



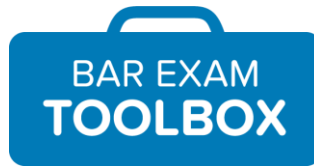
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're talking about the Privileges and Immunities Clause, as part of our "Listen and Learn" series. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on [BarExamToolbox.com](#), and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today we are going to be talking about the Privileges and Immunities Clause of Article IV of the Constitution – not to be confused with the Privileges or Immunities Clause of the Fourteenth Amendment.

Lee Burgess: The first task in any Privileges and Immunities Clause question is distinguishing between these two similar sounding clauses. Article IV, section 2 of the U.S. Constitution, otherwise known as the Privileges and Immunities Clause, bars states from intentionally discriminating against out-of-state citizens, also referred to on some exams as non-residents, concerning civil liberties or important economic activities. For example, a state passing or enforcing a law that imposes a \$500 fee for out-of-state miners to apply for a permit to drill on state land, but only a \$50 fee for in-state miners to apply for the same permit, could be challenged under the Privileges and Immunities Clause of Article IV. In contrast, the Privileges or Immunities Clause of the Fourteenth Amendment bars states from making or enforcing laws that infringe upon the privileges or immunities of national citizenship, rather than state citizenship.

Lee Burgess: So, here are the steps you want to take when identifying whether the Privileges and Immunities Clause applies. First, you must look at what legislative body passed the law. If it's Congress, then the Privileges and Immunities Clause does not apply. But if it's a state, then we may be talking Privileges and Immunities Clause, so you can move on to the next step.

Lee Burgess: The second step is to look at who the law applies to. If it distinguishes between residents and non-residents, then we are one step closer to determining whether this is a Privileges and Immunities Clause question. Here, you're looking for facts where one state is passing a law that affects the residents of a different state. If State X passes a law that distinguishes between residents of



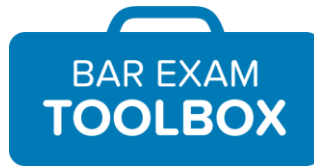
two towns within State X, then we are not dealing with a viable Privileges and Immunities Clause claim. But if State X passes a law that treats State X residents differently than those who are not State X residents, then we may have a viable Privileges and Immunities claim.

Lee Burgess: Finally, the last step to determining whether a law can be challenged under the Privileges and Immunities Clause is looking at whether the law concerns a civil liberty, like the right to vote or the right to interstate travel, or if it concerns an important economic activity, like the right to earn a livelihood. Here, facts that would satisfy this requirement would be, for example, a state infringing on a non-resident's ability to continue successfully running their business.

Lee Burgess: A quick note here: If out-of-state discrimination is sounding familiar to you, that is probably because you have already studied the [Dormant Commerce Clause](#). These concepts are similar, so they are sometimes tested in the same question, but it's important to keep them straight. And we have a couple tips for you to do just that. Now, we have already covered the Dormant Commerce Clause in another episode, but as a reminder, under the Dormant Commerce Clause, state and local governments generally cannot pass laws that, (a) discriminate against out-of-state commerce; or (b) place an undue burden on interstate commerce.

Lee Burgess: The first way to distinguish between the Privileges and Immunities Clause and the Dormant Commerce Clause is by assessing what the law is concerning. As evidenced by its name, the Dormant Commerce Clause concerns commerce, whereas the Privileges and Immunities Clause is broader and concerns civil liberties. But here's where the two clauses overlap: Remember that the Privileges and Immunities Clause also reaches important economic activities, which can include commerce. If this comes up in an essay, you will likely want to analyze the facts under both clauses if the call of the question asks for all possible constitutional analyses. However, your analyses may differ in these two ways:

Lee Burgess: The first difference is that there is no market participant exception under the Privileges and Immunities Clause. As a reminder, under the market participant exception, a state or local government may discriminate against out-of-state commerce if it is acting as a "market participant", rather than solely a regulator of economic activity. This means that a state may prevail under the Dormant Commerce Clause, where it may not prevail under the Privileges and Immunities Clause in the same circumstance, because this exception does not exist in the Privileges and Immunities Clause.



Lee Burgess: And the second difference is that the Privileges and Immunities Clause does not apply to corporations, nor does it apply to non-citizens of the United States. So, if a fact pattern presents a state interfering with out-of-state commerce, and the question asks whether a corporation can succeed in a Privileges and Immunities Clause claim, the answer will always be “No” – although the corporation could still succeed under the Dormant Commerce Clause.

Lee Burgess: So, just to recap: If there is, (a) a state law; that (b) distinguishes between residents and non-residents; and (c) concerns civil liberties or important economic activities, then without justification, that law violates the Privileges and Immunities Clause of Article IV. Now, there are two requirements that must be met in order for a state to be justified in passing such a law. First, there must be a substantial reason for the discriminatory law. This usually presents as an issue or a problem that the state has and is addressed by the law in question. And second, the discriminatory law must have a substantial relationship to that reason. This means that the law actually has to work towards fixing the problem that the state claims.

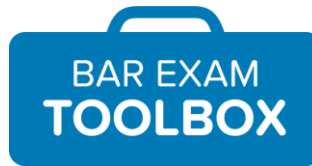
Lee Burgess: Okay, let’s start our first hypo. This question is pulled from Question 1 on the [February 2005 California bar exam](#), but it’s been edited for brevity and focus:

Lee Burgess: “A State X statute prohibits the retail sale of any gasoline that does not include at least 10 percent ethanol, an alcohol produced from grain, which, when mixed with gasoline, produces a substance known as ‘gasohol’. State X is the nation’s largest producer of grain used for making ethanol. There are no oil wells or refineries in the state.

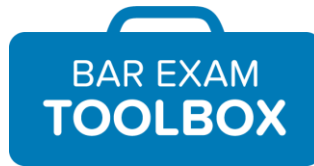
Lee Burgess: Oilco is an international petroleum company doing business in State X as a major retailer of gasoline. Oilco has produced reliable evidence showing that, since the statute was enacted, its sales and profits in State X have decreased substantially because of its limited capacity to produce gasohol.”

Lee Burgess: Can Oilco successfully assert that the statute violates the Privileges and Immunities Clause?”

Lee Burgess: So, using our steps to determine whether the Privileges and Immunities Clause applies – first, is a state passing or enforcing the law? Yes, it’s a State X statute. And does it affect the civil liberties or important economic activities of non-residents? Well, State X is the nation’s largest producer of grain used for making ethanol. This means that residents in states with little or no access to grain used for making ethanol will be prohibited from retailing gasoline in State X, so this statute has a discriminatory impact against out-of-state interests.



- Lee Burgess: There are also a few facts that lead us to believe that Oilco is out-of-state. Oilco is a petroleum company and there are no oil wells or refineries in State X. Oilco's profits have decreased since the statute was enacted, so we can probably assume that Oilco does not have significant access to grain used for making ethanol, and if it were local to State X – the nation's largest producer – it would have access to grain used for making ethanol. Finally, as a major retailer of gasoline, Oilco is certainly engaged in an important economic activity. Thus, the statute likely does concern the important economic activity of an entity outside of State X.
- Lee Burgess: So this may seem like the Privileges and Immunities Clause applies, but let's take a closer look at who's bringing the suit in the case. It's Oilco, and the facts tell us that Oilco is a company. As we talked about earlier, corporations and non-citizens of the United States are not considered non-residents for the purposes of the Privileges and Immunities Clause. Thus, Oilco cannot successfully assert that the statute violates the Privileges and Immunities Clause.
- Lee Burgess: Now let's work on a hypo that gets us to the analysis. This question is pulled from Question 5 on the [July 2018 California bar exam](#). It has been edited for brevity and focus:
- Lee Burgess: "Five years ago, State X bought Railroad, which was in bankruptcy and about to be liquidated. In signing the Act authorizing the purchase of Railroad, the governor stated that it would ensure continued freight rail service for State X industry. The Act authorizing the purchase of Railroad provides that manufacturers with factories in State X shall have first choice of space on Railroad.
- Lee Burgess: Peter, a citizen of State Y, which borders State X, grows melons in State Y for sale to grocers there and in State X. Before its purchase by State X, Peter exclusively used Railroad for shipping melons to his many State X customers. Peter has lost nearly all of his State X customers over the last five years, because he cannot guarantee timely delivery of ripe melons because the shipping space on Railroad is so uncertain.
- Lee Burgess: Peter has repeatedly been forced to give up reserved space on Railroad because it is being used by State X manufacturers. He has now filed suit in federal court in State X.
- Lee Burgess: Can Peter make a claim under the Privileges and Immunities Clause, and how should the court rule?"

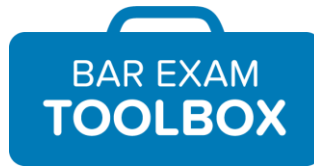


Lee Burgess: Okay, is a state passing or enforcing the law? Yes, State X passed the law. Does the law distinguish between residents and non-residents? Yes, this law is discriminatory on its face. The facts state that the Act provides that manufacturers with factories in State X will have first choice of space on Railroad. Here, we need to also make sure that a non-resident is bringing the claim, and not a corporation or a non-citizen of the U.S. The question asks if Peter can make a claim under the Privileges and Immunities Clause, and the facts state that Peter is a citizen of State Y. So now that we have established that a non-resident is bringing the claim, we can move on to whether the Act affects Peter's civil liberties or important economic activities.

Lee Burgess: Well, before State X purchased Railroad, Peter exclusively used Railroad for shipping his melons to his many State X customers. But because the Act gives preference to in-state manufacturers, Peter's ability to use Railroad is uncertain and Peter has lost nearly all of his many State X customers. And due to the loss of his many State X customers, Peter would successfully argue that the Act is impinging on his ability to earn a livelihood. And like we talked about earlier, the ability to earn a livelihood is an important economic activity, so this means that the Privileges and Immunities Clause applies. But we're not done yet – we must determine whether the state is justified in passing this law.

Lee Burgess: First, is there a substantial reason for the discriminatory law? Here, State X would argue that prior to passing the Act, Railroad – a freight rail service that assumedly plays some role in State X's ability to transport goods – was in bankruptcy, and the Act allowed State X to ensure its continued service. Well, that is a substantial reason, because we can assume that discontinued freight rail service would be detrimental to State X's economy or its ability to distribute goods.

Lee Burgess: So we have a substantial reason, but is that reason substantially related to the Act, which gives manufacturers with factories in State X preference on Railroad? Peter will successfully argue "No" – that giving in-state manufacturers preference is not related enough to continuing the rail service, because the service could continue all the same regardless of whether the shippers were in-state or out-of-state. If there were, say, legislative findings that Railroad was going bankrupt because the service was dominated by out-of-state shippers sending low-weight, low-cost goods, whereas in-state shippers sent high-weight, high-cost goods, but could not ever reserve space on Railroad due to the volume of out-of-state shippers, then the Act could potentially be substantially related to the reason for its passage. But since the part of the Act at issue in this hypo does not contribute to the continued service on Railroad – the State's



reason for passing the Act – the court should rule in Peter’s favor on his Privileges and Immunities Clause claim.

Lee Burgess:

And with that, we’re out of time! Hopefully you found these hypos to be helpful examples of how to identify and work through Privileges and Immunities Clause issues on an exam. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review or rating on your favorite listening app. We’d really appreciate it. And be sure to subscribe so you don’t miss anything. If you have any questions or comments, please don’t hesitate to reach out to Lee or Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via the website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!

#### **RESOURCES:**

[“Listen and Learn” series](#)

[Private Bar Exam Tutoring](#)

[The Brainy Bar Bank: Streamlining Bar Study](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2005](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2018](#)

[Podcast Episode 44: Tackling a California Bar Exam Essay: Constitutional Law](#)

[Podcast Episode 76: Tackling an MEE Con Law Essay Question](#)

[Podcast Episode 135: Listen and Learn – The Dormant Commerce Clause](#)