremendous number of motions filed, rulings made, and opinions written, *Carlson* mirrors Dicken's infamous Jarndyce and Jarndyce. CHARLES DICKENS, *BLEAK HOUSE* (Nicola Bradbury ed., Penguin Books 2003) (1853). However, in *Carlson*, the parties and courts, unlike the unruly Court of Chancery, have stayed focused on the ultimate issue—whether Alaska's differential fishing fee is unconstitutional—and have spent the twenty years that the case has been pending by narrowing the scope of the case from the larger constitutional questions to the factual questions of the state's budgetary expenses.

10. ALASKA STAT. § 16.43.160(b) (Michie 1983), *repealed by* § 7 ch. 27, SLA 2001; *see also Carlson I*, 798 P.2d at 1271. Currently, “a nonresident engaged in

ministrative regulations, and attorney general opinions.<sup>11</sup> The State also required that vessel owners buy a limited entry permit which “control[s] . . . the number of people who can fish in a given geographic area,” again charging nonresident vessel owners three times the amount of resident vessel owners.<sup>12</sup>

In 1983, a group of nonresident fishermen sued the State, claiming that the differential fees violated the Commerce Clause and the Privileges and Immunities Clause of the U.S. Constitution.<sup>13</sup> The group formed a class that included “all persons who participated in one or more Alaska commercial fisheries at any time who paid non-resident assessments to the State for commercial or gear licenses or permits.”<sup>14</sup>

### A. *Carlson I*

In *Carlson I*, the State moved for summary judgment, claiming that the 3:1 ratio did not violate the Privileges and Immunities Clause and the Commerce Clause because the “fee ratio partially reimburses the State for that portion of the costs of fisheries management, enforcement and conservation attributable to nonresidents.”<sup>15</sup> The State included the following in its calculation of the cost of fisheries management: the annual operating budget of the Commercial Fisheries Entry Commission (“CFEC”);<sup>16</sup> the percent-

commercial fishing . . . shall pay an annual base fee of \$60 plus an amount, established by the department by regulation, that is as close as is practicable to the maximum allowed by law.” ALASKA STAT. § 16.05.480 (Michie 2002).

11. *Carlson I*, 798 P.2d at 1270-71.

12. *Carlson III*, 65 P.3d at 854 & n.5 (citing former 20 ALASKA ADMIN. CODE §§ 05.240(a)(1), (2), (4) (2002)). For example, in the highest fee class, nonresident vessel owners paid \$750 for an entry permit, while resident vessel owners paid only \$250. *Id.* Currently, “[t]he fee for a nonresident entry permit . . . shall be higher than the annual base fee by an amount, established by the commission by regulation, that is as close as is practicable to the maximum allowed by law.” ALASKA STAT. § 16.05.490. Alaska still requires both commercial licenses and entry permits: “A person engaged in commercial fishing shall obtain a commercial fishing license. . . . An entry permit . . . entitles the holder to participate as a gear operator in the fishery for which the permit is issued and to participate as a crewmember in any fishery.” § 16.05.480. As in *Carlson*, the fishing license and the entry permit are collectively referred to as “commercial fishing fees.” *Carlson III*, 65 P.3d at 854.

13. *Carlson I*, 798 P.2d at 1270.

14. *Id.*

15. *Id.* at 1272.

16. The CFEC is the organization responsible for issuing commercial fishing permits. The CFEC “is an independent, quasi-judicial regulatory agency responsible for promoting the sustained yield management of Alaska’s fishery resources

age of the operating budget of the Department of Public Safety attributable to the amount of money spent on commercial fisheries enforcement; and the annual operating budget of the Department of Fish and Game for both the Division of Commercial Fisheries (“DCF”)<sup>17</sup> and the Fisheries Rehabilitation Enhancement and Development Division (“FREDD”).<sup>18</sup> The State then determined what percentage of these expenditures was attributable to nonresident fishermen.<sup>19</sup> According to the State’s calculations, the 3:1 ratio was actually favorable to nonresidents because if the State had taken into account the per capita amount of fish caught by nonresidents, the fee differential would have been greater than 3:1.<sup>20</sup> The class argued that the State should not be able to include all of these expenses in its calculation, but rather should only take into account the budget of the CFEC or, alternatively, should also take into account “all sources of revenue to the State attributable to the nonresident commercial fishermen.”<sup>21</sup>

The superior court held that the 3:1 fee ratio violated neither the Privileges and Immunities nor the Commerce Clauses.<sup>22</sup> Based on the Privileges and Immunities Clause, the court held that the State had a permissible reason for discriminating against nonresidents: “to have the non-resident[s] pay a part of their fair share of the costs of enforcement, management and conservation of the fisheries of this State, which costs are largely borne by the residents through general fund expenditures.”<sup>23</sup> Based on the Commerce Clause, the superior court held that the “legitimate local purpose”—balancing the costs paid by residents and nonresidents in

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and the economic health and stability of commercial fishing by regulating entry into the fisheries in the public interest.” Commercial Fisheries Entry Commission, *Frequently Asked Questions*, at <http://www.cfec.state.ak.us/faq/whatcfec.htm> (last visited Jan. 11, 2004).

17. The DCF determines the amount of fish “available each year for commercial harvesting.” *Carlson I*, 798 P.2d at 1272.

18. The FREDD is responsible for “rehabilitat[ing] and enhanc[ing] fisheries by determining where and when fish are needed or wanted to be, and then producing the fish at that time and place.” *Id.*

19. *Id.*

20. *Id.* at 1272 n.3. “Resident commercial fishers are paying the license and permit fees they are charged plus their *per capita* share of oil revenues which are diverted to fisheries management from other benefits or State services.” *Carlson III*, 65 P.3d 851, 856 (Alaska), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 387 (2003).

21. *Carlson I*, 798 P.2d at 1272 (quotation omitted). This number would include federal benefits that Alaska receives from the nonresident commercial fishermen. *Id.* at 1272-73.

22. *Id.* at 1273.

23. *Id.*

commercial fisheries—and the fact that the differential was the least restrictive means to satisfy that purpose justified the discrimination against interstate commerce.<sup>24</sup> Therefore, the 3:1 ratio was upheld.<sup>25</sup>

The Alaska Supreme Court reversed the superior court decision.<sup>26</sup> Because commercial fishing came within the scope of the Privileges and Immunities Clause, the court held that the State had to show “a substantial reason for the discrimination, and whether the 3:1 fee ratio bears a sufficiently close relationship to the goal.”<sup>27</sup> The court looked to the U.S. Supreme Court’s decision in *Toomer v. Witsell*,<sup>28</sup> which held that a 100:1 differential fee for fishing licenses violated the Privileges and Immunities Clause because South Carolina did not prove the extra cost to the nonresident was justified by the “added enforcement burden” imposed on the State by nonresident fishermen or for expenditures “from taxes which only residents pay.”<sup>29</sup> The Court stated, “[N]othing 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 [fisheries] conservation.”<sup>30</sup> Further, the Alaska court relied on *Mullaney v. Anderson*,<sup>31</sup> which stated, “[C]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations. But something more is required than [a] bald assertion to establish a reasonable relation between the higher fees and the higher cost to [Alaska].”<sup>32</sup> The court noted that the amount of support needed to “demonstrate a sufficiently ‘close connection’ to a legitimate state purpose”

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24. *Id.*

25. *Id.* at 1274. The court further held (after the State provided additional evidence of its commercial fishery expenses) that there was no material question of fact “regarding the accuracy of the state’s calculations.” *Id.*

26. *Id.* at 1278.

27. *Id.* at 1274 (“Commercial fishing is a sufficiently important activity to come within the purview of the Privileges and Immunities Clause, and license fees which discriminate against nonresidents are *prima facie* a violation of it.”) (citations omitted).

28. 334 U.S. 385 (1948).

29. *Id.* at 398-99.

30. *Id.* (emphasis added by the Alaska Supreme Court in *Carlson I*, 798 P.2d at 1275). The argument that the State uses a substantial amount of its general fund becomes important in the context of Alaska’s dependency on oil revenues, as a large part of the “general fund” is used by Alaska to pay for fisheries management. *Carlson I*, 798 P.2d at 1273.

31. 342 U.S. 415 (1952).

32. *Id.* at 418.

is unclear.<sup>33</sup> The analysis under the Commerce Clause was “quite similar”<sup>34</sup> and the court concluded again that the State would have to give more proof regarding the burden placed on it to justify the fee differential.<sup>35</sup>

The court determined that the record did not contain enough information to determine whether the 3:1 ratio was excessive and remanded for further investigation.<sup>36</sup> The court gave guidelines to the lower court for determining the correct differential:

The language of *Toomer* to the effect that it would be permissible “to charge nonresidents a differential which would merely compensate the state . . . for any conservation expenditures from taxes which only residents pay” requires additional discussion. We read this statement to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out of which conservation expenditures were made, then differential fees would not be permissible. *That, however, is not the case in Alaska where a very high proportion of total state revenues are derived from petroleum production.*<sup>37</sup>

Therefore, the court explained,

It would be correct to say that eighty-six cents of each dollar spent for conservation came from state revenue sources to which nonresident fishermen made no contribution. These revenues could have been used to benefit residents through various other programs and *they are, analytically, equivalent to taxes which only residents pay.*<sup>38</sup>

The court stated that the issue on remand was whether the fees and taxes paid by a nonresident “are substantially equal to those which must be paid by similarly situated residents when the residents’ *pro rata* shares of state revenues to which nonresidents make no contribution are taken into account.”<sup>39</sup>

## B. *Carlson II*

On remand, each party developed a different method for comparing the fees paid versus the expenditures from state revenue to which the nonresidents did not contribute. The class’ method

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33. *Carlson I*, 798 P.2d at 1275.

34. *Id.* at 1276.

35. *Id.* at 1278.

36. *Id.*

37. *Id.* (emphasis added). The court continued, “[f]or example, in fiscal year 1986, eighty-six percent of state revenues were so derived.” *Id.*

38. *Id.* (emphasis added).

39. *Id.*; see also *Carlson II*, 919 P.2d 1337, 1339 (Alaska 1996), *cert. denied*, 519 U.S. 1101 (1997).

was a per capita formula that “computes the contribution made by each resident to the cost of maintaining the commercial fisheries and compares this with the fee differential.”<sup>40</sup> The State’s per rata formula compared “the total contributions made to the cost of commercial fisheries by residents to the total fees paid by nonresidents.”<sup>41</sup>

On appeal, the Alaska Supreme Court held that the class’ per capita formula was the appropriate method of determining whether the Privileges and Immunities Clause had been violated.<sup>42</sup> Under the class’ formula, “the resident contribution can be compared to the difference in fees paid by nonresidents to determine if the fee differential is constitutional.”<sup>43</sup> “[I]f the superior court finds that the fee differential is not greater than the resident contribution, the State has successfully carried its burden of proving that the means employed by its statutory scheme are substantially related to the legitimate interest served by the statute.”<sup>44</sup> The lower court was also instructed to determine whether it should consider additional costs that the State sought to include in the calculation of total expenditures.<sup>45</sup>

Further, the court held that the Commerce Clause was not implicated in the fee differential: “Unlike the fee differentials in *Oregon Waste Systems*<sup>46</sup> and *Chemical Waste*,<sup>47</sup> the fee differentials at

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40. *Carlson II*, 919 P.2d at 1339. The equation to determine each resident’s per capita share of the fisheries budget was [Fisheries Budget/Alaska Population] x [Percentage of State Budget from Oil Revenue]. *Id.* at 1343. This number would then be compared to the nonresident license fee. *Id.* If the difference between the nonresident fee and the resident’s share was greater than 3:1, then the fee differential violated the Privileges and Immunities Clause. *See id.* at 1346.

41. *Id.* at 1339. The superior court accepted the State’s calculation and found that the amount paid by residents in “taxes (or their analytical equivalent)” exceeded the amounts paid by nonresidents and that, therefore, the fee differential did not violate the Privileges and Immunities Clause. *Id.*

42. *Id.* at 1342-43 (“To establish ‘practical equality’ between residents and nonresidents, the State must demonstrate that the higher fees charged nonresidents are equivalent to the burden borne by residents as measured by the ‘residents’ pro rata shares of state revenues to which nonresidents make no contribution.”) (quoting *Carlson I*, 798 P.2d 1269, 1278 (Alaska 1990)).

43. *Carlson II*, 919 P.2d at 1343.

44. *Id.* at 1344.

45. *Id.*

46. *Oregon Waste Systems, Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994) (holding surcharge on disposal of out-of-state waste violated Commerce Clause); *see also* ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, § 5.3.6, 427 (2d ed. 2002).

issue in this case are not predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits,” which, under United States Supreme Court jurisprudence, is analyzed under either the Privileges and Immunities or Equal Protection clauses.<sup>48</sup>

### C. *Carlson III*

*Carlson III* dealt with what expenditures the State was allowed to count in its fisheries budget.<sup>49</sup> On remand from *Carlson II*, the lower court determined that the State could count both direct and indirect expenditures, but not “general government costs, capital costs, the hatcheries loan fund subsidy, and forgone revenue from fishery resources.”<sup>50</sup> The Alaska Supreme Court affirmed the ruling that both direct and indirect operating expenses could be included “because without the direct operating expenditures the in-

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47. *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 342-44 (1992) (holding that state law requiring out-of-state companies to pay a hazardous waste disposal fee but not requiring the same of in-state companies violated the Commerce Clause); *see also* CHEMERINSKY, *supra* note 46, § 5.3.6, at 426-27.

48. *Carlson II*, 919 P.2d at 1340-41. *But see id.* at 1346 (Rabinowitz, J., dissenting) (stating the U.S. Supreme Court “has, in fact, endorsed the methodology of referring to Commerce Clause precedent in deciding claims based solely on the Privileges and Immunities Clause”); CHEMERINSKY, *supra* note 46, § 5.5, at 446 (“The Dormant Commerce Clause and the Privileges and Immunities Clause overlap: Both can be used to challenge state and local laws that discriminate against out-of-staters. In fact, the Supreme Court has spoken of the ‘mutually reinforcing relationship’ between the dormant commerce clause and the privileges and immunities clause.”) (citing *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978)).

However, because the Alaska Supreme Court continues to use the Privileges and Immunities Clause to determine the constitutionality of the nonresident fee differentials, this Note will not discuss Commerce Clause implications of the issue at length. For analysis of *Carlson* under the Commerce Clause, see Winkfield F. Twyman, Jr., *Losing Face but Gaining Power: State Taxation of Interstate Commerce*, 16 VA. TAX REV. 347, 448-50 (Winter 1997). Twyman argues:

Without significant gains in Alaska’s local interests as trustee and guardian of fishing rights, the fee differential should be struck down under the dormant Commerce Clause. The clear costs to a developed division of power between states and the federal government outweigh uncertain gains in state trusteeship and localism. The Alaskan fee scheme goes too far against ordered relations in power.

*Id.* at 449-50.

49. *Carlson III*, 65 P.3d 851, 853 (Alaska), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 387 (2003). The court also reaffirmed its *Carlson II* ruling regarding the Privileges and Immunities Clause and Commerce Clause, *id.* at 859-63, and ruled that the class was due a refund of the fee differential were the class to prevail, *id.* at 875.

50. *Id.* at 858.

direct operating expenditures would not have been generated.”<sup>51</sup> The court then ruled on the other figures that the State wanted to include in the determination of the fisheries budget. The court ruled that the State could include the following:

- (1) Capital costs directly supporting commercial fishing, e.g. boat harbors and salmon hatcheries, but only as far as they are not counted in the direct operating expenditures;<sup>52</sup>
- (2) Hatchery loan fund subsidies, which loan money to fish enhancement projects, because “the loan subsidy represents forgone revenues that the State could otherwise spend at present value;”<sup>53</sup> and
- (3) Interest income deposited into state savings accounts.<sup>54</sup>

However, the court ruled that the State could not include the following:

- (1) Forgone revenues from commercial fishery resources because “[t]he State cannot recoup from nonresidents the possible revenue it forgoes in making policy decisions regarding its fisheries management;”<sup>55</sup> or
- (2) General governmental expenditures, e.g., correction, health care, and education, because, “[w]hile in economic terms the State may bear much of the cost of government generated by the fishing industry, this does not translate into a legal justification for including these costs in the fisheries expenditures.”<sup>56</sup>

In the three trips this case made before the Alaska Supreme Court, the court has determined that a fee differential in fishing licenses does not per se violate the Privileges and Immunities Clause; decided that the formula used to determine the acceptable fee differential was a per capita, rather than a pro rata, formula; and determined what may be included in the State’s determination of its fisheries budget.

### III. THE PRIVILEGES AND IMMUNITIES CLAUSE

The Privileges and Immunities Clause states: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”<sup>57</sup> Under Supreme Court jurisprudence, this clause limits “the ability of a state to discriminate against out-

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51. *Id.* at 865.

52. *Id.* at 867.

53. *Id.* at 867-68.

54. *Id.* at 868-69.

55. *Id.* at 868.

56. *Id.* at 866-67.

57. U.S. CONST. art. IV, § 2, cl. 1.

of-staters with regard to fundamental rights or important economic activities.”<sup>58</sup> Usually, such discrimination, as in *Carlson*, affects a nonresident’s “ability to earn a livelihood.”<sup>59</sup> In fact, the Privileges and Immunities Clause protects fundamental economic rights.<sup>60</sup> These rights, including “the rights of trade, commerce, and pursuit of a livelihood[,] . . . get strong interstate equality protection, even though the Constitution gives them almost no substantive protection.”<sup>61</sup> A state’s restriction of nonresident activity triggers the Privileges and Immunities Clause if “the activity in question is sufficiently basic to the livelihood of the nation as to fall within the purview of the clauses, and if it is not closely related to the advancement of a substantial state interest.”<sup>62</sup> The first part of the test looks at the fundamental nature of the activity; once the activity has been determined to be fundamental, the state has the burden of showing a substantial interest and a reasonable fit.

Licensing fees are one area in which states often try to differentiate between residents and nonresidents by charging more for the latter. Often states cite as a justification that taxes paid by residents go to manage whatever the license limits. For example, in the case of fishing licenses, a state might argue the residents have to pay for nature conservancy and enforcement through their taxes, while nonresidents are able to take advantage of these without

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58. CHEMERINSKY, *supra* note 46, § 5.5, at 445.

59. *Id.* at 446; *see also* *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (“[I]t 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.”).

60. For examples of what the Court considers fundamental rights, see *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 70 (1988) (holding state residency requirement for bar admittance unconstitutional); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288 (1985) (finding residency requirements for practice of law violated clause); *Hicklin v. Orbeck*, 437 U.S. 518, 526, (1978) (holding an Alaska law requiring preference for residents in hiring for oil production violated clause); *Austin v. New Hampshire*, 420 U.S. 656, 665-66 (1975) (finding that a state tax on nonresident commuter income unconstitutional).

61. David Schmudde, *Constitutional Limitations on State Taxation of Nonresident Citizens*, 1999 LAW REV. MICH. ST. U. DET. C.L. 95, 115 (“A right can be fundamental for privileges and immunities purposes even though it is not a fundamental right. It is fundamental because a compelling interest would be required to override it for citizens and non-citizens alike. Thus, all the rights of trade, commerce, and pursuit of a livelihood are fundamental rights for this purpose.”).

62. 16B AM. JUR. 2D *Constitutional Law* § 758 (1998); *see also Carlson I*, 798 P.2d 1269, 1274 (Alaska 1990) (citing *Supreme Court of Virginia*, 487 U.S. at 64-65). The state also has to choose the least restrictive means available. *Id.*

paying proportional costs.<sup>63</sup> By allowing nonresidents access to the state's resources, the state arguably has increased expenses with no appreciable return of costs from the nonresidents.<sup>64</sup> On the other hand, the problems affecting nonresidents caused by these discriminatory fee differentials are obvious. First, nonresidents have no power to vote on the issues and, therefore, no means of demanding change in the fee structure.<sup>65</sup> Further, if one state levies a licensing fee that greatly discriminates against nonresidents, the surrounding states will be more likely to do the same, leading to "border wars" and inefficient interstate commerce.<sup>66</sup> The Supreme Court has held that commercial fishing is a "sufficiently basic" activity that is protected under the Privileges and Immunities Clause;<sup>67</sup> therefore, such "license fees which discriminate against nonresidents are *prima facie* a violation of it."<sup>68</sup>

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63. See *Toomer*, 334 U.S. at 397 (stating South Carolina's "obvious purpose was to conserve its shrimp supply, and the state suggests that the fee structure was designed to head off an impending threat of excessive trawling"); Brief in Opposition to Petition for Writ of Certiorari at 17, *Carlson III*, 65 P.3d 851 (Alaska), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 387 (2003) (No. 03-73) ("If residents and nonresidents were charged an identical fee, the residents would pay more than the nonresidents for those services when their proportionate tax payments for the same services are taken into account.").

64. See *Mullaney v. Anderson*, 342 U.S. 415, 417-18 (1952) ("The Tax Commissioner relied on the higher cost of enforcing the license law against nonresident fishermen to justify the difference in fees . . ."); see also *Toomer*, 334 U.S. at 398 (noting that South Carolina cited the "allegedly greater cost of enforcing the laws against" nonresidents).

65. Schumde, *supra* note 61, at 115 ("The Clause must be upheld by federal courts in providing the constitutional guarantee of fairness in treatment from other states. Without such an interpretation, the nonresident is 'fair game' for the taxing state.").

66. *Id.* at 115-16 ("This discriminatory taxation leads to border wars. If one state treats the citizens of another state in an unfair manner, the response of the other states has been to enact retaliatory taxes. This results in economic inefficiencies and barriers to work and trade. This is the exact problem that the Privileges and Immunities Clause should be used to avoid.").

67. *Mullaney*, 342 U.S. at 417-18; *Toomer*, 334 U.S. at 403 ("[C]ommercial shrimping in the marginal sea, like other common callings, is within the purview of the Privileges and Immunities Clause."). In contrast, the Supreme Court held that sport hunting is *not* sufficiently basic to the livelihood of the nonresident to merit protection under the Privileges and Immunities Clause. *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978); see also 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 18:13 (2003) ("Commercial wildlife harvesting is a constitutionally protected endeavor, but sport hunting is not.").

68. *Carlson I*, 798 P.2d 1269, 1274 (Alaska 1990).

The two major Supreme Court cases on fishing fees and the Privileges and Immunities Clause, *Toomer v. Witsell* and *Mullaney v. Anderson*, involved a higher licensing fee for nonresidents.<sup>69</sup> According to these cases, a state may charge a nonresident more for a fishing license than a resident in order to compensate the state for added expenses for conservation and enforcement or to compensate residents for taxes that only they pay.<sup>70</sup> “However, a state may not impose a differential on nonresidents which bears no relation to such factors, and is merely intended to discriminate against nonresidents in favor of residents . . . .”<sup>71</sup> In both cases, the Supreme Court found that, though a differential could theoretically be constitutional, the states had not provided enough evidence that the differential represented some real added cost to the state borne only by residents. In *Mullaney*, the Court held:

[T]here is no warrant for the assumption that the differential in fees bears any relation to this difference in cost, nothing to indicate that it ‘would merely compensate’ for the added enforcement burden. . . . What evidence we have negatives the idea of any such relation, for the total amount payable by nonresident fishermen in 1949-1950, in excess of what they would have been charged if they had been residents, may easily have exceeded the entire amount available for administration of the Tax Commissioner’s office in that year.<sup>72</sup>

Similarly, in *Toomer*, South Carolina did not produce sufficient evidence to show that

the cost of enforcing the laws against [nonresidents] is appreciably greater, or that any substantial amount of the State’s general funds is devoted to shrimp conservation. But assuming such

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69. South Carolina charged a 100:1 fee differential, *Toomer*, 334 U.S. at 395, and Alaska charged a 10:1 differential, *Mullaney*, 342 U.S. at 416.

70. 36A C.J.S. *Fish* § 28 (2003) (citing *Toomer*, 334 U.S. at 397) (“But [the clause] 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.”).

71. 36A C.J.S. *Fish* § 28 (citing *Toomer*, 334 U.S. at 398-99) (stating that the court has to “conclude[] that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them” by the 100:1 fee differential). A statute that did not “provide for the licensing of commercial fishing boats owned and operated by nonresidents, with the exception of those vessels owned and operated by bona fide residents of states with which the State of Louisiana has a reciprocal agreement” violated the Privileges and Immunities Clause. *Gospodonovich v. Clements*, 108 F. Supp. 234, 236 (D. La. 1951). Though Louisiana did provide that nonresidents could get a license for \$2,500, no such license had ever been issued. *Id.*

72. *Mullaney*, 342 U.S. at 418.

were the facts, they would not necessarily support a remedy so drastic as to be a near equivalent of total exclusion [of nonresident fishermen caused by the 100:1 fee differential].<sup>73</sup>

A more recent case regarding fee differentials is *Tangier Sound Waterman's Ass'n v. Pruitt*.<sup>74</sup> In *Tangier Sound*, a group of Maryland fisherman claimed that a Virginia law, which tripled nonresident commercial fisherman's harvester license fees, violated the Privileges and Immunities Clause.<sup>75</sup> The Fourth Circuit held that the fee differential violated the Clause because the evidence did not show that the differential merely compensated Virginia for added enforcement and conservation costs which, otherwise, only residents would pay.<sup>76</sup> The court noted that "such a higher tax or fee may be imposed on the nonresident if the purpose of that higher tax or fee is to place the burden so that it will bear as nearly as possible equally upon all resident and nonresident [citizens]."<sup>77</sup>

It is very difficult for a discriminatory local law to pass the substantial interest test. While the Supreme Court has not man-

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73. *Toomer*, 334 U.S. at 398.

74. 4 F.3d 264 (4th Cir. 1993).

75. *Id.* at 265-66 ("The \$1,150 fee was computed by dividing the total expenses for fisheries management and research in 1989-90 by the number of resident commercial fishermen.").

76. *Id.* at 267 ("The additional fee imposed on the nonresidents as computed does not reach to the goal of equality of treatment between resident and nonresident.").

77. *Id.* (internal quotation omitted). Further, the method used by a state to determine the relative costs becomes very important when looking toward the fairness of a fee differential. In *Tangier Sound*, the court found "the record does not disclose that the Commonwealth of Virginia has shown that it created any credible method of allocating costs as between residents and nonresidents which places the burden equally or approximately equally upon residents and nonresidents." *Id.* The importance of the method used is also a key part of the *Carlson* case; in fact, *Carlson III* focuses almost entirely on what the state may include in its calculations. See *Carlson III*, 65 P.3d 851, 863-69 (Alaska), *cert. denied*, \_\_ U.S. \_\_, 124 S. Ct. 387 (2003); Oliver F.C. Murray, *Carlson v. State: Fair Fees for Fishing Far from Home*, 4 OCEAN & COASTAL L.J. 157, 163-64 (1999).

The Tangier Sound Waterman's Association also filed an amicus brief with the Supreme Court when the *Carlson* plaintiffs filed for certiorari after the Alaska Supreme Court's decision in *Carlson III*. See Motion for Leave to File Brief Amicus Curiae and a Brief of the Tangier Sound Waterman's Association as Amicus Curiae in Support of the Petition, 2003 WL 22428534, *Carlson III*, 65 P.3d 851 (Alaska), *cert. denied*, \_\_ U.S. \_\_, 124 S. Ct. 387 (2003). The association requested that the court grant certiorari due to the widespread problem of discriminatory nonresident commercial fishing fees and argued that the Alaska Supreme Court decision contradicted Supreme Court decisions on the Privileges and Immunities Clause and the Dormant Commerce Clause. *Id.* at 4-12.

dated a compelling interest test for Privileges and Immunities review, “it has come close.”<sup>78</sup> The Court “has invalidated much of the local discrimination” under the substantial interest test.<sup>79</sup> In fact, the author has been unable to find a case, aside from *Carlson*, in which a court found that a state law creating a fee differential between residents and nonresidents involved a fundamental right under the Privileges and Immunities Clause, but was so related to a substantial state interest as to validate the discrimination.<sup>80</sup> The

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78. Schmudde, *supra* note 61, at 118.

79. *Id.* at 118 n.130 (citing discriminatory local laws that the Supreme Court has invalidated under the substantial interest test and earlier models of that test). However, Schmudde does note that there are two exceptions to the non-discriminatory rule: (1) “each state can reserve the exercise of governmental power, including the right to vote, to its own citizens;” and (2) states may limit subsidized social welfare services, such as welfare or in-state tuition, to its citizens. *Id.* at 123-24. Further, as James Kushner notes,

the standards are not, however, absolute. A state may not impose an income tax exclusively on nonresident commuters or emigrating residents, and a city might not be able to offer public employment to its own state and city residents, or prefer local vendors, but a state may impose greater restrictions on or charge significantly higher fees for nonresident hunting licenses, recreation access, or boat mooring, or provide other resident hunting preferences, prefer resident estate administrators, limit dumping access to public landfills, limit parking to city residents, and excluding nonresidents from state insurance programs, limit compensation for crime victims to state residents, or limit subsidy and assistance programs to its residents, place limits on the exportation of natural resources or generated utilities, and limit gun permits or limit notice to next of kin of ward in guardianship proceedings to county residents, *because the clause is limited to fundamental rights, such as medical services, the right to be free from higher taxes, and the right to a livelihood, as in the case of employment or professional licensing, such as licensing to practice law.*

JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION § 6:12 (2003) (citations omitted) (emphasis added).

80. *But see* Grand Canyon Dories, Inc. v. Idaho Outfitters and Guides Bd., 709 F.2d 1250, 1256-57 & n.1 (9th Cir. 1983) (determining that the fee differential for outfitter and guide licenses was valid under the Commerce Clause because “the license fee differential is too small to have anything but an incidental effect on interstate commerce,” and noting that plaintiffs did not raise the Privileges and Immunities issue); Broeckl v. Chicago Park Dist., 544 N.E.2d 792, 796 (Ill. 1989) (upholding a law allowing for higher mooring fees for non-Chicago residents because the Privileges and Immunities Clause does not prohibit *intrastate* differential fees); 44 Or. Op. Att’y Gen 407, at \*5-6 (1985) (stating that an Oregon law charged nonresidents seeking outfitter and guide licenses more only if they were residents of a state that imposed similar discriminatory fees against nonresidents and that the act was constitutional because it “does not involve the type of discrimination which the Privileges and Immunities Clause was designed to prevent” in that it attempted “to remove barriers to out-of-state business by Oregon outfitters and guides”).

*Carlson* exception comes from the unique position of the Alaskan economy: specifically, the important role that oil revenues play in the funding of fishing services.

#### IV. ALASKA'S OIL REVENUE STRUCTURE

When Alaska drafted its constitution in 1955-56, one of the problems facing the State was the drain of natural resources out of the state; nonresidents were often responsible for developing those resources, so they benefited from the money generated.<sup>81</sup> To retain the benefits of these resources for residents, the constitution included the following requirement: "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the state, including land and water, for the maximum benefit of its people."<sup>82</sup> To facilitate this requirement, the general fund created a depository for the "proceeds of sales, fees, rents, royalties or other receipts from the land paid to the state . . . and the legislature may provide for payments in lieu of taxes to local governments."<sup>83</sup> These proceeds are paid to the State because "all land in the state and all minerals not previously appropriated [as of February 21, 1983] are the exclusive property of the people of the state and the state holds title to the land and minerals in trust for the people of the state."<sup>84</sup>

During the 1960's-70's, Alaska saw an increase in state revenues generated by oil production. In 1969, the State auctioned drill rights to the state-owned land at Prudhoe Bay.<sup>85</sup> "This lease sale not only provided the state with an immediate \$900 million, it also, for the long term, put the state into the oil exploration and development business with the winning oil companies as its partners."<sup>86</sup> Because of the growth of the oil industry and the money earned by the State of Alaska, "oil revenues have paid for most of the state

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81. Alaska Permanent Fund Corp., *supra* note 5, at 4-5. The Permanent Fund Corporation was established to "manage and invest the assets of the permanent fund." ALASKA STAT. § 37.13.040 (Michie 2002).

82. ALASKA CONST. art VIII, § 2.

83. ALASKA STAT. § 38.05.504 (Michie 2002). The general fund holds "all money the state receives that is not specifically designated to go into one of the other accounts of the state," such as the Permanent Fund. The Institute of Social and Economic Research, The Alaska Citizen's Guide to the Budget, § 6.3 General Fund (updated Dec. 12, 2003), at [http://citizensguide.uaa.alaska.edu/6.STATE\\_ASSETS/6.3\\_general\\_funds.htm](http://citizensguide.uaa.alaska.edu/6.STATE_ASSETS/6.3_general_funds.htm) (last visited February 27, 2004) (hereinafter "Alaska Citizen's Guide").

84. ALASKA STAT. § 38.05.502.

85. Alaska Permanent Fund Corp., *supra* note 5, at 1.

86. *Id.*

and a large share of the local government expenditures benefiting both Alaska businesses and households.”<sup>87</sup>

The structure of the budget puts the State in a different position from other states where “[b]usiness and household taxes and fees paid by the new business and its workers are sufficient to pay for the public services.”<sup>88</sup> In light of the fact that “a very high proportion of total state revenues are derived from petroleum production,”<sup>89</sup> and because these revenues are held “in trust for the people of the state,”<sup>90</sup> the citizens have a more proprietorial interest in the revenues earned by the State through oil revenues. The Alaska Supreme Court stated the oil revenues “could have been used to benefit residents through various other programs and they are, analytically, equivalent to ‘taxes which only residents pay.’”<sup>91</sup> Oil revenues “prevent[] citizens from having to pay state income or sales taxes.”<sup>92</sup> That oil production outweighs all other sources of state revenue means that a much higher proportion of state expenditures are made through revenues that belong only to Alaska residents. “Because a high and identifiable percentage of that fund . . . comes from petroleum revenues, i.e., from taxes and royalties generated by oil and gas production in Alaska[, t]hose Alaska petroleum revenues belong totally to Alaskans—non-Alaskans have no personal stake in them.”<sup>93</sup> Therefore, an Alaska resident has more of a proprietorial interest in how much Alaska pays for fisheries management than, for example, an Alabama resident may have in the money spent on wild duck conservation.

## V. CARLSON V. STATE AND THE PRIVILEGES AND IMMUNITIES WRINKLE

### A. Does *Carlson* violate the rules established in *Toomer*?

Aside from *Carlson*, all other cases where a state charged a nonresident in pursuit of a livelihood or some other fundamental

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87. Alaska Citizen’s Guide, § 11.1 The Alaska Disconnect, at [http://citizensguide.uaa.alaska.edu/11.BUDGET\\_FAQs/11.1\\_AK\\_Disconnect\\_FAQ.htm](http://citizensguide.uaa.alaska.edu/11.BUDGET_FAQs/11.1_AK_Disconnect_FAQ.htm) (last visited Feb. 23, 2004).

88. *Id.*

89. *Carlson I*, 798 P.2d 1269, 1278 (Alaska 1990).

90. ALASKA STAT. § 38.05.502.

91. *Id.*

92. Samantha K. Sherman, *Information is Alaska’s Greatest Untapped Resource*, 8 ENVTL. LAW. 215, 233 (2001).

93. Email from Steve White, Assistant Attorney General, Natural Resources Section, Alaska, and counsel for Alaska in *Carlson* (Jan. 15, 2004) (on file with author).

right a differential fee have ended with the statute being declared unconstitutional under the Privileges and Immunities Clause.<sup>94</sup> Because *Carlson* appears to be a departure from this trend, some might argue that the Alaska Supreme Court got it wrong, that the 3:1 fishing fee differential is in fact a flagrant violation of the rules established in *Toomer*.<sup>95</sup> According to Justice Brennan,

*Toomer* held that a classification based on the fact of noncitizenship was constitutionally infirm “unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.” Moreover, even where the problem the State is attempting to remedy is linked to the presence or activity of nonresidents in the State, the Clause requires that there be ‘a reasonable relationship between the danger represented by non-citizens, as a class, and the . . . discrimination practiced upon them.’<sup>96</sup>

If one assumes that the Supreme Court would take a more restrictive view of *Toomer*, as Justice Brennan did in the above passage, an argument could be made that Alaska has not proven that non-resident fishermen are an evil to the state and that the fee differential is not reasonably related to correcting that evil.

However, it is important to note that Justice Brennan was a dissenter in *Toomer* and that the test in *Toomer* is expressed in positive terms: a state *may* have discriminatory fees *if* the discrimination “merely compensate[s]” the state or equates to a tax which only residents pay.<sup>97</sup> *Toomer* states that the state may “charge non-residents a differential that would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay.”<sup>98</sup> As the Alaska Supreme Court stated, “[N]either the Commerce Clause nor the Privileges and Immunities Clause prevented the imposition of an increased fee for nonresident commercial fishers.”<sup>99</sup> This view of a positive test was also articulated by the Fourth Circuit when they stated that a differential fee “may be imposed on the nonresident if the object of that higher tax or fee is to place the

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94. See *Mullaney v. Anderson*, 342 U.S. 415, 418 (1952); *Toomer v. Witsell*, 334 U.S. 385, 398 (1948); *Tangier Sound Waterman’s Ass’n v. Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993).

95. *But see Murray*, *supra* note 77, at 168-70 (approving of the Alaska Supreme Court’s decision in *Carlson II*).

96. *Baldwin v. Fish and Game Comm’n of Mont.*, 436 U.S. 371, 400 (1978) (Brennan, J., dissenting) (quoting *Toomer*, 334 U.S. at 398-99).

97. *Toomer*, 334 U.S. at 399.

98. *Id.*; see also *Mullaney*, 342 U.S. at 417.

99. *Carlson III*, 65 P.3d 851, 856 (Alaska), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 387 (2003).

burden so that it will bear as nearly as possible equally upon all [residents and nonresidents].”<sup>100</sup>

It is also possible to distinguish *Carlson* from *Toomer* and its progeny on the facts. One factual distinction between the previous cases and *Carlson* is the size of the fee differential.<sup>101</sup> In *Toomer*, South Carolina was charging nonresident fishermen one hundred times more than resident fishermen.<sup>102</sup> In *Mullaney*, Alaska was charging nonresidents ten times more.<sup>103</sup> In the more recent *Tangier Sound*, Virginia was charging nonresidents an extra \$1,150 for a commercial fisherman’s harvester’s license on top of those fees paid both by residents and nonresidents.<sup>104</sup> In contrast to these cases, the fee differential in *Carlson* was only 3:1. For fishing licenses, residents paid \$30 for the license and nonresidents paid \$90 and, for entry permits, residents paid between \$50 and \$250 and nonresidents paid between \$150 and \$750, depending on the fee class.<sup>105</sup> The total difference between the most expensive commercial fishing fee for residents and nonresidents is \$560, half the difference of *Tangier Sound*.

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100. *Tangier Sound Waterman’s Ass’n v. Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993) (internal quotation omitted).

101. Seemingly, under the Privileges and Immunities Clause, *any* unjustified fee differential would violate the Constitution. *Paul v. Virginia*, 75 U.S. 168, 180 (“It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States . . .”). Under Commerce Clause jurisprudence, the impact of a fee differential on interstate commerce is an essential inquiry. *See Grand Canyon Dories, Inc. v. Idaho Outfitters and Guides Bd.*, 709 F.2d 1250, 1256-57 (9th Cir. 1983) (finding no Commerce Clause violation where “the license fee differential is too small to have anything but an incidental effect on interstate commerce”). However, the Alaska Supreme Court stated that the State need only show “practical equality” to pass Privileges and Immunities scrutiny. *Carlson II*, 919 P.2d 1337, 1342 (Alaska 1996), *cert. denied*, 519 U.S. 1101 (1997). If the State demonstrates that “the means employed by its statute have a substantial enough relationship to the [statute’s] legitimate interest to survive Privileges and Immunities review,” then the State must show only a “reasonable relation between the higher fees and the higher cost.” *Carlson III*, 65 P.3d at 863 (quoting *Mullaney*, 342 U.S. at 418).

102. *Toomer*, 334 U.S. 395.

103. *Mullaney*, 342 U.S. at 416.

104. *Tangier Sound*, 4 F.3d at 265-66 (noting that “[i]n addition to this nonresident harvester’s license fee, nonresident commercial fishermen are also required to pay all of the license fees applicable to resident commercial fishermen.”).

105. *Carlson III*, 65 P.3d at 853-54 (citing ALASKA STAT. § 16.43.160(b) (Michie 1983) (amended 1984) (license fees); ALASKA STAT. §§ 16.43.200-225 (Michie 2000) (entry permit fees)).

Another way to distinguish *Carlson* on the facts is by looking at the weight of the evidence presented by Alaska in the current case.<sup>106</sup> In the three preceding cases, the courts all cited the lack of evidence that the fee differential “merely compensated” the state or equated fees paid by nonresidents to resident-only taxes.<sup>107</sup> However, in *Carlson*, “[t]he record contains a lengthy and detailed analysis of the revenues and expenditures connected with fisheries management.”<sup>108</sup> In fact, much of the continuing litigation in the matter has been over what numbers the State is allowed to use in its calculation of its annual budget and how the nonresident share is to be determined.<sup>109</sup> The State is not relying on a mere “bald assertion to establish a reasonable relation between the higher fees and the higher cost to [Alaska]” which the court warns against in *Mullaney*.<sup>110</sup> Though the Supreme Court also warned, “[c]onstitutional issues affecting taxation do not turn on even approximate mathematical determinations,”<sup>111</sup> it is evident from the outcome of previous cases that a state needs to provide verifiable and concrete budgetary evidence that residents and nonresidents were treated substantially equally. The Alaska court has continually attempted to refine the equation and allowable budgetary items to determine whether the State is in fact within the strictures of *Toomer*:

We should clarify, however, that a refund will only be necessary if the difference between the actual fees charged to resident and

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106. One procedural difference between *Carlson* and earlier cases is that the Alaska courts have allowed the State to introduce and refine its evidence of expenditures throughout the case. See, e.g., *Carlson III*, 65 P.3d at 855 (explaining that “[b]ecause the appropriateness of a 3:1 fee differential had not been addressed, we remanded the case for such a determination, placing the burden of persuasion on the State.”).

107. *Mullaney*, 342 U.S. at 418 (stating “[t]here is no warrant for the assumption that the differential in fees bears any relation to this difference in cost, nothing to indicate that it ‘would merely compensate’ for the added enforcement burden”); *Toomer*, 334 U.S. at 398 (stating that “[n]othing in the record indicates . . . that the cost of enforcing the laws against [nonresidents] is appreciably greater, or that any substantial amount of the State’s general funds is devoted to shrimp conservation”); *Tangier Sound*, 4 F.3d at 267 (holding that “[t]he additional fee imposed on the nonresidents as computed does not reach to the goal of equality of treatment between resident and nonresident . . . [and that n]o evidence before [them] indicate[d] that this ha[d] been done.”).

108. *Carlson I*, 798 P.2d 1269, 1271 (Alaska 1990).

109. *Carlson III*, 65 P.3d at 863-69; *Carlson II*, 919 P.2d 1337, 1342-45 (Alaska 1996).

110. *Mullaney*, 342 U.S. at 418.

111. *Id.*

nonresident commercial fishers is substantially in excess of the allowable fee differential indicated by the formula, such that the actual fees do not bear a reasonable relationship to costs not otherwise paid by nonresidents. We leave to the superior court on remand to determine whether proportionality exists in any particular instance and whether a refund is due.<sup>112</sup>

Because *Carlson* fits within both the legal language of *Toomer* and because the facts of the case are distinguishable from the precedent, *Carlson* is not a violation of the rules established in *Toomer*.

#### B. Fitting *Carlson* within the *Toomer* test

Because oil revenues are used to fund many of the fisheries enforcement and conservation, these revenues create a wrinkle in the Privileges and Immunities Clause that may not exist for other states. Past differential fee statutes were struck down because the state could not prove that the residents did in fact pay more than nonresidents.<sup>113</sup> Because of the overwhelming dominance of oil revenues in the state's budget and because those revenues are held "in trust for the people of the state,"<sup>114</sup> the cost to residents is easier to prove and more direct.

In discussing how the oil revenues interact with the Privileges and Immunities Clause, several quotes from the cases discussed above are illustrative. First, in *Toomer*, the Supreme Court said that a state had to show that "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 [fisheries] conservation.*"<sup>115</sup> The emphasis was added by the Alaska Supreme Court,<sup>116</sup> presumably showing its belief in the importance of the use of the general funds in the fishery-related agencies. Similarly, in *Carlson I*, the Alaska Supreme Court read *Toomer*

to mean that if nonresident fishermen paid the same taxes as Alaskans and these taxes were substantially the sole revenue source for the state out of which conservation expenditures were made, then differential fees would not be permissible. *That, however, is not the case in Alaska where a very high proportion of total state revenues are derived from petroleum production.*<sup>117</sup>

The court intimated that because oil production generates so much of the state's revenue, the unique economic structure of the state

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112. *Carlson III*, 65 P.3d at 864.

113. *Mullaney*, 342 U.S. at 418; *Toomer v. Witsell*, 334 U.S. 385, 398; *Tangier Sound Waterman's Ass'n v. Pruitt*, 4 F.3d 264, 267 (4th Cir. 1993).

114. ALASKA STAT. § 38.05.502 (Michie 2002).

115. *Toomer*, 334 U.S. at 398.

116. *Carlson I*, 798 P.2d 1269, 1275 (Alaska 1990).

117. *Id.* at 1278 (emphasis added).

exempts it from the normal application of the *Toomer* rule. The court continued: “These revenues could have been used to benefit residents through various other programs and they are, analytically, equivalent to ‘taxes which only residents pay.’”<sup>118</sup> Because of the relationship between the oil revenues and the citizens’ quasi-ownership of these revenues,<sup>119</sup> using revenues to pay for fisheries management takes away money directly from the residents of the state.

The per-capita formula accepted by the Alaska Supreme Court in *Carlson II* calculates that “the resident contribution can be compared to the difference in fees paid by nonresidents to determine if the fee differential is constitutional.”<sup>120</sup> The comparison is not between what residents paid for licenses versus what nonresidents paid. Rather, the nonresident contribution is compared to the total expenditures by the State. The “resident contribution” is all the money paid by residents for licenses *and* the money forgone by residents in order to cover the additional expenditures of the fishery agencies, that is the money from the “general funds.”

In determining which expenditures would be allowed in the State’s calculation of its fisheries budget in *Carlson III*, the court separated out expenses that were directly related to fisheries management and ensured that these expenses were not counted elsewhere in the state budget. For example, the State could not include general governmental expenses because while “the State may bear much of the cost of government generated by the fishing industry, this does not translate into a legal justification for including these costs in the fisheries expenditures.”<sup>121</sup> Further, hatchery loan subsidies, and other conservation-related efforts, were includable because they represented “forgone revenues that the State could otherwise spend.”<sup>122</sup> All of these determinations reflect the court’s desire to determine what exactly the residents of the state are paying into the general funds either by direct payments or by forgone benefits. The importance of oil revenues in Alaska’s economy creates this unique situation in which money not spent elsewhere could actually be forgone benefits.

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118. *Id.*

119. *Id.*

120. *Carlson II*, 919 P.2d 1337, 1343 (Alaska 1996).

121. *Carlson III*, 65 P.3d 851, 866 (Alaska), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 387 (2003).

122. *Id.* at 867-68.

## VI. CONCLUSION

Because of the lopsided makeup of Alaska's economy and the unique place of the oil revenues in the state's budget, the Privileges and Immunities Clause is not violated when Alaska charges non-residents more for fishing licenses than it does residents. Because the State can, through oil revenues in the general fund, show a direct relationship between the costs borne by residents in the maintenance of the fisheries management, Alaska can prove that fee differential is merely compensating the State for extra costs created by nonresident commercial fisherman and putting residents and nonresidents on equal footing.

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