MUNICIPAL-BASED DISCRIMINATION AND THE PRIVILEGES AND IMMUNITIES CLAUSE: *UNITED BUILDING AND CONSTRUCTION TRADES COUNCIL v. MAYOR OF CAMDEN*

For years states have attempted to combat their unemployment problems[1] by enacting legislation[2] that gave employment priority on publicly funded construction projects to residents of that state. Courts have determined that state laws requiring private contractors who receive public works contracts to employ a stated percentage[3] of state

1. The national unemployment rate is currently at an annual average of 7.1%. The figure for Blacks is 15%. MONTHLY LAB. REV., Aug. 1984, at 53. In August 1980, the time when Camden, New Jersey, adopted the ordinance in question, the national unemployment rate was 7.6%. The unemployment rate for Blacks and other minorities at this time was 13.6%. MONTHLY LAB. REV., Oct. 1980, at 68. Approximately 53% of Camden residents were Black and 19.2% Hispanic. United Bldg. & Constr. Trade Council v. Mayor of Camden, 88 N.J. 317, 327, 443 A.2d 148, 153 (1982) (citing 1980 U.S. Census Bureau statistics for the City of Camden.) Thus, Camden's unemployment problem was more severe than in most areas.

2. ALA. CODE § 39-3-2 (1975); ALASKA STAT. § 36.10.010 (1982); ARIZ. REV. STAT. ANN. § 34-302 (1984); ARK. STAT. ANN. § 14-607 (1979); COLO. REV. STAT. § 8-17-101 (Supp. 1983); CONN. GEN. STAT. § 31-52 (1975); DEL. CODE ANN. tit. 29, § 6913 (1974); HAWAII REV. STAT. § 103-57 (1976); IDAHO CODE § 44-1001 (1977); IOWA CODE ANN. § 73.3 (West Supp. 1984-85); LA. REV. STAT. ANN. § 38:2185 (West 1968); ME. REV. STAT. ANN. tit. 26, § 1301 (1974); MD. ANN. CODE art. 21, § 8-503 (1957); MISS. CODE ANN. § 31-5-17 (1972); MONT. CODE ANN. § 18-2-403 (1983); NEV. REV. STAT. § 338.130 (1983); N.D. CENT. CODE § 43-07-20 (1978); OKLA. STAT. ANN. tit. 61, § 10 (West Supp. 1984-85); PA. STAT. ANN. tit. 43, § 154 (Purdon 1964); S.D. CODIFIED LAWS ANN. § 5-19-6 (1980); UTAH CODE ANN. § 55-3-33 (1953); VT. STAT. ANN. tit. 19, § 27 (1968); W. VA. CODE § 5A-3-44 (Supp. 1984); WYO. STAT. § 16-6-104 (1982).

These statutes are of two basic types: those that require the contractor to employ a stated percentage of state residents, and those that require the contractor to prefer state residents over nonresidents. *See infra* notes 3-4.

Courts have invalidated five other state statutes: ILL. REV. STAT. 48, § 271 (1983); MASS. GEN. LAWS ANN. ch. 149, § 26 (West 1976); N.J. STAT. ANN. § 34:9-2 (1975); N.Y. LABOR LAW § 222 (McKinney 1965) (repealed 1982); WASH. REV. CODE ANN. § 39.16.005 (Supp. 1985). *See infra* note 5.

3. Colorado's statute is typical:

residents or give state residents "hiring preference"[4] violate the privileges and immunities clause of the Constitution.[5] In *United Building and Construction Trades Council v. Mayor of Camden*,[6] the Supreme Court extended the scope of the privileges and immunities clause to city ordinances that discriminate on the basis of municipal residency.

A Camden, New Jersey, municipal ordinance[7] required contractors

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Whenever any public works financed in whole or in part by funds of the state, counties, school districts, or municipalities of the state of Colorado are undertaken in this state, Colorado labor shall be employed to perform the work to the extent of not less than eighty percent of each type or class of labor in the several classifications of skilled and common labor employed on such project or public works. 'Colorado labor', as used in this article means any person who is a resident of the state of Colorado, at the time of employment, without discrimination as to race, color, creed, sex, age, or religion except when sex or age is a bona fide occupational qualification.

COLO. REV. STAT. § 8-17-101 (Supp. 1983).

4. Connecticut's statute is typical: "In the employment of mechanics, laborers or workmen in connection with any public works project . . . preference shall be given to persons who are residents of the state, and, if they cannot be obtained in sufficient numbers, then to residents of other states." CONN. GEN. STAT. § 31-52a(a).

5. U.S. CONST. art. IV, § 2, cl. 1: "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States." *Id.*

Cases holding that state laws violated the clause include: Hicklin v. Orbeck, 437 U.S. 518 (1978); People *ex rel.* Bernardi v. Leary Const. Co., 102 Ill. 2d 295, 464 N.E.2d 1019 (1984); Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston, 81 Mass. Adv. Sh. 2039, 425 N.E.2d 346 (1981); Neshaminy Constructors, Inc. v. Krause, 187 N.J. Super. 174, 453 A.2d 1359 (1982); Salla v. County of Monroe, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert. denied sub nom.* Abrams v. Salla, 446 U.S. 909 (1980); Laborers Local Union No. 374 v. Felton Const., 98 Wash. 2d 121, 654 P.2d 67 (1982). The Massachusetts Supreme Court, responding to a question posed by the state senate, concluded that a proposed bill requiring contractors to employ 80% Massachusetts residents would violate the privilege and immunities clause. Opinion of the Justices to the Senate, 393 Mass. 1201, 469 N.E.2d 821 (1984).

6. 104 S.Ct. 1020 (1984).

7. CAMDEN, N.J., ORDINANCE MC 1653 § C (IV)(b) required that on all construction projects funded by the city: "The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden."

The city passed the ordinance on August 28, 1980. This was the second ordinance in Camden's affirmative action program. The first ordinance, adopted July 24, 1980, provided that every public works contractor "shall make every effort to employ not less than 25% minority workers in the utilization of all trades, as tradesmen, journeymen and apprentices, in performances of his/her contract, whether or not the work is subcontracted." United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 323, 433 A.2d 148, 151 (citing Camden ordinance). Appellant originally challenged both ordinances on constitutional and statutory grounds. 88 N.J. at 321, 443 A.2d at

and subcontractors working on city construction projects to have Camden residents comprise at least forty percent of their work force.[8] The city adopted the ordinance as part of a state-wide affirmative action program.[9] The New Jersey Treasury Department[10] approved the ordinance pursuant to state law.[11] United Building and Construction Trades Council of Camden County (United Building), an association of

150. On appeal to the Supreme Court, however, the council dropped the challenge to the 25% minority hiring goal.

The provisions of the Camden ordinance applied "Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00. . . ." CAMDEN N.J., ORDINANCE MC 1650 § II (1980). Originally the Camden ordinance also applied to the development and construction of all residential housing of four units or less, but the city narrowed the scope of the ordinance by amendment.

8. Originally the ordinance contained a one-year residency requirement in order for a person to be considered a Camden resident. In July, 1983, Camden deleted this requirement and defined a resident as "any person who resides in the City of Camden." United Bldg. & Constr. Trades Council v. Mayor of Camden, 52 U.S.L.W. 4187, 4189 (citing Brief of Appellees, Mayor and Council of the City of Camden, at A-5).

For a discussion of durational residency requirements, see Note, *Durational Residence Requirements from* Shapiro *Through* Sosna*: The Right to Travel Takes a New Turn*, 50 N.Y.U. L. REV. 622 (1985); Note, *Residency Requirements for City Employees: Important Incentives in Today's Urban Crisis*, 18 URB. L. ANN. 197 (1980); Note, *Municipal Employee Residency Requirements and Equal Protection*, 84 YALE L.J. 1684 (1975).

9. New Jersey's Law Against Discrimination established a comprehensive affirmative action program in the awarding of public works contracts. N.J. STAT. ANN. § 10:5-31 to 5-38 (West 1976). The act provides that no public works contract shall be awarded to a contractor unless he agrees to abide by an affirmative action program approved by the State Treasurer. N.J. STAT. ANN. § 10:5-32. The state or city awarding the public works contract must include a specified affirmative action provision in the contract, and the contractor must submit a specific affirmative action plan to the State Treasurer for approval. N.J. STAT. ANN. § 10:5-33, 5-34. The act also empowers the treasurer to require state and local agencies awarding public work contracts to submit affirmative action programs. N.J. STAT. ANN. § 10:5-36(c).

10. Chief Affirmative Action Officer Carl G. Briscoe approved the ordinance on November 24, 1980, for a period of one year. 83 N.J. at 324, 443 A.2d at 151.

11. The law conditioned approval on the affirmative action program's compliance with minimum state requirements. The law empowered the State Treasurer to determine percentages of minority populations across the state and to promulgate guideline percentages for determining the adequacy of affirmative action programs submitted for approval. N.J. STAT. ANN. § 10:5-36(a), (b). The State Treasurer set the Camden County goal at 20%. N.J. ADMIN. CODE tit. 17, § 27-7.3. The minority hiring goal enacted by the city and approved by the State Treasurer was 25%. Presumably, the resident hiring quota of 40% enacted by the city "could only increase the likelihood that any contractor [would] meet the State Treasurer's minority hiring goals." 88 N.J. at 329, 443 A.2d at 154.

labor organizations, appealed[12] the Department's decision claiming that the ordinance violated the privileges and immunities clause.[13] The New Jersey Supreme Court[14] held that the clause did not apply because the ordinance discriminated on the basis of municipal, rather than state, residency.[15] The Supreme Court reversed and remanded, holding that a municipal ordinance was subject to the strictures of the privilege and immunities clause.[16]

A primary purpose of the privileges and immunities clause in the Constitution is to insure that states will not impose burdens upon individuals of other states engaged in trade or commerce.[17] In *Corfield v.*

12. The Council filed a Notice of Appeal with the Appellate Division challenging the final determination of the Chief Affirmative Action Officer. 88 N.J. at 324, 443 A.2d at 151.

13. Appellant raised several grounds on appeal: (1) the State Treasurer acted outside the scope of his authority under the Law Against Discrimination; (2) the State Treasurer abused his discretion in approving Camden's goal; (3) the approval of the minority hiring goal violated the equal protection clause; and (4) the approval of the resident hiring quota violated the commerce clause, the privileges and immunities clause and was preempted by state statute.

14. 88 N.J. 317, 443 A.2d 148.

15. The New Jersey Supreme Court relied primarily on the fact that there were New Jersey residents disadvantaged to the same extent as the Council. The court stated as follows:

> Clearly, the Camden affirmative action plan does not aim primarily at out-of-state residents. It almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents. Because the Camden ordinance does not affect 'the States' . . . treatment of each other's residents,' [citation omitted], it does not violate any privilege of state citizenship.

Id. at 341-42, 443 A.2d at 160.

16. 104 S.Ct. at 1029.

17. The fourth article of the Articles of Confederation, upon which the Framers based the privileges and immunities clause, provided:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States . . . shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, any shall enjoy therein all the *privileges of trade and commerce*, subject to the same duties, impositions and restrictions as the inhabitants thereof.

1 U.S.C. XXXIX (1982) (emphasis added).

There is evidence that the Framers of the Articles of Confederation contemplated two distinct privilege guarantees: one that assured the free inhabitants of each state the fundamental, natural rights of free citizens in the several states; and another that guaranteed interstate equality to merchants and others. The original draft of Article IV was based on two separate privilege provisions. 5 JOURNAL OF THE CONTINENTAL CON-

Coryell,[18] the first federal case to interpret the clause, the court held that the privileges and immunities covered by the clause included all fundamental and inherent rights.[19] The court recognized the pursuit of employment as a fundamental right.[20] *Corfield* is notable because the court fashioned a framework for privileges and immunities analysis. Instead of applying the privileges and immunities clause to protect fundamental rights, however, the court upheld New Jersey's exclusion of noncitizens from state-owned oyster beds by relying on the common ownership doctrine.[21] This doctrine provides that the right to certain property located in a state rests in the state or its citizens, and may be kept for their exclusive use.[22] Thus, despite *Corfield's* far reaching view of the rights protected by the clause, early decisions rarely invalidated statutes on privileges and immunities grounds.[23]

GRESS 547 (1906). The Framers of the Constitution, however, did not disclose whether they intended to retain both privilege guarantees in Article IV, § 2, ch. 1.

18. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230). Several state courts interpreted the clause before *Corfield*. *See* Douglas v. Stephens, 1 Del. Ch. 465 (1821) (privileges and immunities protected were the basic, fundamental, natural rights of men); Campbell v. Morris, 3 Harr. and McHen. 535 (1797) (Court of Appeals of Maryland) (indicating that the clause protects "personal rights"); Murray v. McCarty, 16 Va. (2 Munf.) 393 (1811) (holding that the clause protects natural rights, such as the freedom to acquire property).

19. Justice Washington made a partial list of rights protected by the clause:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . .

6 F. Cas. at 552.

For an early discussion of the rights protected under the Privileges and Immunities Clause, see Meyers, *The Privileges and Immunities of Citizens in the Several States*, 1 MICH. L. REV. 286 (1902).

20. *See supra* note 19.

21. 6 F. Cas. at 552.

22. *Id.* Justice Washington stated:

> [I]t would, in our opinion, be going quite too far to construe the grant of privileges and immunities of citizens, as amounting to a grant of a cotenancy in the common property of the state, to the citizens of all the other states. Such a construction would, in many instances, be productive of the most serious public inconvenience and injury, particularly, in regard to those kinds of fish, which, by being exposed to general use, may be exhausted.

Id.

23. *See, e.g.*, McCready v. Virginia, 94 U.S. 391 (1876) (law prohibiting noncitizens from planting oysters in Virginia waters held valid); Benentt v. Boggs, 3 F. Cas. 221 (C.C.D. N.J. 1830) (No. 1,319) (New Jersey statute that discriminated against nonresi-

The Supreme Court limited the broad language of *Corfield* in *Paul v. Virginia*.[24] In *Paul*, the Court upheld a Virginia statute that prohibited the sale of insurance policies by foreign insurance companies unless they obtained a license and placed money on deposit with the state. The Court recognized that the clause protected freedom from discriminating legislation, the right to enter into and exit from other states, freedom to buy and enjoy property, and the pursuit of happiness.[25] The Court, however, determined that the privileges and immunities clause was not designed to secure *all* privileges enjoyed by citizens of one state to citizens of other states.[26] A state's own citizens could enjoy exclusively those privileges not listed in *Paul*.[27]

Although *Paul* clearly established the types of privileges worthy of protection, early decisions interpreting the privileges and immunities clause were inconsistent.[28] The confusion stemmed from application of the common ownership theory to situations in which the nonresident asserted that the statute in question infringed upon a protected privilege. For example, in *McCready v. Virginia*,[29] a Virginia statute re-

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dent fishermen held valid); State v. Medbury, 3 R.I. 138 (1855) (Rhode Island statute prohibiting the taking of oysters by nonresidents held valid).

24. 75 U.S. (8 Wall.) 168 (1868) (statute requiring corporations incorporated elsewhere to deposit bonds in order to obtain license found not to be in violation of the privileges and immunities clause).

25. *Id.* at 180.

26. *Id.* For a critical discussion of Justice Field's interpretation of the scope of the Clause, see Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause by Article Four*, 9 WM. & MARY L. REV. 1 (1967) (arguing that the privileges and immunities clause of Article IV has been misinterpreted by the Supreme Court and misunderstood by scholars ever since *Paul v. Virginia* was decided).

27. 75 U.S. (8 Wall.) at 180. Justice Field stated:

> [T]he privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own states are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States.

Id.

28. *Compare* Ward v. Maryland, 79 U.S. 418 (1871) (statute requiring nonresident traders doing business within the state to first purchase $300 license found unconstitutional) *with* McCready v. Virginia, 94 U.S. 391 (1876) (law prohibiting noncitizens from planting oysters in Virginia waters held valid). *See also* Note, *Construction Workers Residency Requirements: A Constitutional Response*, 17 NEW ENG. L. REV. 461, 471 (1982).

29. 94 U.S. 391 (1876).

stricted access to oyster beds in Virginia waters to its own citizens.[30] The Supreme Court held that state ownership rights subordinated out-of-state watermen's privilege of employment. The Court stated that "citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State."[31]

The Supreme Court's decision in *Toomer v. Witsell*[32] eliminated much of the confusion. In *Toomer*, a South Carolina statute required nonresident shrimpers to pay a license fee one hundred times greater than the fees paid by resident shrimpers.[33] In finding the statute unconstitutional, Chief Justice Vinson articulated a two-prong test.[34] For a statute to pass the test, the state must show that "noncitizens constitute a peculiar source of the evil at which the statute is aimed."[35] The state also must demonstrate that there is "a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination placed upon them."[36] South Carolina failed to satisfy both parts of the test. The state failed to prove that nonresidents used better fishing methods, operated larger boats or escaped prosecution more easily than residents.[37] Furthermore, even if the state had shown these facts, the licensing fee was not reasonably related to these problems.[38] The *Toomer* test remains intact as the definitive standard courts use in applying the privileges and immunities clause.[39]

Two recent decisions have refined the *Toomer* test. The first, *Austin v. New Hampshire*,[40] invalidated New Hampshire's Commuter Income Tax,[41] which fell exclusively on nonresidents' income. In an important

30. *Id.* at 396.

31. *Id.* at 395.

32. 334 U.S. 385 (1948).

33. *Id.* at 389.

34. The Court did not explicitly delineate a two-prong test. Subsequent state court decisions, however, and the Supreme Court in *United Building* interpreted *Toomer* in this manner. *See* Note, *supra* note 28, at 469.

35. 334 U.S. at 398.

36. *Id.* at 399.

37. *Id.* at 398.

38. *Id.* at 399.

39. *See, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978); Baldwin v. Fish and Game Comm'n 436 U.S. 371 (1978); Austin v. New Hampshire, 420 U.S. 656 (1975); Doe v. Bolton, 410 U.S. 179 (1973); Mullaney v. Anderson, 342 U.S. 415 (1952).

40. 420 U.S. 656 (1975).

41. N.H. REV. STAT. ANN. § 77-B:2 II (1970). The act imposed a four percent tax

footnote, the Court held that for purposes of privileges and immunities analysis, the terms "citizen" and "resident" were interchangeable.[42] Thus, a statute that discriminates on the basis of either citizenship or residency is subject to the privileges and immunities clause.

The second case, *Baldwin v. Fish and Game Commission*,[43] reaffirmed the principle that the privileges and immunities clause protects only fundamental rights. In *Baldwin*, Montana's hunting license fees for nonresidents was seven times higher than the fees imposed upon Montana residents.[44] The court acknowledged that the scheme discriminated against nonresidents, but held that recreational, big-game hunting was not a fundamental right worthy of protection.[45] Because *Toomer* did not state explicitly whether a showing of fundamentality was a necessary part of its test, *Baldwin* further refined the standard.

Another decision, *Zobel v. Williams*,[46] shed further light upon the applicability of the clause. An Alaska statute allocated state treasury funds to state residents on the basis of their length of residency.[47] The Supreme Court held that the law only discriminated among different classes of residents and therefore was not subject to the strictures of the privileges and immunities clause.[48] The Court viewed the scheme ex-

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on nonresidents' New Hampshire derived income, but provided a $2,000 exemption. If that income would be subject to a tax in the nonresident's home state, however, the New Hampshire tax would be reduced so that it did not exceed the other tax.

42. *Austin* cleared up this earlier uncertainty. *Compare* Travis v. Yale & Town Mfg. Co., 252 U.S. 60, 78-79 (1920) *and* Blake v. McClung, 172 U.S. 239, 246-47 (1898), *with* Douglas v. New Haven R.R. Co., 279 U.S. 377, 386-87 (1929) *and* La Tourette v. McMaster, 248 U.S. 465, 469-70 (1919).

43. 436 U.S. 371 (1978). For a thorough analysis of the *Baldwin* decision, *see* Note, *The Privileges and Immunities Clause: A Reaffirmation of Fundamental Rights*, 33 U. MIAMI L. REV. 691 (1979) (noting the reluctance of the Supreme Court to expand the content of rights protected under the privileges and immunities clause of article IV and the fourteenth amendment).

44. 436 U.S. at 374. In 1976 a Montana resident could purchase an elk hunting license for $9, or he could buy a combination license granting various hunting privileges for $30. MONT. REV. CODE ANN. §§ 26-202.1(1), (2), (4) and 26-230 (Supp. 1977). To hunt elk a nonresident was required to purchase a combination license for $224. MONT. REV. CODE ANN. §§ 26-202.1(4), (12), and 26-230 (Supp. 1977). Therefore, to hunt elk in 1976, a nonresident paid either 7½ or 25 times as much as a resident.

45. 436 U.S. at 388.

46. 457 U.S. 55 (1982).

47. *Id.* at 57. The statute provided that each citizen 18 years of age or older would receive one dividend unit per year of residency subsequent to 1959. Each dividend unit was worth $50. ALASKA STAT. ANN. § 43.23.010 (Supp. 1981).

48. 457 U.S. 59 n.5 (1982). The majority held that although the law violated the equal protection clause, the privileges and immunities clause did not apply. The Court

clusively as a form of intrastate discrimination.[49] Justice O'Connor's concurring opinion,[50] however, rested on privileges and immunities grounds. She argued that even though the statute discriminates among classes of residents, in effect, someone who moves to Alaska "labors under a continuous disability"[51] because of his prior residence in another state. The fact that the discrimination unfolded only after the nonresident established residency did "not insulate Alaska's scheme from scrutiny."[52] Notwithstanding Justice O'Connor's concurrence, the *Zobel* decision is significant because it illustrates the Court's hesitancy to apply the clause to intrastate discrimination cases.[53]

As refined by *Austin* and *Baldwin*, courts have applied the *Toomer* test to invalidate state laws that discriminate against nonresidents in employment opportunities.[54] In *Hicklin v. Orbeck*,[55] a unanimous Court applied the *Toomer* analysis to the "Alaska Hire" statute.[56] The

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may have given cursory treatment to the privileges and immunities argument since it already relied on equal protection grounds.

49. *Id.* The Court observed that the statute "does not simply make distinctions between native-born Alaskans and those who migrate to Alaska from other States." Because the statute "also discriminates among long-time residents and even native-born residents," the clause did not apply. 457 U.S. at 59 n.5.

50. 457 U.S. at 74 (O'Connor, J., concurring).

51. *Id.* at 75.

52. *Id.*

53. Justice O'Connor did not view Alaska's scheme as involving only intrastate discrimination. Her "continuous disability" approach incorporates the notion that out-of-state residents are disadvantaged even before they move to Alaska. The majority of the Court in *United Building* relied on Justice O'Connor's concurrence to support its statement that "Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." 104 S.Ct. 1020, 1027.

54. *See* Hicklin v. Orbeck, 437 U.S. 518, 524-38 (1978) (invalidating an Alaska hiring preference statute); Mullaney v. Anderson, 342 U.S. 415, 417-20 (1952) (invalidating a commercial fishing license scheme employed by the Territory of Alaska that charged nonresidents ten times more than residents); Massachusetts Council of Constr. Employers v. Mayor of Boston, 384 Mass. 466, 473-78, 425 N.E.2d 346, 352-55 (1981), *rev'd sub nom.* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204 (1982) (invalidating a Massachusetts hiring preference statute); Neshaminy Constructors v. Krause, 187 N.J. Super. 174, 453 A.2d 1359 (1982) (invalidating a New Jersey hiring preference statute); Salla v. County of Monroe, 48 N.Y.2d 514, 522-25, 399 N.E.2d 909, 913-15, 423 N.Y.S.2d 878 (1979) *cert. denied sub nom.* Abrams v. Salla, 446 U.S. 909 (1980).

55. 437 U.S. 518 (1978).

56. ALASKA STAT. §§ 38.40.010-.090 (1977). Section 38.40.030(a) required that "all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes, unitization agreements, or any renegotiation of any of the preceding to which the

statute favored Alaska residents over nonresidents for any employment contract generated by state-owned oil and gas leases.[57] The Court viewed the law as a far-reaching attempt to force private employers benefitting from Alaska's oil to favor Alaska residents in making employment decisions.[58] The state failed to prove that nonresidents were the peculiar source of Alaska's unemployment problem.[59] Furthermore, the statute did not bear a substantial relationship to the evil that nonresidents allegedly presented because it treated skilled and unskilled residents equally.[60] The Court recognized that a state's ownership of the property was a factor to be considered in the analysis, but not a dispositive one.[61] Several state courts have relied on *Hicklin* to invalidate statutes granting preference to resident construction workers.[62]

Employment preference statutes also have been challenged on commerce clause grounds. In *White v. Massachusetts Council of Construction Employers*[63] the City of Boston required private contractors participating in city-financed construction projects to fill fifty percent of their positions with city residents. The Massachusetts Supreme

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state is a party" contain a provision requiring the lessee to employ Alaska residents in preference to nonresidents. An employer who failed to comply with the act could be required to pay the rejected employee triple his lost wages. *Id.* at § 38.40.070.

57. *Id.* at § 38.40.030.

58. 437 U.S. at 531.

59. *Id.* at 526.

60. *Id.* at 527. Alaska argued that nonresidents were the cause of its high unemployment rate because they possessed higher skills than the unemployed residents, many of whom were Eskimos and Indians. 437 U.S. at 527 n.10. The Court held that because "Alaska Hire" gave preferential treatment to both skilled and unskilled residents, it was not reasonably likely to combat the problem allegedly caused by nonresidents. *Id.* at 527-28.

61. *Id.* at 528-29. The fact that a unanimous Court placed little emphasis on state ownership suggests that employment is a highly protected right. *Hicklin* is the premiere case in employment preference analysis because it emphasizes the importance of protecting nonresidents' rights to seek employment in a discriminating state. Because employment is a vigorously protected right, the Court in *United Building* could easily disregard the fact that the privileges and immunities clause is phrased in terms of *state* citizenship.

62. *See* Massachusetts Council of Constr. Employers v. Mayor of Boston, 384 Mass. 466, 473-78 425 N.E.2d 346, 352-55 (1981), *rev'd on other grounds*, 460 U.S. 204 (1983); Neshaminy Constructors v. Krause, 181 N.J. Super 376, 380-85, 437 A.2d 733, 735-38, *aff'd*, 187 N.J. Super. 174, 175, 453 A.2d 1359 (1982); Salla v. County of Monroe, 48 N.Y.2d 514, 522-25, 399 N.E.2d 909, 913-15, 423 N.Y.S.2d 878, 882-84 (1979), *cert. denied sub nom.* Abrams v. Salla, 446 U.S. 909 (1980).

63. 460 U.S. 204 (1983).

Court found the mayoral order unconstitutional on commerce clause grounds.[64] The Supreme Court reversed and held the order valid.[65] The Court found that the city acted as a market participant as opposed to a market regulator.[66] Because the commerce clause acts as an implied restraint only upon state *regulatory* powers, it did not apply.[67] Thus, *United Building*, decided one year later, was the Court's first chance to apply the privileges and immunities clause to an ordinance that discriminated on the basis of municipal residency.

In *United Building and Construction Trades Council v. Mayor of Camden*, Camden argued that the privileges and immunities clause does not apply to a municipal ordinance.[68] The city contended that the clause applies solely to laws passed by a state and laws that discriminate on the basis of state citizenship.[69] The Court pointed out two flaws with the city's reasoning.[70] First, the city's distinction between municipal and state laws was tenuous because the State Treasurer had approved the Camden ordinance.[71] Second, a municipality is merely a political subdivision of the state and therefore derives its authority from the state.[72] The Court held that a state could not accomplish an

64. 384 Mass. 466, 478, 425 N.E.2d 346, 354 (1981).

65. 460 U.S. 204, 215 (1983).

66. *Id.* at 214-15.

67. *Id.* at 210. The Court held that the adverse affect of implementing the mayor's order upon construction firms that employed out-of-state residents was not relevant to whether the city is a market participant or a market regulator. The Court stated that the impact on out-of-state residents is relevant only after it is decided that the city is regulating the market rather than participating in it. *Id.* The Court held that for purposes of the commerce clause, everyone employed on a city public works project is "in a substantial if informal sense, 'working for the city.'" *Id.* at 211 n.7. That these employees were "working for the city" indicated that the city was a market participant.

The Court did not decide whether the mayor's order violated the privileges and immunities clause. The Massachusetts Supreme Court held that the order violated the clause, but the Council dropped the claim on appeal. The Supreme Court nevertheless noted that the mayor's order, which applied to contracts involving only city funds, was not as drastic as the coercion involved in *Hicklin*, which applied to all businesses that benefitted from the economic ripple effect of Alaska's decision to develop its oil and gas resources. *Id.* at 211.

68. 104 S.Ct. 1020, 1025 (1984).

69. *Id.*

70. *Id.* at 1025-26.

71. *Id.*

72. *Id.* at 1026. *See also* Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974); Avery v. Midland County, 390 U.S. 474, 480-81 (1968).

unconstitutional act by delegating authority to its municipalities.[73] Thus, the Court found the clause applicable to municipal ordinances.

The Court next addressed the argument that the privileges and immunities clause applies only to provisions that discriminate on the basis of state citizenship.[74] The Court concluded that municipal residency classifications give rise to the same concerns as state residency classifications.[75] An out-of-state resident is excluded from employment regardless of whether the basis for discrimination is state or city residency.[76] The ordinance adversely affected New Jersey residents not living in Camden,[77] but the Court noted that these residents, unlike out-of-state residents, have a remedy at the polls, which out-of-state residents lack.[78] Furthermore, out-of-state residents must "not be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation."[79]

The Court criticized the dissent for asserting that adversely affected residents would protect nonresidents at the polls.[80] The court noted that Camden had adopted its ordinance pursuant to state law, manifesting that residents already had failed to protect nonresidents.[81] In addition, a failure to apply the clause to any form of discrimination less than statewide would provide states with a simple means for evading the clause.[82] As long as an ordinance was not phrased in terms of state

73. 104 S.Ct. at 1026.

74. *Id.*

75. *Id.*

76. *Id.* at 1027.

77. *Id.* The Court noted that the disadvantaged in-state resident has no claim under the privileges and immunities clause. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 77 (1872) (rejecting a fourteenth amendment privileges and immunities challenge to a Louisiana health law).

78. 104 S.Ct. at 1027.

79. *Id.* (citing Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

80. 104 S.Ct. at 1027.

81. *Id.*

82. *Id.* The Court stated as follows:

> Suppose, for example, that California wanted to guarantee that all employees of contractors and subcontractors working on construction projects funded in whole or in part by state funds are state residents. Under the dissent's analysis, the California legislature need merely divide the State in half, providing one resident-hiring preference for Northern Californians on all such projects taking place in Northern California, and one for Southern Californians on all projects taking place in Southern California. State residents generally would benefit from the law at the expense of out-of-state residents; yet, the law would be immune from scrutiny under the Clause simply because it was not phrased in terms of *state* citizenship or residency.

citizenship, the ordinance would be immune from scrutiny.[83]

After determining that the Camden ordinance was subject to the privileges and immunities clause, the Court applied the *Toomer* test. The Court readily concluded that an out-of-state resident possessed a fundamental interest in employment.[84] On the narrower question of whether a person's interest in employment on public works contracts in another state is "fundamental," the Court refused to apply the *White* decision to privileges and immunities analysis.[85] The *United Building* Court held that while the commerce clause acts as an implied restraint upon state regulatory powers, the privileges and immunities clause imposes a direct restraint on state action in the interests of interstate harmony.[86] Therefore, the market-regulator market-participant distinction that is crucial under commerce clause analysis is not dispositive under privileges and immunities analysis.[87] Camden's activities as a market participant does not preclude privileges and immunities clause scrutiny.[88] The Court concluded that the opportunity to seek employment with private employers is sufficiently fundamental to fall within the purview of the clause, even though the private employers are engaged in public works projects.[89]

Although the Court concluded that Camden's ordinance discriminated against a protected privilege, it was impossible to determine whether Camden had met its burden under the *Toomer* test,[90] because

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Such a formalistic construction would effectively write the Clause out of the Constitution.

Id.

83. *Id.*

84. *Id.* at 1028. The Court acknowledged that public employment was qualitatively different than employment in the private sector. Nevertheless, the Court held that because the privileges and immunities clause imposed a direct restraint on state action, the distinction did not render the clause inapplicable. *Id.* at 1028-29.

85. 104 S.Ct. at 1028.

86. *Id.*

87. *Id.* at 1028-29. The Court, relying on *Hicklin*, stated:

The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps a crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. But it does not remove the Camden ordinance completely from the purview of the Clause.

Id. at 1029.

88. *Id.*

89. *Id.*

90. *Id.* at 1030. Under the *Toomer* test, Camden would be required to show that non-Camden residents are the cause of Camden's high unemployment problem. Fur-

lower courts never applied the test.[91] Therefore, the Court remanded the case to determine whether the city had a substantial reason for discriminating against citizens of other states.[92]

In his dissent,[93] Justice Blackmun reviewed the history of the privileges and immunities clause and concluded that it was not concerned with intrastate discrimination based on municipal residency.[94] He placed particular reliance on the *Zobel* decision, arguing that the *Zobel* Court refused to apply the clause because the law allocating treasury funds adversely affected *some in-state residents* in a way that disadvantaged nonresidents as well.[95] Blackmun contended that disadvantaged in-state residents could turn to the state's political processes for relief[96] and that this mechanism, in turn, would protect out-of-state residents.[97] Thus, he would apply the clause only to situations "which bear the same sort of practical relationship to a classification based on state residence."[98]

Justice Blackmun also disagreed with the majority's contention that the ordinance received "state sanction and approval,"[99] and that therefore the state's political processes were not effective in protecting out-of-state citizens. Although the city established the ordinance pursuant to state law, he argued that political pressure could force the city to

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thermore, it would have to show that the 40% resident hiring quota was reasonably calculated to solve the problem.

91. *Id.* at 1030. *See* 88 N.J. 317, 324, 443 A.2d 148, 151, *rev'd*, 104 S.Ct. 1020 (1984) for a review of the procedural disposition of the case.

92. 104 S.Ct. at 1030.

93. *Id.* at 1030-37 (Blackmun, J., dissenting).

94. *Id.* at 1031-33. Justice Blackmun stated:

> While the Framers thus conceived of the Privileges and Immunities Clause as an instrument for frustrating discrimination based on state citizenship, there is no evidence of any sort that they were concerned by intrastate discrimination based on municipal residence. The most obvious reason for this is also the most simple one: by the time the Constitution was enacted, such discrimination was rarely practiced and even more rarely successful.

Id. at 1032.

95. *Id.* at 1033.

96. *Id.* at 1034.

97. *Id.* at 1034-35. Justice Blackmun supported his assertion by pointing out that California and Georgia both repealed protectionist measures due to political pressure. *Id.* at 1035.

98. *Id.* n.14. Justice Blackmun remarked that if a state established a resident hiring preference, but excluded one remote county, the classification would come within the ambit of the clause.

99. *Id.* n.12.

repeal the ordinance.[100]

United Building and Construction Trades Council v. Mayor of Camden presents a rational extention of the privileges and immunities clause to city residency requirements. When the Framers drafted the clause,[101] they were not concerned with intrastate discrimination based on municipal residency.[102] Nevertheless, all residency requirements exclude out-of-state residents regardless of whether the discrimination is city or state-based. To the nonresident, municipal residency classifications give rise to the same concerns as state residency requirements. The Court properly disallowed a strict reading of the privileges and immunities clause to sanction municipal-based discrimination.

The Court refused to conclude that the internal political processes of a state would protect out-of-state residents. Even if a state's political processes could protect nonresidents, as Justice Blackmun posited in his dissent, the Court correctly followed *Toomer* in holding that out-of-state residents should not have to rely on these "uncertain remedies."[103] Moreover, the dissent incorrectly relies on *Zobel* to conclude that the clause does not apply to discrimination among state residents. The Alaska statute at issue in *Zobel* discriminated only among state residents.[104] The state did not disadvantage nonresidents because state residency determined one's right to receive a payment.[105] Camden's ordinance also discriminated among state residents, but more importantly, it correspondingly discriminated against nonresidents. This corresponding discrimination is crucial to the Court's analysis, but discounted by Justice Blackmun.

If the *United Building* Court declined to apply the clause to municipal-based discrimination, states easily could evade the strictures of the

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100. *Id.* Justice Blackmun also took issue with the majority's expression of his position regarding the application of the clause to classifications that are less than statewide. Justice Blackmun argued that "[t]he Clause exists to protect against those classifications that a State's political process cannot be relied on to prevent. . . ." *Id.* at 1035 n.14. *See supra* notes 96-98 and accompanying text.

101. For more information on how article IV of the Articles of Confederation became the privileges and immunities clause, see 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, 317 (M. Farrand ed. 1911).

102 104 S.Ct. at 1034. *See supra* note 94.

103. 104 S.Ct. at 1034.

104. Justice O'Connor disagreed. *See supra* note 53.

105. 457 U.S. at 75. The right to pursue employment is categorically different than the right created by Alaska's legislature. The former exits independently of where one resides; the latter does not exist unless one resides in Alaska. *See id.*.

clause by drafting numerous residency quotas for different sections of the state. Justice Blackmun would remedy this problem by applying the clause to situations "which bear the same sort of practical relationship to a classification based on state residence."[106] Courts would have great difficulty applying this standard, however, because there are many possible discrimination schemes. The protection of the privileges and immunities clause should not depend on whether a state discriminates against enough of its own residents to make it appear to be intrastate discrimination.

Finally, *United Building* does not frustrate the city's goal of reducing inner-city unemployment.[107] It merely subjects municipal residency requirements to the *Toomer* test.[108] If Camden's goal is to increase employment among blacks, it can do so through a minority hiring goal.[109]

United Building is noteworthy because it extends the privileges and immunities clause beyond discrimination based solely on state residency. This decision will serve as a warning to state, county[110] and city governments that contemplate passage of protectionist laws. *United Building* does not spell defeat for municipal affirmative action programs. It does require, however, that a city use minority or resident hiring goals that will withstand scrutiny under the *Toomer* test. *United Building* revives the privileges and immunities clause. This

106. 104 S.Ct. at 1035 n.14.

107. *See supra* note 1.

108. In dictum, Justice Rehnquist hinted that the Camden ordinance might pass the test. Distinguishing the ordinance from the statute in *Hicklin*, he stated:

> The Alaska Hire statute at issue in *Hicklin v. Orbeck* [citation omitted] swept within its strictures not only contractors and subcontractors dealing directly with the State's oil and gas; it also covered suppliers who provided goods and services to those contractors and subcontractors. We invalidated the Act as an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents. . . . No similar 'ripple effect' appears to infect the Camden ordinance. It is limited in scope to employees working directly on city public works projects.

104 S.Ct. at 1030.

109. The Supreme Court of New Jersey held that Camden's 25% minority hiring goal violated neither the United States nor the New Jersey Constitution. 88 N.J. 317, 337-38, 443 A.2d 148, 158 (1982). United Building did not appeal this portion of the court's holding.

110. See Construction & Gen. Laborers Union v. St. Paul, 270 Minn. 427, 428-29, 134 N.W.2d 26, 28 (1965) for an example of an ordinance discriminating on the basis of county residency.

sparsely used constitutional provision is now a nonresident's best hope for defeating protectionist measures of all types.

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