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Carlson v. State: Fair Fees For Fishing Far From Home

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CARLSON v. STATE: FAIR FEES FOR FISHING FAR FROM HOME

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"[A]ll men are equal before fish."[1]

I. INTRODUCTION

Every year the abundance of marine life attracts nonresident commercial fishermen to the icy waters off the coast of Alaska.[2] The State of Alaska charges these nonresident commercial fishermen three times as much as resident commercial fishermen for fishing licenses[3] and limited entry permits.[4] In *Carlson v. State*,[5] a class representing all nonresident commercial fishermen challenged the constitutionality of these fee differentials.[6] Specifically, the class alleged the violation of rights afforded by the Commerce Clause[7] and the Privileges and Immunities Clause[8] of the United States Constitution.[9] A majority of the Supreme Court of Alaska held that the case did not implicate the Commerce Clause.[10] The court did, however, entertain the class's challenge under the Privileges and Immuni-

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1. THE GREAT QUOTATIONS 331 (George Seldes ed., 1960) (quoting Herbert C. Hoover).

2. *See, e.g.*, Commercial Fisheries Entry Commission, *1997 Permit Status Report for All Fisheries* (visited Jan. 27, 1998) <http://www.cfec.state.ak.us/PSTATUS/14051997.HTM>.

3. *See infra* note 36.

4. *See infra* note 37.

5. 919 P.2d 1337 (Alaska 1996).

6. *Id.*

7. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States."

8. U.S. CONST. art. IV, § 2, cl. 1. The Privileges and Immunities Clause provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

9. Carlson v. State, 919 P.2d at 1338.

10. *Id.* at 1340-41.

ties Clause.[11] The court endorsed a formula that given more finalized budgetary figures would test the constitutionality of Alaska's nonresident commercial fishery fee differentials under the Privileges and Immunities Clause.[12] The court remanded the case to the superior court to ascertain those figures and to apply the formula.[13]

This Note analyzes the treatment of nonresident commercial fishery fee differentials under the Privileges and Immunities Clause of the U.S. Constitution. Part II traces the development of case law in this field. Part III assesses the Supreme Court of Alaska's adoption and endorsement of a mathematical formula to determine the constitutionality of Alaska's nonresident commercial fishery fee differentials. Part IV considers whether this formula could be a model against which the constitutionality of other nonresident commercial fishery fee differentials could be judged. This Note concludes that a system of taxation unique to Alaska will likely confine the application of the formula to that state.

II. LEGAL HISTORY OF COMMERCIAL FISHING FEE DIFFERENTIALS UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE

Since 1948, the scope of nonresident commercial fishery fee differentials has been defined under the Privileges and Immunities Clause of the U.S. Constitution.[14] Prior to 1948, courts routinely held that the Constitution did not guarantee equal treatment to residents and nonresidents in the taking of fish.[15] States established nonresident license fees that effectively priced nonresidents out of their fisheries.[16] In Texas, for example, while residents were charged $3 to license their vessels, nonresidents were charged $2500; a differential of 83,333.33%.[17] It was to this kind of injustice that the U.S. Supreme Court responded in 1948.

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11. *Id.* at 1341-44.
12. *Id.* at 1342-44.
13. *Id.* at 1344.
14. *See infra* notes 18-34 and accompanying text.
15. *See* Toomer v. Witsell, 73 F. Supp. 371, 376 (E.D.S.C. 1947) The court stated: "It is well settled . . . that these constitutional provisions do not require the state to accord equality of treatment to non residents and residents with respect to the taking of fish . . . . *Id.*
16. *See infra* note 17 and accompanying text.
17. *See* Brownsville Shrimp Co. v. Miller, 207 S.W.2d 911, 912 (Tex. 1947).

A. Toomer v. Witsell

Modern Privileges and Immunities jurisprudence is widely regarded as stemming from the U.S. Supreme Court's 1948 *Toomer* decision.[18] In *Toomer*, the Supreme Court invalidated a South Carolina statute that required nonresidents to pay one hundred times more than South Carolina residents for a license to fish commercially for shrimp in the three-mile maritime belt off the coast of that state.[19] In reaching this conclusion, the Court rejected a Commerce Clause challenge to the statute[20] and developed a new two-step test to assess the constitutionality of discrimination against nonresidents under the Privileges and Immunities Clause.[21]

The *Toomer* two-step test recognized that "[l]ike many other constitutional provisions, the Privileges and Immunities Clause is not an absolute"[22] but nevertheless strictly limited discrimination against nonresidents to "where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[23]

The Court applied the two-step test to the facts of *Toomer* and concluded that although a State could legitimately:

> charge non-residents a differential which would merely compensate . . . for any added enforcement burden . . . or for any conservation expenditures from taxes which only residents pay[,] [w]e would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger

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18. Toomer v. Witsell, 334 U.S. 385 (1948); *see generally* Werner Z. Hirsch, *The Constitutionality of State Preference (Residency) Laws Under the Privileges and Immunities Clause*, 22 SW. U.L. REV. 1, 12 n.47 (1992) (stating that the *Toomer* decision marks the beginning of the Supreme Court's modern privileges and immunities analysis); John A. Coppede, Note, *Constitutional Law--Wyoming Upholds a Resident Laborer Preference Statute. State v. Antonich, 694 P.2d 60 (Wyo. 1985)*, 21 LAND & WATER L. REV. 219, 220 (1986).

19. Toomer v. Witsell, 334 U.S. at 403.

20. *Id.* at 394-95. The Supreme Court reasoned that "the taking of shrimp occurs before the shrimp can be said to have entered the flow of interstate commerce." *Id.*

21. *Id.* at 396.

22. *Id.*

23. New Hampshire v. Piper, 470 U.S. 274, 284 (1984) (citing Toomer v. Witsell, 334 U.S. at 396). The utility of using the *Piper* test is that it puts the language of *Toomer* into one sentence.

represented by non-citizens, as a class, and the severe discrimination practiced upon them.[24]

B. Mullaney v. Anderson

The United States Supreme Court reaffirmed the *Toomer* two-step test in its *Mullaney* decision.[25] In *Mullaney*, the Supreme Court invalidated an Alaska statute that required nonresidents to pay ten times more than Alaska residents for a license to fish in what then were Alaska's territorial waters.[26] The Territorial government of Alaska asserted that under the *Toomer* two-step test the added costs of enforcing the licensing requirements against nonresident commercial fishermen bore a substantial relationship to the level of discrimination imposed.[27] The Court, however, concluded that the challenged discrimination faltered at the second step of the test, and stated that "something more is required than [a] bald assertion to establish a reasonable relation[ship] between the higher fees and the higher cost to the Territory."[28]

C. Tangier Sound Waterman's Association v. Pruitt

In 1993, the Fourth Circuit Court of Appeals gave its own interpretation of the *Toomer* two-step test in its *Tangier Sound*[29] decision. In *Tangier Sound*, the Fourth Circuit invalidated a Virginia statute that charged out-of-state commercial fishermen an extra $1150 for a "special nonresident harvester's license."[30] Virginia defended the $1150 differential, stating that it represented a nonresident's share of the state's resource management costs.[31] The State reached the $1150 sum by dividing the budget of Virginia's marine management program (the numerator) by the number of resident commercial fishermen (the denominator).[32] The Fourth

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24. Toomer v. Witsell, 334 U.S. at 399.
25. Mullaney v. Anderson, 342 U.S. 415 (1952).
26. *Id.*
27. *Id.* at 417-18.
28. *Id.* at 418.
29. Tangier Sound Waterman's Ass'n v. Pruitt, 4 F.3d 264 (4th Cir. 1993).
30. *Id.* at 268.
31. *Id.* at 267.
32. *Id.* at 265.

Circuit, however, held that the fee differential tripped on the second step of the *Toomer* test.[33] The court reasoned that in calculating the fee differential of $1150, the facts and figures represented in both the numerator and denominator of the State's formula were inappropriately determined.[34]

III. *CARLSON V. STATE*

A. Facts and Procedure

In 1984, a class representing all nonresident commercial fishermen challenged Alaska's practice of charging them three times as much as resident commercial fishermen[35] for commercial fishing licenses[36] and limited entry permits.[37] Among other allegations,[38] the class claimed that

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33. *Id.* at 267.

34. The Fourth Circuit explained that Virginia had overstated the numerator by failing to recognize the sums that nonresidents contributed in the form of various fees and sales taxes. The court further noted that Virginia should have used the number of Virginia taxpayers as the denominator. Tangier Sound Waterman's Ass'n v. Pruitt, 4 F.3d at 267-68. Indeed, it seems that the Fourth Circuit was advocating a formula similar to the one adopted by the class in *Carlson II*. *See infra* note 53.

35. Brief of Appellants at 2, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

36. ALASKA STAT. § 16.05.480 (a) (Michie 1996).

> A person engaged in commercial fishing shall obtain a commercial fishing license. The fee for the license is $30 for residents, and $90 for nonresidents. Except for those which are also entry or interim-use permits, all commercial fishing licenses are nontransferable. The commercial fishing license shall be retained in the possession of the licensee, readily accessible for inspection at all times. No more than one fee may be charged annually against a person. For the purposes of this section, "commercial fishing license" includes entry permits and interim-use permits issued under AS 16.43 and crewmember fishing licenses.

Id.

37. ALASKA STAT. § 16.43.160(a)-(b) (Michie 1996).

> (a) The commission [Commercial Fisheries Entry Commission] shall establish annual fees for the issuance and annual renewal of entry permits or interim-use permits. The amount paid by a permit holder under the provisions of AS 16.05.480 shall be credited by the commission toward payment of the fee charged under this section. No more that one credit may be obtained annually by a person.
>
> (b) Annual fees established under this section shall be no less than $10 and no more than $750 and shall reasonably reflect the different rates of economic return for different fisheries. The amount of an annual fee for a nonresident shall be three times the amount of the annual fee for a resident.

the fee differentials violated two clauses of the U.S. Constitution: the Privileges and Immunities Clause and the Commerce Clause.[39] The superior court granted a motion for summary judgment by the State,[40] and the class appealed to the Supreme Court of Alaska (*Carlson I*).[41]

The *Carlson I* court somewhat passed over the Commerce Clause claim[42] and concentrated on the Privileges and Immunities action.[43] The court first ruled that commercial fishing was a sufficiently important activity to come within the purview of the Privileges and Immunities Clause.[44] The court then determined that the fee differentials passed the first step of the *Toomer* test by holding that equalizing the burden of fisheries management was a substantial state interest.[45] The court, however, concluded that the record was insufficient to pass judgment on the second step of the *Toomer* test.[46] The court thus partially reversed the grant of summary judgment to the State and remanded the case back to the superior court.[47] The issue remanded was framed as follows:

> The appropriate inquiry is . . . whether all fees and taxes which must be paid to the state by a nonre

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Id.

38. The class initially challenged the authority of Alaska to charge the fee differential between 1978 and 1982. This challenge was defeated at the first appeal. Brief of Appellants at 3, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590) (citing Carlson v. State, 798 P.2d 1269, 1278-79 (Alaska 1990)).

39. Brief of Appellants at 2-3, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

40. Brief of Appellee at 5, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

41. *Id.*

42. Carlson v. State, 798 P.2d at 1276-77. The Supreme Court of Alaska exhibited a reluctance to conclude whether the Commerce Clause was even implicated in the appeal. The Court weighed those cases that would involve the clause against those that would reject it. Ultimately, however, the Court failed to take a side on this issue. *Id.*

43. *Id.* at 1274-1278.

44. *Id.* at 1274. The Supreme Court of Alaska noted that for an activity to be protected under the Privileges and Immunities Clause it must be "sufficiently basic to the livelihood of the Nation . . . as to fall within the purview of the [clause]." *Id.* (citation omitted). Courts must make this threshold determination before they reach the *Toomer* two step test.

45. *Id.* at 1278.

46. *Id.*

47. Carlson v. State, 798 P.2d at 1278.

> state revenues to which nonresidents make no contribution are taken into account.[48]

The court placed the burden of proof on the State.[49]

The decisive issue on remand became the size of fee differential that would be allowable.[50] In cross-motions for summary judgment, each side advanced a competing formula to calculate this sum.[51] The class advanced a *per capita* formula, and the State advanced a *pro rata* formula.[52] Briefly stated, the class's *per capita* formula established a maximum allowable fee differential in a two-step formula by dividing the state's fisheries budget by the population of the state and then multiplying that figure by the percentage of total state revenues to which nonresidents made no contribution.[53] By contrast, the State's *pro rata* formula compared the percentages that residents and nonresidents paid of their *pro rata* share[54] of the state's fisheries budget.[55] Under this formula, the fee differential would be allowable so long as the percentage that residents paid of their *pro rata* share of the state's fisheries budget was equal to or greater than the corresponding percentage paid by nonresidents.[56]

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48. *Id.*

49. *Id.* at 1276. The significance of this action should not go unnoted. This was the first time that any court in a fee differentials case had unequivocally assigned the burden of persuasion with one or other of the parties. *See* Taylor v. Conta, 316 N.W.2d 814, 823 (Wis. 1982) (discussing the ambiguity of which party should bear the burden of proof in Privileges and Immunities cases). In *Taylor* the Supreme Court of Wisconsin suggested a reason for placing the burden with the state. The court explained that "[s]ince nonresidents are not represented in the . . . State's legislative halls, judicial acquiescence . . . would remit them to such redress as they could secure through their own State . . . ." *Id.* at 818. (citation omitted).

50. Brief of Appellants at 4, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

51. Carlson v. State, 919 P.2d 1337, 1339 (Alaska 1996).

52. *Id.*

53. Brief of Appellants at 5-6, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590). The class's *per capita* formula can be summarized in a simple equation:

$$\text{Maximum Fee Differential} = \frac{\text{Fisheries Budget}}{\textit{Alaska Population}} \times \% \text{ Total State Revenue to Which Nonresidents Make No Contribution}$$

Id. at 6.

54. The *pro rata* share is determined by multiplying the percentage of permits held by residents or nonresidents by Alaska's fisheries budget. Carlson v. State, 919 P.2d at 1345.

55. Brief of Appellee at 14, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

56. *Id.* at 14-15.

The superior court initially adopted the class's *per capita* approach.[57] The State then successfully moved to reconsider, arguing that summary judgment was improperly granted because there were genuine issues of material fact over the figures that should be included in calculating the state's fisheries budget.[58] After reconsideration, the court adopted the State's approach, and, without ruling on the budgetary issue, it granted the State summary judgment.[59] The class again appealed to the Supreme Court of Alaska (*Carlson II*).[60]

B. Arguments on Appeal

On appeal, the class raised three arguments. First, the class argued that the crossing of interstate borders to enter Alaskan waters cloaked nonresident commercial fishermen with the protection of the Commerce Clause of the United States Constitution.[61] The class reasoned that under the United States Supreme Court's recent decision in *Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon*,[62] the discrimination[63] inherent in Alaska's nonresident commercial fishery fee differentials rendered them "virtually per se invalid" under the Clause.[64]

Second, the class argued that Alaska's nonresident fee differentials violated the Privileges and Immunities Clause of the U.S. Constitution.[65] This argument began with an absolute assertion that no fee differential was allowable under the Clause.[66] The class explained this stance by contend-

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57. *Id.* at 7.

58. Brief of Appellants at 8, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590). The State argued that an extra fifteen categories should have been included in the figures comprising Alaska's fisheries budget. *Id.*

59. Brief of Appellee at 7, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

60. Brief of Appellants at 13, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

61. *Id.* at 13-24.

62. 511 U.S. 93 (1994).

63. The class argued that in this case "discrimination" meant nothing more than the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Brief of Appellants at 15, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590) (citing Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon, 511 U.S. at 99).

64. Brief of Appellants at 15-17, Carlson v. State, 919 P.2d 1337 (Alaska 1997) (No. S-6590).

65. *Id.* at 24-38.

66. *Id.* at 25.

ing that under the Fourth Circuit's *Tangier Sound* decision it was unlikely that Alaska's fee differentials could pass the second step of the *Toomer* test.[67] The class then argued that any residual chance of the fee differentials passing the *Toomer* two-step test was absolutely foreclosed by the U.S. Supreme Court's decision in *Oregon Waste Systems*.[68] The class recognized that *Oregon Waste Systems* had been decided under the Commerce Clause and responded by presenting evidence of the "mutually reinforcing relationship" between the Commerce Clause and the Privileges and Immunities Clause.[69] The class concluded this argument by positing that even if some fee differential were allowable under the Privileges and Immunities Clause, its *per capita* formula was better suited to Privileges and Immunities analysis than the State's *pro rata* formula.[70]

Finally, the class argued that it was "entitled to a refund with statutory prejudgment interest of all unlawfully exacted license and permit fees from the date the class action was filed."[71]

The State responded to the class by raising two arguments on appeal.[72] First, the State argued that its fee differentials did not violate the Privileges and Immunities Clause.[73] The State supported this assertion by arguing that its *pro rata* formula was the appropriate choice for a Privileges and Immunities case.[74] The State then showed that under the *pro rata* formula, the fee differentials did not violate the Privileges and Immunities Clause.[75]

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67. *Id.* at 28-32.

68. *Id.* at 33-38.

69. *Id.* at 33. This relationship stretches back to the Articles of Confederation. The Privileges and Immunities Clause and the Commerce Clause both appeared in Article IV. SAMUEL A. PLEASANTS III, THE ARTICLES OF CONFEDERATION 45 (1968).

70. Reply Brief of Appellants at 19-28, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590). It appears that the class made this argument as something of an afterthought. The class stated: "Comparing methodologies is an irrelevant and futile exercise if the underlying attribution rationale violates the Commerce and Privileges and Immunities Clauses." *Id.* at 19.

71. Brief of Appellants at 38-47, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

72. Brief of Appellee at 1, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590). In a footnote, the State formally recognized the class's third argument about its entitlement to a refund. The State, however, concluded that this argument presented no issue on appeal. *Id.*

73. *Id.* at 11-33.

74. *Id.* at 11-21. The general theme of this argument ran that because the theoretical basis allowing higher fees for nonresidents was the recovery of costs related to benefits provided, a *per capita* approach made no sense. *Id.*

75. *Id.* For example, the State's figures show that in 1989 while resident commercial

In advancing this argument, the State noted that the class's *per capita* formula had never been followed by any court or commentator.[76]

Second, the State argued that its fee differentials could not violate the Commerce Clause because the fee differentials in question were not subject to scrutiny under the Clause.[77] The State explained this position by stating that in Commerce Clause cases, "[t]he Supreme Court focuses on the particular activity that triggers the state tax or fee[,]" and that in this case "the activity that triggers Alaska's fees is participating in the state's commercial fisheries, not entering the state."[78]

C. The Carlson II Decision

The case invited the Supreme Court of Alaska to decide the constitutional issues *de novo* and to evaluate the superior court's adoption of the State's *pro rata* formula.[79] Writing for a majority, Justice Compton began the opinion by rejecting the class's argument that the case should be decided under the Commerce Clause.[80] The court reasoned that unlike *Oregon Waste Systems*, the fee differentials in this case were not "predicated upon the movement of articles of commerce across state lines, but rather upon the residency status of those applying for permits."[81] The Supreme Court of Alaska noted that the U.S. Supreme Court analyzes statutes based on residency under the Privileges and Immunities or Equal Protection Clauses of the U.S. Constitution.[82]

The Supreme Court of Alaska next analyzed the class's Privileges and Immunities action. The court recognized that the *Carlson I* court had settled certain preliminary threshold issues and moved straight to an analysis of whether the fee differentials could pass the second step of the *Toomer* test.[83] The court began this analysis by rejecting the class's

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fishermen paid ninety percent of their *pro rata* share of the state's fisheries budget, nonresident commercial fishermen paid only forty-one percent. Therefore, under the State's formula, the fee differentials were constitutional that year. *Id.* at 20.

76. *Id.* at 24-28.

77. *Id.* at 33-37.

78. Brief for Appellee at 34-35, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

79. Carlson v. State, 919 P.2d 1337, 1339 (Alaska 1996).

80. *Id.* at 1340-41.

81. *Id.* at 1340.

82. *Id.* at 1340-41.

83. *Id.* at 1341-42.

argument that the U.S. Supreme Court's *Oregon Waste Systems* decision prohibited the State from arguing that its fee differentials were nondiscriminatory.[84] The Supreme Court of Alaska explained this rejection by stating that it would not be "analytically sensible" to use the reasoning of a Commerce Clause case in resolving this Privileges and Immunities issue.[85] The court further reasoned that contrary to the class's contentions, the kind of fee differential denounced in *Oregon Waste Systems* was not the same as the one the *Carlson I* court had outlined in the issue it remanded to the superior court.[86]

The Supreme Court of Alaska continued its Privileges and Immunities analysis with an evaluation of the competing formulae advanced by the class and the State on appeal.[87] The court stated that the correct formula should "compare the relative burden placed on resident and nonresident commercial fishers."[88] The court concluded that the class's *per capita* formula "does just this."[89] The court, however, remanded the case back to the superior court because issues concerning the budgetary items to be included in the formula remained unresolved from when the case was last at the superior court.[90] The Supreme Court of Alaska held that the superior court should determine the appropriate budget and apply it to the class's formula.[91] The Supreme Court of Alaska stated that if on doing this the state's nonresident commercial fishery fee differentials exceeded the

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84. *Id.* At 1342.

85. Carlson v. State, 919 P.2d 1337, 1342 (Alaska 1996). The Supreme Court of Alaska stated:

> In this case the Privileges and Immunities Clause question turns on whether there is a sufficient relationship between the higher fees charged nonresidents and the State's interest in imposing on nonresidents their share of the costs for managing the State's commercial fisheries. In *Oregon Waste Systems*, the issue was whether the interstate and intrastate taxes [were] imposed on sufficiently equivalent events such that they could be considered proxies for each other... These are different inquiries for which the analysis is not interchangeable.

Id. (citations omitted).

86. *Id.* The Supreme Court of Alaska noted that in *Carlson I* it had advocated a fee differential that would merely balance out any expenditures from taxes which only residents paid. By comparison, if applied to this case, the fee denounced in *Oregon Waste Systems* would impose on nonresidents their entire share of the costs of commercial fisheries management, while the residents' share would be borne by the entire population of Alaska. *Id.*

87. *Id.* at 1342-44.

88. *Id.* at 1343.

89. *Id.*

90. *Id.* at 1344.

91. Carlson v. State, 919 P.2d 1337, 1344 (Alaska 1996).

residents' *per capita* contribution, then the fee differentials must be stricken as violative of the Privileges and Immunities Clause.[92] Finally, on the question of a refund, the Supreme Court of Alaska held that if the superior court found for the class, "it must determine the date from which the class should be given a refund, and what, if any, interest is due on that refund."[93]

In a dissent to the *Carlson II* opinion, Justice Rabinowitz argued that the court erred in rejecting the U.S. Supreme Court's analysis in *Oregon Waste Systems* as inapposite in a Privileges and Immunities case.[94]

IV. DISCUSSION

In *Baldwin v. Fish and Game Commission of Montana*,[95] Justice Blackmun noted that the Privileges and Immunities Clause "is not one of the contours [of the Constitution] which have been precisely shaped by the process and wear of constant litigation and judicial interpretation . . . ."[96] This statement is suggestive of the uncertainty that surrounds the Privileges and Immunities Clause. The strength of the *Carlson II* opinion is that, at least in the field of commercial fisheries law, it goes a long way in ironing out the contours of uncertainty to which Justice Blackmun alluded. The opinion does this by endorsing an objective formula to test whether the state has met its burden of proof in the second step of the *Toomer* test.

A. The per Capita Formula

This Note contends that in selecting the class's *per capita* formula, the Supreme Court of Alaska made the correct choice. The Privileges and Immunities Clause of the U.S. Constitution was designed to protect

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92. *Id.*

93. *Id.*

94. *Id.* at 1346-49. The dissent argued that *Oregon Waste Systems* did not turn on the size of the fee differential, but rather on its very existence. *Id.* at 1347. If anything, the dissent's argument is strengthened by the United States Supreme Court's recent decision in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564 (1997) which applied a virtually per se rule of invalidity to a state law that it found facially discriminatory against interstate commerce.

95. 436 U.S. 371 (1978).

96. *Id.* at 379.

individual citizens.[97] This focus on the individual is the basic reasoning behind the class's use of a *per capita* formula.[98] The *per capita* formula assumes that all Alaskan residents, not just resident commercial fishermen, contribute to the state's fisheries budget.[99] The formula determines the differential that should be charged to establish substantial equality between resident and nonresident commercial fishermen.[100] Thus, by concentrating on the individual, the class's *per capita* formula ensures substantial equality for all.

By contrast, the State's focus on residents and nonresidents as groups ultimately results in inequality. The State's argument is based on the fact that, as a group, resident commercial fishermen contribute a higher percentage of their *pro rata* share of Alaska's fisheries budget than nonresident commercial fishermen.[101] From this position, the State reasoned that it has the right to recover the same *pro rata* share from nonresident commercial fishermen.[102] The inequity of this position can be demonstrated by the fact that under the State's own formula and figures, the maximum nonresident fee differential that could have been charged to nonresidents in one year was $5452.[103] This differential is more than ten

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97. *See, e.g.*, Toomer v. Witsell, 334 U.S. 385, 395 (1948) (stating that the Privileges and Immunities Clause "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").

98. Reply Brief of Appellants at 20, Carlson v. State, 919 P.2d 1337 (Alaska 1959) (No. S-6590).

99. Brief of Appellants at 5, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

100. The size of this differential is equal to the *per capita* contribution of any Alaska resident to the state's fisheries budget. By paying this amount, nonresidents would contribute to Alaska's fisheries budget in a substantially equal way. *See id.* at 7.

101. Brief of Appellee at 20, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590).

102. *Id.*

103. Under the State's formula and figures for 1989, the maximum permitted fee differential can be expressed by the following equation:

$$1989\ MFD = \frac{34{,}200{,}000\ (NFB)}{5646\ (NR)} \times \frac{.90\ (PPRS)}{1.0} = \$5452.00$$

MFD = Maximum nonresident fee differential
NFB = Nonresident share of fisheries budget
NR = Number of nonresident permit holders
PPRS = Percentage *pro rata* share paid by resident commercial fishermen as a group

Reply Brief for Appellants at 23, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590). The class used the figures from 1989 rhetorically to highlight a fundamental

times greater than the highest differential now levied in Alaska, over one hundred times greater than the Alaska fee differential held unconstitutional by the U.S. Supreme Court in *Mullaney*, and well over twice as large as the *Toomer* fee differential whose constitutionality the U.S. Supreme Court did not even seriously consider.[104]

B. The Future Applicability of the per Capita Formula

When the class's *per capita* formula is eventually applied on remand, it will determine in an instant whether Alaska's commercial fishery fee differentials are violative of the Privileges and Immunities Clause. It is the instantaneous nature of this formula that has the potential to revolutionize an area of the law that has thus far been characterized by slow, incremental change.[105] Important questions, however, remain about the applicability of the *Carlson II* formula outside of Alaska.[106] Those questions center around the calculation of the percentage of total state revenues to which nonresidents make no contribution. In Alaska, the calculation of this figure is relatively simple because the state is in the near unique[107] position of levying neither a sales tax[108] nor a state income tax.[109] In other states the calculation of this percentage may be unfeasibly time-consuming, prohibitively expensive, or both. Indeed, in dictum the U.S. Supreme Court expressed a certain unwillingness to "plunge . . . into the morass of

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weakness in the State's formula. In reality, however, a fee differential of $5452 would be prevented by the statutory limitations imposed by Alaska. *See supra* notes 36 and 37.

104. *Id.* at 24.

105. Reasons for this slow pace of change include: The early uncertainty over which party bore the burden of persuasion (*see supra* note 49 and accompanying text); and the relative scarcity of Privileges and Immunities Cases. *See supra* note 96 and accompanying text.

106. Virtually every state with a significant commercial fishing industry operates some kind of nonresident commercial fishing fee differential. Brief of Appellee at 3, Carlson v. State, 919 P.2d 1337 (Alaska 1996) (No. S-6590). *See, e.g.*, DEL. CODE ANN. tit. 7 § 914 (1994) (charging nonresidents ten times as much as residents for commercial fishing licenses).

107. New Hampshire is the only other state to levy neither a state sales nor a state income tax. *See infra* notes 108-09.

108. Federation of Tax Administrators, *State Sales Tax Rates* (visited Jan. 27, 1998) <http://www.taxadmin.org/fta/rate/sales.html>.

109. Federation of Tax Administrators, *State Individual Income Tax Rates* (visited Jan. 27, 1998) <http://www.taxadmin.org/fta/rate/ind_inc.html>.

weighing comparative tax burdens."[110] The problem that this statement raises is that even with some alternative to the class's *per capita* formula, a state is still faced with the burden of proving that the level of discrimination it practices is somehow closely related to a substantial state interest.[111] This burden, however, can only be met with the kind of comparative financial analysis that the Supreme Court spurned.[112]

V. CONCLUSION

In its *Carlson II* opinion, the Supreme Court of Alaska adopted an objective formula to test the constitutionality of that state's nonresident commercial fishery fee differentials under the Privileges and Immunities Clause of the U.S. Constitution. When this formula is applied on remand, it will determine to a mathematical certainty whether Alaska's nonresident commercial fishery fee differentials violate the Privileges and Immunities Clause. A system of taxation unique to Alaska makes an application of the formula relatively simple in that state. In other states, however, the systems of taxation in operation may make the formula impossible to apply. Ultimately, it seems that outside of Alaska, the future of the formula and perhaps the future of all nonresident commercial fishery fee differentials will depend on the systems of state taxation in operation, the sophistication of available statistics, and the willingness of courts to plunge into a morass that the Supreme Court dared not enter.

110. Oregon Waste Systems, Inc. v. Department of Environmental Quality of the State of Oregon, 511 U.S. 93, 105 (1994).

111. Toomer v. Witsell, 334 U.S. 385, 396 (1948).

112. *See supra* notes 18-34 and accompanying test. The cases discussed in this section strongly suggest that a state must present compelling financial evidence of a close relationship between the discrimination practiced and a substantial state interest.