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Hiring Preference Acts: Has the Supreme Court Rendered Them Violations of the Priviliges and Immunities Clause?

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HIRING PREFERENCE ACTS: HAS THE SUPREME COURT RENDERED THEM VIOLATIONS OF THE PRIVILEGES AND IMMUNITIES CLAUSE?

INTRODUCTION

During recent years, construction workers have suffered the highest unemployment rate of workers in any industry, almost twice the overall national average.[1] In 1983, 18.4% of workers in the construction industry were jobless.[2]

This problem is alleviated somewhat by huge state, local and federal funding of public works projects. Publicly funded construction exceeded $50 billion in 1983, accounting for almost one-fifth of total new construction in the country.[3] State and local governments were the primary source for public works financing and for construction jobs, contributing almost 80% of total public funds.[4]

The expanding federal budget deficit has led the Reagan Administration to propose cutbacks in federal funding. Although the effects on the construction industry of these proposed cutbacks and of the pending federal income tax bill are uncertain,[5] over time they probably will cause an increase in this already important state and local influence on public works projects.

State and local governments have sought to channel job opportunities to the residents who pay taxes and to the unemployed within their boundaries.[6] One way these governments have ensured that their residents receive the publicly funded jobs is by enacting hiring preference

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1. Recently compiled Commerce Department figures show this comparison.

Selected Unemployment Rates

	1975	1979	1980	1981	1982	1983
All Unemployed	8.5	5.8	7.1	7.6	9.7	9.6
Construction	18.0	10.3	14.1	15.6	20.0	18.4

U.S. Dep't of Commerce, Statistical Abstract of the United States Table No. 683 (1985).

2. *Id.*

3. *Value of New Construction Put into Place (S in billions):*

	1970	1975	1976	1977	1978	1979	1980	1981	1982	1983
Total	95.2	135.9	151.1	173.8	205.6	230.4	230.7	239.1	230.1	262.2
Public (total)	28.1	40.9	39.1	38.2	45.9	48.8	55.0	53.3	51.0	50.8
State and Local Gov't owned	24.8	34.6	32.1	30.9	37.5	40.2	45.4	42.9	40.8	40.2

Id. Table No. 1293 (rounded to one decimal point).

4. *See id.*

5. *See* Engineering News-Record, July 18, 1985, at 88, col. 2 (tax proposals would reduce state and local ability to fund construction projects); *id.*, June 27, 1985, at 10, col. 1 (construction projects "already being shelved in anticipation of unfavorable tax treatment"); *id.*, February 21, 1985, at 10, col. 1 (greater burden on state and local governments).

6. *See* State v. Antonich, 694 P.2d 60, 60-61 (Wyo. 1985) (construing Wyo. Stat. § 16-6-203 (1982)); *see also* Colo. Rev. Stat. § 8-17-101 (1973 & Supp. 1984); Miss. Code Ann. § 31-5-17 (1972); S.D. Codified Laws Ann. § 5-19-6 (1980).

acts. These acts require private contractors to hire local labor as a condition to obtaining public works construction contracts.[7]

In 1984, in *United Building & Construction Trades Council v. Mayor of Camden*,[8] the Supreme Court held that, because preference acts discriminated against nonresidents, and thereby infringed their "fundamental" privilege to secure employment from private contractors, the acts fell within the "purview" of the privileges and immunities clause of article IV of the Constitution.[9] Because the record had failed to show sufficient evidence to justify Camden's discrimination against nonresidents, the Court remanded the case, and did not address what form a preference act must take to survive a constitutional challenge.[10]

Five state courts have struck down preference acts as violative of the privileges and immunities clause.[11] In contrast, the Supreme Court of Wyoming recently upheld Wyoming's statute, which was similar to those struck down by other courts.[12] Twenty-one other states have statutes remaining in force.[13]

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7. *See, e.g.*, Ark. Stat. Ann. § 14-607 (1979); Mont. Code Ann. § 18-2-403 (1983); Wyo. Stat. § 16-6-203 (1982).

8. 465 U.S. 208 (1984).

9. *See id.* at 218-19. "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1.

10. *See Camden*, 465 U.S. at 223.

11. *See* People *ex rel.* Bernardi v. Leary Constr. Co., 102 Ill. 2d 295, 298-99, 464 N.E.2d 1019, 1023 (1984) (construing Preference to Citizens on Public Works Projects Act, Ill. Rev. Stat. ch. 48, §§ 269-275 (1981)) (overruling People *ex rel.* Holland v. Bleigh Constr. Co., 61 Ill. 2d 258, 335 N.E.2d 469 (1975)); Opinion of the Justices to the Senate, 393 Mass. 1201, 1208, 469 N.E.2d 821, 826 (1984) (advisory opinion holding that proposed bill, if enacted, would be unconstitutional); Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 384, 437 A.2d 733, 737-38 (Ch. Div. 1981) (construing N.J. Rev. Stat. § 34:9-2 (1965)), *aff'd and modified on other grounds per curiam*, 187 N.J. Super. 174, 453 A.2d 1359 (App. Div. 1982); Salla v. County of Monroe, 48 N.Y.2d 514, 518, 399 N.E.2d 909, 910, 423 N.Y.S.2d 878, 879 (1979) (construing N.Y. Lab. Law § 222 (McKinney 1965) (repealed 1982)), *cert. denied*, 446 U.S. 909 (1980); Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 123, 654 P.2d 67, 68 (1982) (en banc) (construing Wash. Rev. Code Ann. § 39.16.005 (1972 & Supp. 1986)). In addition, the Seventh Circuit has reviewed Illinois' preference act and held that it violated both the commerce clause and the privileges and immunities clause. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 496, 498 (7th Cir. 1984) (construing Preference to Citizens on Public Works Projects Act, Ill. Rev. Stat. ch. 48, §§ 269-275 (1981)).

12. *See* State v. Antonich, 694 P.2d 60, 60-61 (Wyo. 1985); Wyo. Stat. § 16-6-203 (1982).

13. *See* Ala. Code § 39-3-2 (1975); Ark. Stat. Ann. § 14-607 (1979); Cal. Lab. Code § 2015 (West 1971); Colo. Rev. Stat. § 8-17-101 (1973 & Supp. 1984); Conn. Gen. Stat. § 31-52a (1983); Del. Code Ann. tit. 29, § 6913 (1983); Fla. Stat. Ann. § 255.04 (West 1975 & Supp. 1985); Hawaii Rev. Stat. § 103-57 (1976); Idaho Code § 44-1001 (1977 & Supp. 1985); Iowa Code Ann. § 73.3 (West 1973 & Supp. 1985); Me. Rev. Stat. Ann. tit. 26, § 1301 (1964); Md. Ann. Code art. 21, § 8-503 (1981) (hiring preference permitted); 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, § 9 (West 1963 & Supp. 1984-1985); Pa. Stat. Ann. tit. 43, § 154 (Purdon 1964); S.D. Codified Laws Ann. § 5-19-6 (1980); Utah Code Ann. § 34-30-11 (1953 & Supp. 1983) (preference limited to resident veterans); Wis. Stat. Ann. § 101.43 (West 1973 & Supp. 1985); Wyo. Stat. § 16-6-203 (1982).

Part I of this Note sets the background for examining hiring preference acts by discussing the policy underlying the privileges and immunities clause, the test used to analyze state action, and the fundamental right to work, which the clause protects. Part II examines the effect of the *Camden* decision, discusses subsequent opinions on the constitutionality of preference acts, and constructs a Model Hiring Preference Act designed to comply with these constitutionally imposed limits. Part III discusses the open question of what degree of scrutiny the Court might apply in analyzing the constitutionality of hiring preference acts. Part IV analyzes the effect of subjecting hiring preference acts to the standard of review used recently by the Court. The Note concludes that the Court's requirements may already have made hiring preference acts impracticable. Depending on the strictness of the standard of review, the Court could render all hiring preference acts, including the Model Hiring Preference Act suggested in Part II, violations of the privileges and immunities clause. The Note further suggests that the Supreme Court should prevent the creation of pockets of discrimination throughout the country by precluding other state courts from following the unwise lead of the Supreme Court of Wyoming. The Supreme Court should reconsider the *Camden* decision and hold definitively that hiring preference acts are unconstitutional.

I. POLICIES AND PURVIEW OF THE PRIVILEGES AND IMMUNITIES CLAUSE

A. *Mutuality of the Commerce Clause and the Privileges and Immunities Clause*

Although this Note is concerned primarily with the privileges and immunities clause, hiring preference acts also require commerce clause analysis.[14] These two clauses find a common origin in article IV of the Articles of Confederation.[15] The Constitution's framers held "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[16] Thus, it was natural for the two clauses to evolve similarly. The Supreme Court has called their evolution a "mutually reinforcing relationship."[17]

Although the clauses evolved together, some of their policies differ. The overriding purpose of the commerce clause is to ensure producers and consumers access to the American market unrestricted by state in-

14. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221 (1984); U.S. Const. art. I, § 8, cl. 3.

15. Supreme Court of N.H. v. Piper, 105 S. Ct. 1272, 1276 & n.7 (1985).

16. Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979); *see* Ward v. Maryland, 79 U.S. (12 Wall.) 418, 431 (1870); Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868).

17. Hicklin v. Orbeck, 437 U.S. 518, 531 (1978).

terference.[18] "[R]egulation affecting interstate commerce" triggers commerce clause analysis.[19] The privileges and immunities clause, however, protects the rights of nonresidents from the "uncertain remedies afforded by diplomatic processes and official retaliation"[20] by restricting the states' exercise of police powers.[21] This clause is triggered by "discrimination against out-of-state residents on matters of fundamental concern."[22]

Despite these differing policies, the commerce clause and the privileges and immunities clause are rooted in the common purpose of protecting United States citizens from parochial, self-interested state actions that curtail economic and political freedoms of nonresidents and inhibit the growth of a competitive national market and a unified people. Ultimately, the clauses prevent self-defeating discrimination and ensuing retaliation.[23]

B. *The* Toomer *Test*

To analyze cases under the privileges and immunities clause, the Supreme Court developed the test contained in the parent of modern privileges and immunities cases, *Toomer v. Witsell*.[24]

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18. *See* H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949); *see also* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984) ("Commerce Clause acts as an implied restraint upon state regulatory powers").

19. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984).

20. Toomer v. Witsell, 334 U.S. 385, 395 (1948).

21. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984) (privileges and immunities clause "imposes a direct restraint on state action in the interests of interstate harmony").

22. *Id.*

23. The privileges and immunities clause generally prohibits discrimination against nonresidents as a means of protecting a state's own citizens. *See* Toomer v. Witsell, 334 U.S. 385, 396 (1948) (unequal shrimp fishing license fees). The Supreme Court has noted that "no [other] provision in the Constitution has tended so strongly to constitute the citizens of the United States one people." Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1868). *See also* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984) (clause "imposes a direct restraint on state action in the interests of interstate harmony"); Austin v. New Hampshire, 420 U.S. 656, 662 (1975) ("structural balance essential to the concept of federalism"); *id.* at 660 ("establishes a norm of comity"). Moreover, the Court has tolerated neither retaliation in response to another state's discriminatory treatment, *see* Travis v. Yale & Towne Mfg. Co., 252 U.S. 60, 82 (1920) (striking down different treatment for income tax exclusions), nor reciprocal agreements between states to benefit each other's residents, *see* Great Atl. and Pac. Tea Co. v. Cottrell, 424 U.S. 366, 379 (1976) (state "may not use the threat of economic isolation as a weapon to force sister States to enter into even a desirable reciprocity agreement").

In the commerce clause cases, the Court has been concerned as well about retaliation becoming a burden on commerce. Thus, a 25-mile restriction on milk sources would "invite a multiplication of preferential trade areas," Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951), and New York's bar to low-priced milk from Vermont would open the door to "rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation," Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935).

24. 334 U.S. 385, 396 (1948). The *Toomer* Court considered South Carolina's regu-

The "*Toomer* test" involves a two-part analysis. A state may not discriminate against nonresidents unless "(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."[25]

According to the *Toomer* Court, to prove a "substantial reason" the state must show that nonresidents "constitute a peculiar source of the evil" at which the discriminatory means are aimed.[26] The Court has accepted this definition in the cases involving constitutional challenges to hiring preference acts.[27]

C. *The "Fundamental Right" to Work*

A state's action may be challenged under the privileges and immunities clause when a state has infringed " 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity."[28] The privileges and immunities clause protects those "fundamental" rights necessary to "the formation, the purpose, or the development of a single Union" of the states.[29]

In only two narrow areas has the Court allowed a state to discriminate against nonresidents. First, a state may discriminate when it infringes

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lation of the shrimp harvest off its coastline as shrimp migrated from North Carolina to Florida. *See id.* at 387-88. South Carolina imposed a license fee for each fishing boat. The fee for residents was only $25; but the fee for nonresidents was $2500. *Id.* at 389.

Because there was "no assertion of federal power" that conflicted with the state's regulations on the shrimp fishing industry, South Carolina's statute did not infringe the commerce clause. *Id.* at 393. Four states, however, had imposed their own regulations, ostensibly for conservation purposes, that took the form of "retaliation," and led effectively to the creation of fishing barriers at offshore "state lines." *Id.* at 388.

In applying what became the *Toomer* test, the Court held that, even if the state had been able to show that nonresident fishermen constituted a "peculiar source of evil" by using larger boats, harvesting greater quantities of shrimp, or being more costly to police, the state had numerous alternatives to its prohibitively high license fee to remedy the situation. *See id.* at 398-99. For example, the Court noted that the state could graduate "license fees according to the size of the boats." *Id.*

Most recently, in March 1985, the Court applied the *Toomer* test in Supreme Court of N.H. v. Piper, 105 S. Ct. 1272, 1278-80 (1985), to strike down a rule requiring residence as a condition to practice law in New Hampshire as a member of the state's bar.

25. Supreme Court of N.H. v. Piper, 105 S. Ct. 1272, 1279 (1985). The *Piper* Court, in part two of the test, used the words "substantial relationship." *See id.* Although the Court cited *Camden*, that opinion used the words "close relation," *see* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984), which it quoted from Toomer v. Witsell, *see* 334 U.S. 385, 396 (1948). Nothing in the *Piper* opinion implies that the Court intended any meaning from the change and, in fact, the Court used both phrases in the sentence immediately following. *See Piper*, 105 S. Ct. at 1279 ("In deciding whether the discrimination bears a close or substantial relationship to the State's objective . . . "). The language suggests that the Court intended to use the words interchangeably. As such, this Note will use only the most recent form, "substantial relationship."

26. Toomer v. Witsell, 334 U.S. 385, 398 (1948).

27. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984); Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978).

28. Baldwin v. Fish and Game Comm'n, 436 U.S. 371, 383 (1978).

29. *Id.* (elk hunting not a fundamental right).

only a "nonfundamental" right.[30] Second, a state may discriminate against nonresidents when the Court finds that "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community."[31]

30. *See id.* at 388. Montana had imposed an elk hunting license fee 25 times higher for nonresidents than for residents. *Id.* at 374. The Court allowed this difference because "[e]quality in access to Montana elk is not basic to the maintenance or well-being of the Union." *Id.* at 388.

The Court has considered few "nonfundamental" rights. *Baldwin* was handed down in 1978, over 100 years after the last such Supreme Court case, McCready v. Virginia, 94 U.S. 391, 396 (1876), which upheld a statute limiting to residents the right to cultivate oysters in the State's inland tidewater basins. Yet, even if *McCready* remains good law in light of subsequent commerce clause cases, *see* H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 539 (1949) (curtailing of milk trade prohibited), the *Toomer* Court limited the "*McCready* exception" to stationary oyster beds. *See* Toomer v. Witsell, 334 U.S. 385, 401-02 (1948) (migratory shrimp).

By discussing "fundamental rights" in a privileges and immunities context, the *Baldwin* Court apparently revived a theory that the Court had used infrequently and inconsistently since the early 1800's. *See Baldwin*, 436 U.S. at 394-402 (Brennan, J., dissenting) (urging that the clause be invoked in all cases where a state distinguished solely on the basis of residency). The revival appears to use the term "fundamental rights" differently from the original sense used in Corfield v. Coryell, *see* 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) ("those privileges and immunities which . . . belong, of right, to the citizens of all free governments"); *see also* L. Tribe, American Constitutional Law § 6-32, at 405-06 (1978) (commenting that Justice Washington was referring to the early 19th century philosophy of seeing innate "natural rights" of man in his "social compact" with the sovereign), than in a modification of the sense expressed later in Paul v. Virginia, *see* 75 U.S. (8 Wall.) 168 (1868), of the rights which a state expressly guarantees to its citizens through its constitution and laws, *id.* at 180; *see* Hague v. CIO, 307 U.S. 496, 511 (1939) (clause "prevents a State from discriminating against citizens of other States in favor of its own"). *See Baldwin*, 436 U.S. at 387 (opinion of the Court); *id.* at 396-97 (Brennan, J., dissenting). Under the modern theory it therefore appears that, of the privileges and immunities which a state guarantees its residents, only a portion count as "fundamental" and only these are protected by the privileges and immunities clause.

The "nonfundamental rights," other than those in *McCready* and *Baldwin*, have been found in lower court cases. *See, e.g.*, Sestric v. Clark, 765 F.2d 655, 658 (7th Cir. 1985) (dictum) (limited privilege not to take bar exam); Sklar v. Byrne, 727 F.2d 633, 639 & n.8 (7th Cir. 1984) (possession of handguns); *In re* Frazier, 594 F. Supp. 1173, 1185 (E.D. La. 1984) (denial to nonresident of right to practice law before federal court, because of failure to comply with local rule requiring an office to be maintained as a condition of bar membership, could not be considered "an affront to the comity exercised between Louisiana and Mississippi"); Alerding v. Ohio High School Athletic Ass'n, 591 F. Supp. 1538, 1541 (S.D. Ohio 1984) (participation in interscholastic athletics had insignificant effect on "promotion of interstate harmony"); Commonwealth v. Lightman, 339 Pa. Super. 359, 489 A.2d 200, 204 (1985) (tolling criminal statutes of limitation while accused was absent from the state "cannot be said to impact on the vitality of the Nation").

31. Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972) (suffrage and right to hold political office); *see* Martinez v. Bynum, 461 U.S. 321, 325-29 (1983) (public school enrollment); McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646-47 (1976) (per curiam) (civil service employment).

A nonresident has a fundamental right of access to state courts but "upon terms which in themselves are reasonable and adequate for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens." Canadian N. Ry. v. Eggen, 252 U.S. 553, 562 (1920) (statute of limitations rule concerning causes of action arising outside the state).

Payment of health care benefits is another area where the Court has permitted limited

The Court, however, has held repeatedly in its decisions on the privileges and immunities clause that the "pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."[32]

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discrimination against nonresidents. *See* Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261-64 (1974) (striking down only durational residency requirement of county's program to restrict nonemergency free medical care to residents); Doe v. Bolton, 410 U.S. 179, 200 (1973) (although Georgia statute which limited use of *all* abortion clinics to Georgia residents violated privileges and immunities clause, the Court left open whether Georgia could have restricted use of "state-supported facilities"). Welfare benefit cases have also employed this reasoning. *See* Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (striking down only durational residency requirement of state program to restrict welfare benefits to residents); *cf.* Zobel v. Williams, 457 U.S. 55, 64-65 (1982) (state's natural resource "dividend" payments based on length of residency); Edwards v. California, 314 U.S. 160, 173-74 (1941) (California bar to migrant indigents during the Depression).

In most of these cases, because the Court refrained from declaring that a state could not discriminate, the Court implied that a state could limit the benefits or the right to residents. In these cases, the Court struck down the condition that to become a resident a person must have met a "durational residency requirement," usually for a period of a few months to a year. *See* Dunn v. Blumstein, 405 U.S. 330, 332-33 (1972).

Durational residency requirements violate the "fundamental right to travel," which may be found in the privileges and immunities clause of the fourteenth amendment, by infringing a right of "national citizenship," *see* J. Nowak, R. Rotunda & J. Young, Constitutional Law ch. 9, § V (2d ed. 1983), in the equal protection clause of the fourteenth amendment, by creating "invidious distinctions" among the state's citizens, *see* Shapiro v. Thompson, 394 U.S. 618, 633 (1969), and by penalizing people for having recently exercised their right to travel, *see* Dunn v. Blumstein, 405 U.S. 330, 339-40 (1972), in the commerce clause, *see* Zobel v. Williams, 457 U.S. 55, 66-67 (Brennan, J., concurring), or in the privileges and immunities clause of article IV, *id.* at 73-74 (O'Connor, J., concurring).

Although a state cannot justify durational residency requirements on "budgetary or recordkeeping considerations," it can when the benefit to the individual would be no different after the time lapse. *See* Sosna v. Iowa, 419 U.S. 393, 406-07 (1975). Thus, the Supreme Court upheld Iowa's residency requirement of one year to obtain access to a court in divorce proceedings. *See id.* The later adjudication of the divorce would have given the individual no fewer rights, and the state had a legitimate interest in the durational requirement to make "collateral attacks" on its judgment more difficult. *Id.*

As construction workers might lose the open jobs altogether if they were penalized by having to wait to be eligible for employment on a public works project, a state's durational residency requirement in a hiring preference act would not fall within the *Sosna* exception and so would be unconstitutional. For examples of hiring preference acts containing durational residency requirements, see Ala. Code § 39-3-2 (1975) (two-year residency requirement); Conn. Gen. Stat. § 31-52 (1983) (three months).

32. United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 219 (1984). In Supreme Court of N.H. v. Piper, 105 S. Ct. 1272 (1985), the majority refused to hold that lawyers had less of a right to practice law unimpeded by state interference than had other professions or trades. *See id.* at 1277; *see also* Hicklin v. Orbeck, 437 U.S. 518, 524-25, 534 (1978) (discussing nonresidents' right to employment infringed by "Alaska Hire Act"); Mullaney v. Anderson, 342 U.S. 415, 417-18 (1952) (discriminatory license fee for fishing held to violate privileges and immunities clause); Toomer v. Witsell, 334 U.S. 385, 396 (1948) ("one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State"); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (inequitable license fee on nonresident traders infringed right to engage "in lawful commerce, trade, or business without molestation").

Although the Court did find, in Baldwin v. Fish & Game Comm'n, 436 U.S. 371 (1978), that elk hunting was not a fundamental right, the Court's decision followed from

Within the area of employment, the Court has distinguished between the right to work at all, and the right to work for the government. The Constitution does not guarantee a fundamental right to a government job.[33] Thus, a state may make residency a condition of direct employment by the state without violating the privileges and immunities clause.[34] But, a state's restrictions on nonresidents who are employed by, or seek employment from, any party other than the state itself, even if the restrictions pertain to state-funded projects, constitute a prima facie violation of the privileges and immunities clause.[35] Thus, the restrictions are immediately subject to analysis under the *Toomer* test.[36]

II. TOWARD A MODEL HIRING PREFERENCE ACT

A. *The* Camden *Decision*

The Court has considered hiring preference acts in three recent cases.[37] In 1978, in *Hicklin v. Orbeck*,[38] the Court struck down the overbroad "Alaska Hire Act" as violative of the privileges and immunities clause.[39] In 1983, the Court, in *White v. Massachusetts Council of Con-*

its concern for protecting activities in pursuit of a trade. *See id.* at 388. "Elk hunting by nonresidents in Montana is a recreation and a sport," Justice Blackmun explained. "It is not a means to the nonresident's livelihood." *Id.*

33. United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 219 (1984). *See also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (no fundamental right to government job under equal protection clause).

34. *See* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646-47 (1976) (per curiam) (upholding residency requirement for firemen); Detroit Police Officers Ass'n v. Detroit, 385 Mich. 519, 522-23, 190 N.W.2d 97, 97-98 (1971) (residency requirement for police upheld), *appeal dismissed*, 405 U.S. 950 (1972).

35. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 497 (7th Cir. 1984) (following *Camden*); *see also* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221-22 (1984) ("opportunity to seek employment with such private employers is 'sufficiently basic to the livelihood of the Nation' . . . as to fall within the purview of the Privileges and Immunities Clause") (citation omitted) (quoting Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 388 (1978)).

36. See *infra* note 131 and accompanying text.

37. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984); White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983); Hicklin v. Orbeck, 437 U.S. 518.

38. 437 U.S. 518 (1978).

39. *See id.* at 526-27. The "Alaska Hire Act" 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 state is a party" contain a clause mandating the preferential hiring of Alaska residents. *Id.* at 520 n.2. The Act's scope extended its control as far as to contracts among subcontractors and suppliers. The Act also apparently controlled hiring preferences at refineries and distribution systems. *Id.* at 530. The Act even went so far as to require that all nonresidents be laid off prior to laying off a qualified resident. *Id.* at 520 n.1. For an example of another preference act with a similar provision, see Hawaii Rev. Stat. § 103-57 (1976) (nonresident may be employed for public works "until persons with such qualifications competent for such services can be obtained").

Because it "owned" the oil and gas, Alaska argued that it could determine to whom it wished to sell the natural resources, and that it could set the conditions for the sale. *See Hicklin*, 437 U.S. at 528. The Court rejected this proprietary interest argument because

struction Employers, Inc.,[40] rejected a commerce clause challenge to an executive order of the mayor of Boston requiring contractors working on city projects to hire at least fifty percent of their workers from among Boston's residents.[41]

Alaska had not limited its control over preferential hiring to the initial sale of the resources. The connections with private employers were "sufficiently attenuated" to constitute discriminating violations. *Id.* at 529; *see* South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237, 2244-47 (1984) (processing timber at mills in the state as a condition for sale of timber).

"In sum," Justice Brennan concluded for a unanimous Court, "the Act is 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." *Hicklin*, 437 U.S. at 531.

The Alaska statute failed both parts of the *Toomer* test. *Id.* at 525-28. First, the source of Alaska's unemployment was inadequate job skills and remoteness from the work site, not nonresidents moving into jobs in Alaska. Thus, Alaska had not shown that nonresidents constituted the "peculiar source of the evil" of the State's unemployment. *Id.* at 526. Second, even if the State could have justified its discrimination against nonresidents to correct its unemployment problem, a justification which the Court volunteered would be a "dubious" assumption, *see id.* at 526, and one that "may present serious constitutional questions," *id.* at 528, the state's means would have had to have been "more closely tailored to aid the unemployed the Act is intended to benefit." *Hicklin*, 437 U.S. at 528. The Alaska remedy for the unemployment, because it was a complete bar to nonresidents, was far in excess of that necessary to improve job opportunities for the unemployed, who were primarily native American residents. *Id.* at 526, 527 & n.10, 528.

40. 460 U.S. 204 (1983).

41. *Id.* at 214-15. In questions on preference acts, the Court determines first whether the restrictions violate the commerce clause. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221 (1984). Thus, this clause acts as a first "hurdle" before the Court even reaches the privileges and immunities clause analysis under the *Toomer* test.

The *White* Court distinguished between those contracts for which Boston provided the entire financing and those for which it received grants from federal agencies or departments authorized by Congress. *See* 460 U.S. at 214-15. On those projects where Boston received some federal grant money, the Court found that the federal regulations which governed the grant's use had expressly provided that local residents receive preferential treatment, and Congress could regulate commerce in any way it chose. *See id.* at 213 & n.11.

On those projects for which Boston provided all the funding and, therefore, for which Congress had not expressly condoned limiting the benefits to contractors who agreed to hire 50% of their workers from residents, the Court turned to its decisions in Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) and Reeves, Inc. v. Stake, 447 U.S. 429 (1980). *See White*, 460 U.S. at 211 n.7. The construction employees, hired by both private contractors and subcontractors, were essentially "working for the city," so no regulation burdened interstate commerce and the commerce clause could not apply. *Id.*; *see* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 219-20 (1984) (explaining *White*'s rationale).

"[T]he Commerce Clause is . . . an affirmative grant of power to Congress to regulate [trade between the states and foreign nations, and] has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237, 2240 (1984). However, the clause does not prohibit "a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (footnote omitted) (Maryland could require greater documentation from nonresident

Lest anyone suspect that the *White* Court had approved hiring prefer-

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scrap processors when it offered bounties for automobile hulks). The Court thus developed the "market participant" doctrine. The Court reasoned that when a state acts as a market participant in a proprietary capacity, it is often "burdened with the same restrictions imposed on private market participants." Reeves, Inc. v. Stake, 447 U.S. 429, 439 (1980) (South Dakota acted as market participant in selling cement from state-owned and operated cement plant). Therefore, the state should also "share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.*

The market participant doctrine, however, has never claimed full support of the Court. *See Alexandria Scrap*, 426 U.S. at 794 (6-3 decision in which Justice Stevens concurred on narrow grounds and Justices Brennan, White, and Marshall dissented); *Reeves*, 447 U.S. at 429 (5-4 decision in which Justice Powell dissented and was joined by Justices Brennan, White and Stevens). Justice Powell, who authored the *Alexandria Scrap* opinion, also authored the dissent in *Reeves*. A state-run business cannot be presumed to act in the same way as a private enterprise because, he wrote, "[a] State frequently will respond to market conditions on the basis of political rather than economic concerns." *Reeves*, 447 U.S. at 450. South Dakota's hoarding of the cement it produced was "precisely the kind of economic protectionism that the Commerce Clause was intended to prevent." *Id.* at 447.

Indeed, the Court's earlier dissenters ultimately succeeded in obtaining the Court's support for limiting to a "relatively narrow" definition the market in which a state could be said to be a participant. *See South-Central Timber*, 104 S. Ct. at 2245-46. In *South-Central Timber*, because Alaska itself was not engaged in processing timber, it was not a market participant and therefore violated the commerce clause when it imposed conditions on purchasers of the State's timber that required them to send their timber to in-State processors. *Id.* at 2246.

The significance of this new restriction on the market participant doctrine was not missed by Justice Rehnquist. Writing in a dissent joined by Justice O'Connor, he argued that "[t]he contractual term at issue here no more transforms Alaska's sale of timber into 'regulation' of the processing industry than the resident-hiring preference imposed by the city of Boston in *White* . . . constituted regulation of the construction industry." *Id.* at 2248 (Rehnquist, J., dissenting).

If Justice Rehnquist's fears are correct, then the Court's earlier holding in *White* that Boston acted as a "market participant" might not withstand a reevaluation by the Court of whether the employees of private contractors and subcontractors were "working for the city," which was the essential theory on which the Court based its decision in that case. *See White*, 460 U.S. at 211 n.7. Such an interpretation would be supported by Justice Brennan's concurring opinion in *South-Central Timber*, *see* 104 S. Ct. at 2247-48 (Brennan, J., concurring) (market participant doctrine had an "inherent weakness"); nevertheless, the majority opinion merely distinguished *White*'s "working for the city doctrine," by noting that a city funding public works "retained a continuing proprietary interest in the subject of the contract," *see id.* at 2246 & n.10.

Certain members of the Court have already announced their dissatisfaction with the market participant doctrine in general, and the "working for the city doctrine" specifically. *See White*, 460 U.S. at 218-23 (Blackmun, J., joined by White, J., concurring in part, dissenting in part); *South-Central Timber*, 104 S. Ct. at 2247-48 (Brennan, J., concurring). Indeed, Justice Blackmun, the author of the market participant doctrine as expanded by *Reeves*, had dissented from the majority's opinion in *White* precisely because he felt that state control of the contractual relations between private contractors and their employees constitutes "the essence of regulation." *White*, 460 U.S. at 219 (Blackmun, J., concurring in part, dissenting in part).

An extension of *South-Central Timber*'s "relatively narrow" definition of the market participant doctrine to the area of public works projects may mean that a state may not avoid the commerce clause prohibitions on regulation if it either requires private contractors to compel their subcontractors to hire only local labor, or requires municipalities or political subdivisions within the state to hire only residents. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 496 (7th Cir. 1984) (state acted as regulator when it imposed

ence acts,[42] the Court returned to the issue a year later in *United Building & Construction Trades Council v. Mayor of Camden*.[43] In *Camden*, the Court considered a municipal ordinance, essentially the same as the Boston mayor's executive order in *White*,[44] and merged the analyses from the prior two cases. Although the Court found that Camden had not violated the commerce clause,[45] the city's ordinance could nevertheless be properly challenged under the privileges and immunities clause because it discriminated against nonresidents.[46] Justice Rehnquist explained that "the fact that Camden is merely setting conditions on its

hiring restrictions on municipalities); *cf. South-Central Timber*, 104 S. Ct. at 2246 (state regulated commerce when it "attempt[ed] to govern the private, separate economic relationships of its trading partners"). The Court ultimately may interpret this limit as prohibiting a state from compelling primary contractors, with whom it deals directly, to hire only residents, with whom the state does not deal directly. The Court was not ready to take such a position in *South-Central Timber*. *See id.* at 2246 & n.10 (distinguishing "working for the city doctrine" in *White*). But if the Court does extend this new restriction to bar such conditions on primary contractors, it would be impossible to draft a hiring preference act able to sustain constitutional challenge under the commerce clause, for these acts are necessarily designed to affect contractors' dealings with employees outside the state's direct participation.

42. Because the Court did not grant certiorari on the issue, the Court did not address the privileges and immunities clause question in *White*. *See* 460 U.S. at 214 n.12 (lower court decided only on commerce clause grounds). Consequently, *Camden* marked almost a complete reversal on the preference act's fate. Only Justice White, who dissented in *White* and joined in *Camden*, remained on the same side in terms of the judgment's practical outcome. *See id.* at 215; United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984).

43. 465 U.S. 208 (1984).

44. Both measures set goals for local residents and both extended to all primary contractors and their subcontractors. *See id.* at 211-12; *White*, 460 U.S. at 205 n.1; *id.* at 224 n.8 (Blackmun, J., concurring in part, dissenting in part).

45. *See Camden*, 465 U.S. at 221. Earlier, in *White*, Justice Blackmun argued that Boston's restricting private contractors in their direct relations with employees constituted the "essence of regulation." *See White*, 460 U.S. at 219 (Blackmun, J., concurring in part, dissenting in part). While the Court disagreed in *White*, *see id.* at 211 n.7, the majority moved toward Justice Blackmun's view of the limits to the "market participant doctrine" in *South-Central Timber*. See *supra* note 41.

46. *Camden*, 465 U.S. at 221-22. The Court rejected the argument of the court below, the Supreme Court of New Jersey, *see* United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 341, 443 A.2d 148, 160 (1982), *rev'd*, 465 U.S. 208 (1984), and of Justice Blackmun, *see Camden*, 465 U.S. at 224, (Blackmun, J., dissenting) that the privileges and immunities clause did not apply to the municipal ordinance because it discriminated against both New Jersey residents and nonresidents. *See id.* at 215-17. Municipalities derive their authority from the states and therefore fall under the privileges and immunities restrictions. *Id.* at 215. To hold otherwise, Justice Rehnquist noted, would allow California, for example, to escape the privileges and immunities clause's restraints altogether merely by limiting employment in Southern California to residents of that region, while limiting employment in Northern California to residents of that region. *See id.* at 217 n.9.

The privileges and immunities clause did not protect New Jersey's own residents from discrimination by Camden, because, unlike the nonresidents—10 minutes across the Delaware River in Philadelphia—who required such constitutional protection, New Jersey residents who were victims of discrimination had a chance to seek remedy at the polls. *See id.* at 217; *cf.* Austin v. New Hampshire, 420 U.S. 656, 662 (1975) (nonresidents taxed under the challenged scheme had no access to state's legislative process).

expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause."[47]

After finding that the nonresidents' interest in working on the public works projects constituted a "fundamental right," the Court found that the city's action fell within the "purview" of the privileges and immunities clause,[48] and applied the *Toomer* test.[49]

That Camden provided funding for the construction projects was "perhaps the crucial factor" in analyzing the ordinance's constitutionality, but that fact alone did not create a "substantial interest" which would justify discrimination.[50]

The Court did not reject the city's arguments that it had "substantial reasons" for the discriminatory preference act.[51] The Supreme Court did not state that "[s]piralling unemployment, a sharp decline in population, and a dramatic reduction in the number of businesses located in the city [which had] eroded property values and depleted the city's tax base,"[52] could not justify discrimination. Nor did the Court state that a hiring preference act could not be used to stem "middle class flight" such as that which had apparently "plagued" Camden.[53] Indeed, the argument that non-Camden, New Jersey residents and Pennsylvania residents might " 'live off' Camden without 'living in' Camden" was not rejected by the Court as a justification for municipal discrimination.[54]

Rather, the weakness in Camden's case was that the city presented no

47. *Camden*, 465 U.S. at 220.

48. *Id.* at 219, 221.

49. *See id.* at 222-23. See *supra* text accompanying notes 24-27.

50. *Camden*, 465 U.S. at 221. It would seem that at least some funding on the state's part would be necessary; otherwise, the state would be acting as a market regulator in violation of the commerce clause. See *supra* note 41. In striking down state preference acts, lower courts have felt it particularly significant that the states had received a high proportion of federal funding for their projects, because the states were prohibiting nonresident employment on projects which they had not funded entirely themselves. *See* Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 384, 437 A.2d 733, 737 (Ch. Div. 1981) (80% federal funding made New Jersey's interest "too attenuated to tip the balance" in the State's favor), *aff'd and modified on other grounds per curiam*, 187 N.J. Super. 174, 453 A.2d 1359 (App. Div. 1982); Salla v. County of Monroe, 48 N.Y.2d 514, 525, 399 N.E.2d 909, 915, 423 N.Y.S.2d 878, 883 (1979) (75% federal funding made the issue broader than just a "local concern" in the construction project and the unemployment problem), *cert. denied*, 446 U.S. 909 (1980); Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 130, 654 P.2d 67, 71 (1982) (en banc) (75% federal funding). This concern for federal funding may mean that the courts had left open whether they would have permitted the discrimination to continue on projects which received little or no funding from the federal government. *But see* Opinion of the Justices to the Senate, 393 Mass. 1201, 1207 n.8, 469 N.E.2d 821, 825 n.8 (1984) (if enacted, preference act would violate clause regardless of amount of state funding, but lesser amount provided by state weakened state's proprietary interest argument).

51. *See* 465 U.S. at 222-23.

52. *Id.* at 222.

53. *See id.*

54. *See id.*

evidence that the nonresidents constituted a peculiar source of Camden's plight. The Court found in the record no findings of fact regarding the source of Camden's plight, but only that the State had conducted "brief administrative proceedings."[55]

The Court refused to take judicial notice of facts which might have justified the city's substantial reasons for discrimination.[56] Because the ordinance failed to clear the first hurdle of the *Toomer* test, the Court did not reach the second issue of whether the city's means were "carefully tailored to alleviate this evil without unreasonably harming nonresidents."[57] Instead the Court remanded the case to permit Camden to show the necessary evidence.[58]

B. *The Effects of the* Camden *Remand*

The *Camden* court did not have to remand the case; it could have declared hiring preference acts to be per se violations of the privileges and immunities clause. By remanding the case, the Court suggested that, if a state could prove that it had a substantial reason to discriminate against nonresidents, the Court might then find that some form of discrimination could meet the demands of the privileges and immunities clause.[59]

Although many states and municipalities have used preferential hiring,[60] there have been few constitutional challenges. Of the acts challenged, the only one that remains valid is that upheld by the Supreme Court of Wyoming.[61] The key provision of Wyoming's preference act required every contractor working on Wyoming state or municipal public works projects to employ a Wyoming resident unless no Wyoming resident was "available" or "qualified to perform the work involved."[62] A state employment office had to certify that no available or qualified Wyoming resident could be hired before the contractor could employ a nonresident. The employment offices would conduct a statewide search before certifying nonavailability.[63]

Other courts have had more difficulty justifying the discrimination inherent in their states' preference acts. Wyoming's act was almost exactly the same as the one struck down by the Illinois Supreme Court and the

55. *See id.*
56. *See id.*
57. *Id.*
58. *See id.*
59. *See id.*
60. Twenty-two states have preference acts in force. See *supra* note 13. In addition, many other ways to hire preferentially may exist, such as Boston's executive order, upheld under the commerce clause in *White*, or the municipal ordinance remanded in *Camden*.
61. *See* State v. Antonich, 694 P.2d 60, 60-61 (Wyo. 1985) (construing Wyo. Stat. § 16-6-203 (1982)).
62. Wyo. Stat. § 16-6-203 (1982).
63. *See* State v. Antonich, 694 P.2d 60, 61 (Wyo. 1985); Wyo. Stat. § 16-6-203 (1982).

Seventh Circuit,[64] and essentially the same as those struck down by the Court of Appeals of New York,[65] by the Supreme Court of Washington,[66] and by a lower court in New Jersey.[67] Because its scope was not limited to areas of "critical unemployment" directly affected by nonresidents, the Wyoming act was broader than the proposed act rejected by the Supreme Judicial Court of Massachusetts.[68]

While easily distinguishing Wyoming's act from the overbroad "Alaska Hire Act" struck down in *Hicklin v. Orbeck*,[69] the Supreme Court of Wyoming never discussed in detail how the provisions in Wyoming's act led the court to results different from those reached by the other state courts considering their similar statutes.[70] In particular, the Wyoming court never mentioned the Seventh Circuit's opinion in *W.C.M. Window Co. v. Bernardi*,[71] which struck down an act containing language nearly identical[72] to that of Wyoming on grounds of violating both the commerce clause[73] and the privileges and immunities clause.[74] The different results arise primarily from the courts' disagreement on how much evidence a state must produce to prove that nonresidents constitute a peculiar source of the evil of the state's unemployment among residents.[75]

In light of these different interpretations and of the changes rendered

64. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 489 (7th Cir. 1984) (construing Preference to Citizens on Public Works Projects Act, Ill. Rev. Stat. ch. 48, §§ 269-274 (1981)); People *ex rel.* Bernardi v. Leary Constr. Co., 102 Ill. 2d 295, 296-97, 464 N.E.2d 1019, 1021 (1984) (decided after *Camden*, overruling People *ex rel.* Holland v. Bleigh Constr. Co., 61 Ill. 2d 258, 335 N.E.2d 469 (1975) (decided before *Hicklin* and *Camden*)). *See* Preference to Citizens on Public Works Act, Ill. Rev. Stat. ch. 48, § 271 (1966).

65. *See* Salla v. County of Monroe, 48 N.Y.2d 514, 518, 399 N.E.2d 909, 910, 423 N.Y.S.2d 878, 879 (1979) (construing N.Y. Lab. Law § 222 (McKinney 1965) (repealed 1982)), *cert. denied*, 446 U.S. 909 (1980).

66. *See* Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 123, 654 P.2d 67, 68 (1982) (en banc) (construing Wash. Rev. Code Ann. § 39.16.005 (1972 & Supp. 1986)).

67. *See* Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 437 A.2d 733 (Ch. Div. 1981) (construing N.J. Rev. Stat. § 34:9-2 (1965)), *aff'd and modified on other grounds per curiam*, 187 N.J. Super. 174, 453 A.2d 1359 (App. Div. 1982).

68. The proposed act would have required "private contractors [and subcontractors] on state funded projects in critical unemployment areas" of Massachusetts to hire 80% of their workers from Massachusetts residents. *See* Opinion of the Justices to the Senate, 393 Mass. 1201, 1201-02, 469 N.E.2d 821, 822 (1984).

69. *See* State v. Antonich, 694 P.2d 60, 62 (Wyo. 1985).

70. *See id.* at 63.

71. 730 F.2d 486 (7th Cir. 1984).

72. *Compare* Preference to Citizens on Public Works Projects Act, Ill. Rev. Stat. ch. 48, § 271 (1966) *with* Wyo. Stat. Ann. § 16-6-203 (1982).

73. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 496 (7th Cir. 1984).

74. *See id.* at 497-98.

75. *Compare id.* at 498 (state had done "nothing" to show a compelling need to uphold the preference act against nonresidents) *with* State v. Antonich, 694 P.2d 60, 62 (Wyo. 1985) (all state need show is "a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project"). See *infra* Part II.C.

in the cases decided after *Camden, South-Central Timber Development, Inc. v. Wunnicke*[76] and *Supreme Court of New Hampshire v. Piper*,[77] the provisions of hiring preference acts require reexamination.

C. *Conforming a Model Preference Act to the* Toomer *Test*

For a state to draft a hiring preference statute that complies with the constitutional constraints of the *Toomer* test, the state must show that it has a "substantial reason" for discriminating against nonresidents.[78] In so doing, it must present evidence that nonresidents constitute a peculiar source of the evil.[79] Finally, the state must show that its remedy "bears a substantial relationship" to those reasons.[80]

1. Substantial Reasons

The states' chief argument in support of their hiring preference acts is that the states have a legitimate interest in reducing unemployment within their borders, and in channelling state tax revenues to benefit their own citizens.[81] A state may act within its legitimate police powers to allocate tax revenues to improve the employment situation of its resi-

76. 104 S. Ct. 2237 (1984).

77. 105 S. Ct. 1272 (1985).

78. United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984) (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)).

79. *Id.*

80. *See* Supreme Court of N.H. v. Piper, 105 S. Ct. 1272, 1279 (1985); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984).

81. The Supreme Court of Wyoming stated that the purpose of Wyoming's preference act was to reduce "unemployment among the labor force which makes possible government projects through contributions to the public treasury." State v. Antonich, 694 P.2d 60, 62 (Wyo. 1985). "The limiting of benefits to those who fund the state treasury and for whom the State was created to serve," the dissenters on the Supreme Court of Washington argued in accord, "affects the essential and patently unobjectionable purpose of state government—to serve the citizens of the state." Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 139, 654 P.2d 67, 76 (1982) (en banc) (Dore, J., dissenting). However, the Supreme Judicial Court of Massachusetts balanced the interests of the State and nonresidents differently, and concluded that Massachusetts' "interest in assuring that its limited resources are preserved for the benefit of its residents" did not justify discriminating against nonresidents. *See* Opinion of the Justices to the Senate, 393 Mass. 1201, 1207, 469 N.E.2d 821, 825-26 (1984).

General statistics on the reliance of the states on federal funding point out an inherent weakness in the states' argument that a discriminatory allocation of tax revenues can justifiably be limited to those who contribute to the state's treasury. Every state relies heavily on federal funds and grants to support construction projects and other state activities. In 1982, for example, state and local governments looked to the federal government for $87 billion, or 16% of their total revenue, and, from 1978 through 1982, received on average over 18% of their total revenue from federal sources:

Revenue From Federal Government

	1970	1975	1978	1979	1980	1981	1982
$ In Billions	21.9	47.0	69.6	75.2	80.3	90.3	86.9
% of Total State and Local Revenues	14.6	17.8	18.7	18.6	20.6	17.8	15.9

dents. But, the Supreme Court, in *United Building & Construction Trades Council v. Mayor of Camden*,[82] has rejected the argument that, as a matter of law, a state's expenditures on public works projects justifies barring nonresidents from exercising their "fundamental" right to obtain employment from private contractors.[83]

The Court reviewed other reasons proposed by Camden to justify its discrimination. These reasons included eradicating unemployment among its citizens, stopping a population decline, and halting a reduction in the tax base and in property values. Because the Court refrained from stating that these reasons could not qualify as "substantial," the Court's dictum suggests that a state might have "substantial reasons" to discriminate against nonresidents to alleviate these problems. In short, the

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Dep't of Commerce, Statistical Abstract of the United States Table No. 445 (1985) (rounding to one decimal point).

In each year from 1975, the amount of the federal funding received by the states exceeded greatly the state's capital outlays for construction:

	1970	1975	1978	1979	1980	1981	1982
Revenue From Federal Government ($ in Billions)	21.9	47.0	69.6	75.2	83.0	90.3	86.9
State Capital Outlay — Construction ($ in Billions)	24.3	36.4	36.2	43.3	51.5	55.0	53.3

Id. (rounding to one decimal point).

A number of courts have already noted that a state's receipt of federal grant money for its public works undercuts its argument that it should be able to benefit its own citizens at the expense of nonresidents. *See* Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 384, 437 A.2d 733, 737 (Ch. Div. 1981), *aff'd and modified on other grounds per curiam*, 187 N.J. Super. 174, 453 A.2d 1359 (App. Div. 1982); Salla v. County of Monroe, 48 N.Y.2d 514, 525, 399 N.E.2d 909, 915, 423 N.Y.S.2d 878, 883 (1979), *cert. denied*, 446 U.S. 909 (1980); Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 130, 654 P.2d 67, 71 (1982) (en banc).

Furthermore, if the source of the tax revenue is used to justify discrimination, states with preference acts in force would find collectively that they could assert that argument less persuasively to justify enforcement of their preference acts than could those states which do not have such acts. To illustrate broadly, although on average and as a group the states with valid preference acts paid per capita lower federal income taxes than did states without such preference acts ($1109 compared to $1162 in 1982), on average they received slightly more per capita in federal funds ($2872 compared to $2823 in 1983). *See* Dep't of Commerce, Statistical Abstract of the United States Table Nos. 504 & 513 (1985) (author's calculations); *see also* N.Y. Times, June 19, 1985, at D27, col. 4 (64% of the states with preference acts, compared to only 57% of the states without such acts, received *more* per capita in federal revenue than they paid in federal taxes for fiscal year 1984) (author's calculations). See *infra* note 100.

82. 465 U.S. 208 (1984).

83. "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 the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause," Justice Rehnquist wrote. *Camden*, 465 U.S. at 221. "But it does not remove the Camden ordinance completely from the purview of the Clause." *Id.*; *cf.* Hicklin v. Orbeck, 437 U.S. 518, 531 (1978) (Alaska's ownership of oil and gas "simply constitutes insufficient justification for the pervasive discrimination against nonresidents that the Act mandates.").

Court might permit a state to use a hiring preference act to remedy the kind of "decay" which "plagu[ed]" Camden.[84]

But in Camden's case, the city had to show something more than "decay." Camden used the argument that, as long as one Camden resident was unemployed, any non-Camden resident who took a public works job in the city was a peculiar source of the evil faced by the unemployed resident because the nonresident " 'live[d] off' Camden without 'living in' Camden."[85] Athough aware of Camden's 11.5% unemployment rate,[86] the Supreme Court nevertheless remanded the case for further findings of fact on the connection between Camden's plight and the nonresidents who held public works jobs.[87] The remand indicated that the state would be required to provide significant evidence to the court to establish that nonresidents had caused the unemployment condition among residents.[88]

Earlier, in *Hicklin v. Orbeck*,[89] the Supreme Court had determined that conditions peculiar to the residents themselves probably could not justify finding that nonresidents had caused Alaska's unemployment. The unemployment among Alaska's native American populations resulted from "their lack of education and job training or because of their geographical remoteness from job opportunities."[90] For these reasons,

84. *See Camden*, 465 U.S. at 222-23.

85. *Id.* at 222.

86. In the opinion below, the Supreme Court of New Jersey referred to the finding in the City Council's ordinance that Camden had an 11.5% unemployment rate compared to 8.1% for New Jersey and 7.6% for the county. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 323, 443 A.2d 148, 151 (1982), *rev'd*, 465 U.S. 208 (1984).

87. *See Camden*, 465 U.S. at 223.

88. *See id.*; *see also* Hicklin v. Orbeck, 437 U.S. 518, 526 (1978) ("major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment"). Some lower courts have recognized this constitutional requirement of a causal connection. For example, the New York Court of Appeals rejected as simplistic the argument that just because a nonresident was employed, he or she therefore constituted a " 'peculiar source' of the evil" confronting the unemployed resident. *See* Salla v. County of Monroe, 48 N.Y.2d 514, 523, 399 N.E.2d 909, 913-14, 423 N.Y.S.2d 878, 882 (1979), *cert. denied*, 446 U.S. 909 (1980). Because Washington had shown no "evil" represented by nonresidents, the Supreme Court of Washington also rejected the State's argument that "by keeping within the state wages from public works projects, local economies will be strengthened." Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 127, 654 P.2d 67, 70 (1982) (en banc). *See also* Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 385, 437 A.2d 733, 738 (Ch. Div. 1981) ("[A]bsent a special showing of specific dangers posed by out-of-state employees, [New Jersey] may not attempt to resolve its problems on the backs of citizens of [its] neighboring states."), *aff'd and modified on other grounds per curiam*, 187 N.J. Super. 174, 453 A.2d 1359 (App. Div. 1982).

In contrast, the Wyoming court adopted precisely this reasoning which other courts had rejected and which the Supreme Court labeled as insufficient justification. *See* State v. Antonich, 694 P.2d 60, 62-63 (Wyo. 1985) (quoting the State's brief, the court stated that the evil to which the preference act was aimed was "a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project.")

89. 437 U.S. 518 (1978).

90. *Id.* at 526-27.

the "influx" of nonresidents into Alaska was merely a "symptom" of the conditions in the state.[91] To prove a substantial reason for barring nonresidents, the state had to show that nonresident workers had caused the unemployment, not merely that their presence was a "symptom" of conditions in the state.

It follows from the Court's concern for a causal connection that, even if discrimination could have been justified by a sufficient connection at one time, that discrimination can continue only as long as the nonresidents "constitute a peculiar source of the evil."[92] Should the evil itself cease, the Court's concern may mean that the discriminatory treatment also should cease.[93]

The Court has required a state to show a causal connection between the nonresidents and the evil they allegedly pose to residents. For the "Union of the States" to succeed and prosper, an individual state must not be allowed either to isolate itself from conditions affecting the nation as a whole, or attempt to shift the burden of its own difficulties to the people of other states.[94]

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91. *See id.* at 526, 527 n.10. Indeed, the Court even stated that it was a "dubious" assumption that the State ever could "validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against nonresidents." *Id.* at 526.

92. *See Camden*, 465 U.S. at 222 (quoting Toomer v. Witsell, 334 U.S. 385, 398 (1948)).

93. None of the statutes currently in force have provisions under which the preferential treatment would be withdrawn. *See, e.g.*, Conn. Gen. Stat. § 31-52a (1983); Del. Code Ann. tit. 29, § 6913 (1983); N.D. Cent. Code § 43-07-20 (1978). All the acts, except those of California and Wisconsin, operate with no regard to whether nonresidents cause unemployment within the state. *See, e.g.*, Me. Rev. Stat. Ann. tit. 26, § 1301 (1964); Nev. Rev. Stat. § 338.130 (1983); Pa. Stat. Ann. tit. 43, § 154 (Purdon 1964). The California and Wisconsin statutes, although triggered by an administrative finding that a "period of extraordinary unemployment" exists, condition the cause of the unemployment not on nonresidents, as required by *Camden*, *see* 465 U.S. at 222-23, but on "industrial depression" generally. *See* Cal. Lab. Code § 2012 (West 1971); Wis. Stat. Ann. § 101.43 (West 1973 & Supp. 1985). Two statutes operate without reference to unemployment. *See* Fla. Stat. Ann. § 255.04 (West 1975 & Supp. 1985) (preference required if at no higher cost); Okla. Stat. Ann. tit. 61, § 9 (West 1963 & Supp. 1984-1985) (preference required if at same quality and at no higher cost). Therefore, none of the preference acts currently in force would likely withstand the Court's scrutiny of how they determine nonresidents to be the "peculiar source of the evil" of unemployment within the state.

94. *See* Hicklin v. Orbeck, 437 U.S. 518, 532-34 (1978); *see also Camden*, 465 U.S. at 220 (policy under the privileges and immunities clause is "comity" among the states); Austin v. New Hampshire, 420 U.S. 656, 662 (1975) (privileges and immunities clause "implicates not only the individual's right to nondiscriminatory treatment but also, perhaps more so, the structural balance essential to the concept of federalism"). The Court frowns on "parochial legislation" where a state's "presumably legitimate goal was sought to be achieved by the illegitimate means of isolating the State from the national economy." City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978). Nor may a state "isolate itself from difficulties common to all [states] by restraining the transportation of persons and property across its borders." Edwards v. California, 314 U.S. 160, 173 (1941). The Constitution was never intended to permit the states to take whatever measures they could devise to benefit their citizens during "times of stress and strain." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

2. Evidence Required

In its remand of *Camden*, the Supreme Court hinted at what kind of evidence a state would be required to supply to the Court to justify a discriminatory preference act.[95] The record contained comparative statistics on the difference between Camden's high level of unemployment and unemployment levels in the state and in the county.[96] But, without more, comparative statistics failed to persuade the Court.

The Court in *Camden* refused to take "judicial notice of Camden's decay,"[97] and implied that the city should have been required to conduct a "trial" or engage in some other proceedings by which "findings of fact" could be made.[98] A state would have to conduct an investigation more thorough than "the brief administrative proceedings that led to approval of the ordinance by the State Treasurer."[99]

The lower courts which have examined their states' preference acts generally have called for a quantitative "cost-benefit" analysis in which evidence of the net effect of increased employment among state residents is weighed against the higher costs associated with barring nonresident workers and contractors who were willing to do the job at lower costs.[100]

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95. *See Camden*, 465 U.S. at 223.

96. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 323, 443 A.2d 148, 151 (1982) (Camden: 11.5%; New Jersey: 8.1%; county: 7.6%), *rev'd*, 465 U.S. 208 (1984).

97. *Camden*, 465 U.S. at 223.

98. *See id.*

99. *Id.*

100. *See* W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 498 (7th Cir. 1984). Evidence was required because the consequences of the preference act's barring nonresident workers were not "as clear as those of allowing carriers of Bubonic plague to enter the state without quarantine or nonresident students to attend the University of Illinois free of charge." *Id.*; *see also* Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 129, 654 P.2d 67, 70 (1982) (en banc) (state provided insufficient evidence). Some courts have been concerned that a ban on nonresidents, who would presumably have agreed to accept lower wages or fewer benefits to do the work, might impair the project's feasibility by raising costs prohibitively. Such a consequence could result in a net decrease in employment across the state. *See W.C.M. Window Co.*, 730 F.2d at 498 (state would have to show court that preference act would not have a "boomerang" effect); Salla v. County of Monroe, 48 N.Y.2d 514, 524, 399 N.E.2d 909, 914, 423 N.Y.S.2d 878, 883 (1979) (act might "deter contractors from bidding on New York public works jobs altogether"), *cert. denied*, 446 U.S. 909 (1980); *cf.* Fla. Stat. Ann. § 255.04 (West 1975 & Supp. 1985) (preference required only if at no greater cost); Okla. Stat. Ann. tit. 61, § 9 (West 1963 & Supp. 1984-1985) (preference required if at same quality and at no higher cost).

The Supreme Court of Wyoming's Chief Justice noted that the record before the Wyoming court did not "demonstrate" that the state had established a "nexus" between the unemployment and the nonresidents working on state-funded projects. *See* State v. Antonich, 694 P.2d 60, 64 (Wyo. 1985) (Thomas, C.J., concurring). Indeed, the opinion made no mention that a legislative committee had investigated the reasons underlying the unemployment conditions in Wyoming's construction industry. Also, no mention was made of any fact-finding having been conducted by a trial court. *See id.* at 60-64. It appears that the Wyoming court accepted as evidence precisely the type of "conclusory" findings on the justification for discrimination which the Massachusetts Justices made

Because it is possible that nonresidents would stop threatening to cause unemployment among residents, the state should continually monitor the situation on its public works projects to make sure that the state's discrimination remained justified. Close monitoring would be important because of the Court's concern for a causal connection between nonresident discrimination and the unemployment among residents. Consequently, a hiring preference act should set forth the procedural steps for the state's administration to follow in approving a preference in favor of its residents, and in providing continual reports to ensure that the substantial reasons for discrimination still justified barring nonresidents. A preference act establishing an "across-the-board grant of a job preference,"[101] with no procedures for imposing and withdrawing the inequitable treatment, would not be flexible enough to adapt to changed conditions in the construction industry. Such an act would thus fail to meet the Court's requirement that the state show sufficient evidence to

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clear would be inadequate in their State. *See* Opinion of the Justices to the Senate, 393 Mass. 1201, 1205 n.5, 469 N.E.2d 821, 824 n.5 (1984).

Actually, it would be hard for a state to show, on a statewide basis, that nonresidents had caused the unemployment within the state. It is true that unemployment rates in the construction industry have been consistently among the highest rates by industry group in the country:

Unemployment Rate By Industry (%)

	1975	1979	1980	1981	1982	1983
All Unemployed	8.5	5.8	7.1	7.6	9.7	9.6
Construction	18.0	10.3	14.1	15.6	20.0	18.4

U.S. Dep't of Commerce, Statistical Abstract of the United States Table No. 683 (1985). But, on a statewide basis, the group of twenty-two states that have preference acts which remain valid has had on average each year from 1979 through 1983 a lower unemployment rate than has the group of states without such statutes:

Total Unemployed (%)

	1979	1980	1981	1982	1983	Average 1979-1983
National Average	5.8	7.1	7.6	9.7	9.6	8.0
Average for States with Preference Acts	5.4	6.4	6.9	8.6	8.9	7.2
Average for States without Preference Acts	5.7	7.2	7.6	9.4	9.6	7.9

See id. at Table No. 686 (author's calculations). These statewide unemployment levels are illustrations and might not reflect unemployment levels within the construction industry or within the area of publicly funded construction. The disparity in condition, however, which is to the benefit of those states that have discriminatory preference acts, suggests broadly that as a group the states with preference acts would be unable to show that nonresidents—who, in essence, are citizens of the group of states which have the higher average statewide unemployment—are the necessary cause of their own unemployment problems.

Furthermore, even if at one time the states could have shown a justification for preferential treatment, the fact that their average statewide employment is higher than the states without preference acts suggests that the states with such acts would have a hard time justifying continuing the discrimination.

101. Hicklin v. Orbeck, 437 U.S. 518, 528 (1978).

justify the discrimination based on a link between nonresidents and the unemployment sought to be alleviated.[102]

3. Substantial Relationship

Once the state has shown enough "evidence" of "substantial reasons" for enacting or enforcing a preference act, the final hurdle of the *Toomer* test requires that the state's discriminatory remedy bear a "substantial relationship" to alleviating unemployment.[103]

The Court struck down the "Alaska Hire Act" because Alaska had not shown that nonresidents constituted a peculiar source of the evil of unemployment among Alaska's native Americans.[104] But, even if the state had proved the causal connection, the Act would still have failed to sustain challenge under the privileges and immunities clause because the state's remedy bore no substantial relation to the unemployment problem.[105] The Act made no distinction between Alaskan residents who were unemployed and those who were not. "Alaska Hire simply grants all Alaskans, regardless of their employment status, education, or training, a flat employment preference for all jobs covered by the Act,"[106] Justice Brennan noted. "A highly skilled and educated resident who has never been unemployed is entitled to precisely the same preferential treatment as the unskilled, habitually unemployed Arctic Eskimo enrolled in a job-training program."[107] A preference act would have to be "more closely tailored to aid the unemployed" than was Alaska's overbroad statute.[108]

Although the *Camden* Court noted that the city's ordinance, which was "limited in scope to employees working directly on city public works projects," was not as broad as the act which the Court found excessive in *Hicklin v. Orbeck*, the Court could not consider whether Camden's methods were "closely related" to solving its residents' unemployment problem.[109] The record contained evidence insufficient to determine whether

102. It would appear that none of the currently enforceable preference acts provides enough flexibility to meet these requirements, because they all impose blanket bars to nonresidents instead of establishing procedural guidelines. *See, e.g.*, Ark. Stat. Ann. § 14-607 (1979); Iowa Code Ann. § 73.3 (West 1973 & Supp. 1985); N.D. Cent. Code § 43-07-20 (1978).

103. Supreme Court of N.H. v. Piper, 105 S. Ct. 1272, 1279 (1985); *see* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984) ("close relation"); Hicklin v. Orbeck, 437 U.S. 518, 527-28 (1978) ("closely tailored").

104. *See* Hicklin v. Orbeck, 437 U.S. 518, 526 (1978).

105. *Id.* at 527.

106. *Id.*

107. *Id.*; *see also* Opinion of the Justices to the Senate, 393 Mass. 1201, 1203-06, 469 N.E.2d 821, 823-25 (1984) (proposed statute which did not limit preference to the unemployed was not closely related to state's interest despite its limited reach to areas of "critical unemployment"); Salla v. County of Monroe, 48 N.Y.2d 514, 523, 399 N.E.2d 909, 914, 423 N.Y.S.2d 878, 882 (no distinction between those currently unemployed and those who might be "drawn away" from other jobs), *cert. denied*, 446 U.S. 909 (1980).

108. Hicklin v. Orbeck, 437 U.S. 518, 527-28 (1978).

109. *See Camden*, 465 U.S. at 223.

the city had substantial reasons for discriminating in the first place.[110]

These opinions suggest that a state could draft a hiring preference act limited to giving preferential treatment on public works projects to unemployed construction laborers. However, the requirement that the preference be substantially related to the extent to which nonresidents had deprived residents of work indicates the need for a flexible statute. A fixed quota of residents, for example, would not necessarily relate to the degree to which nonresidents constituted a peculiar source of the evil, because the employment of nonresidents could at any time threaten to cause unemployment among residents that was higher or lower than the level established by the quota.[111] It follows that, to bear a substantial relationship to the unemployment caused by nonresidents, the act would have to allow a state's administration to set preference levels from time to time. The levels would depend on conditions in the industry.

4. Drafting a Model Hiring Preference Act

Taking into account all of the Supreme Court's concerns, the requirements of a Model Hiring Preference Act would appear to be as follows:

a. No durational requirements for residency. These violate the equal protection clause of the fourteenth amendment.[112]

b. No quota of residents. Quotas may bear no relation to the degree to which nonresidents constitute the peculiar source of the evil.[113]

c. No exemptions from discrimination for the residents of states which offer similar exemptions in return. These reciprocal agreements undermine the basic policy of the privileges and immunities clause.[114]

d. No retaliatory provisions enforced only against states which enforce their own acts against the preference act's state. Again, these retaliatory measures undermine the basic policy of the privileges and immunities clause.[115]

e. Preference given only to the "unemployed" whose condition is the "evil against which the statute is aimed." No preference given to those who become "available" merely to switch jobs.[116]

f. The state must provide at least some funding to avoid "regulating" in conflict with the commerce clause. Also for this reason, to avoid com-

110. *Id.*

111. *See* Opinion of the Justices to the Senate, 393 Mass. 1201, 1205-06, 469 N.E.2d 821, 824 (1984) (statute not narrowly tailored because it extended preference to all Massachusetts residents and imposed a potentially unrelated 80% quota); *see also* Colo. Rev. Stat. § 8-17-101 (1973 & Supp. 1984) (80% quota); Idaho Code § 44-1001 (1977 & Supp. 1985) (95% quota).

112. See *supra* note 31.

113. See *supra* note 111 and accompanying text.

114. See *supra* note 23 and accompanying text.

115. See *supra* notes 23-24 and accompanying text.

116. *See* State v. Antonich, 694 P.2d 60, 64 (Wyo. 1985) (Thomas, C.J., concurring) (distinguishing between those workers who were unemployed and those who became "available"). See *supra* note 39 and text accompanying notes 104-08.

merce clause challenges, the state should not impose restrictions on municipalities or other political subdivisions of the state on projects for which the state has provided no funds of its own.[117]

g. The preference act's reach may extend only to the state's direct dealings with primary contractors. Again, this limit is necessary to avoid conflict with the commerce clause.[118]

h. The act must set up procedural steps through which the state can produce the evidence necessary to justify discrimination in the first place and to monitor conditions thereafter.[119]

Proposed Model Hiring Preference Act[120]

> On showing, other than by mere conclusory evidence,[121] after thorough administrative investigation and proceedings,[122] that a designated area's construction employment opportunities for residents of the state have been decreased by nonresidents,[123] the state may require primary[124] contractors working on state-funded[125] public works construction projects, in that designated area,[126] to give preference to the state's residents in hiring construction workers. Such preference shall be limited[127] to those residents who are unemployed and whose unemployment was caused primarily by the employment of such nonresidents, and was not caused by other conditions in the state or in the nation, or by characteristics peculiar to the residents themselves,[128] such as, but not limited to, disparities between residents and nonresidents in their ability to perform the work. Such preference shall extend, as shown by other than mere conclusory evidence, after thorough administrative investigation and proceedings, only as long as[129] nonresidents primarily—and not other conditions in the state or in the nation, or characteristics peculiar to the residents themselves, such as, but not limited to, disparities between residents and nonresidents in their ability to perform the work—continue to, or would, deprive residents of construction employment opportunities in that designated area.

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117. See *supra* note 41.

118. *See supra* note 41.

119. See *supra* text accompanying notes 101-02, 111.

120. The key provisions of the model act are marked by footnotes referring the reader to other parts of this Note for relevant discussion.

121. See *supra* note 100.

122. See *supra* text accompanying note 99.

123. See *supra* notes 88, 90-91 and accompanying text.

124. See *supra* note 41.

125. *See supra* note 41.

126. See *supra* text accompanying notes 104-08.

127. See *supra* text accompanying notes 101-02, 111.

128. See *supra* text accompanying notes 90-91.

129. See *supra* text accompanying notes 92-93, 111.

III. THE STANDARD OF REVIEW

In March 1985, in its most recent privileges and immunities clause decision, *Supreme Court of New Hampshire v. Piper*,[130] the Supreme Court stated that "[i]n deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means."[131] In privileges and immunities clause cases, where the Court has found that a state has available a choice between two ways to obtain its goals, one that discriminates and one that does not, the Court has required the state to adopt the latter, "less restrictive," one.[132] Thus, the Court's practice of "considering the availability of less restrictive means" apparently has resulted in the Court's adopting this consideration as a standard of review of state action, a standard which requires a state to "achieve its legitimate goals without unnecessarily discriminating against nonresidents."[133]

The question remains open whether "less restrictive means" actually marks a change from the Court's prior analyses. If so, then the further question remains open of whether the Court would apply the standard to review all state actions under the privileges and immunities clause. Prior to *Piper*, the Court had never used the words "less restrictive means" to describe the standard of review appropriate for privileges and immunities clause cases. In *Toomer v. Witsell*, the Court had stated that the inquiry should "be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[134] Prior to *Piper*, observers and lower courts,

130. 105 S. Ct. 1272 (1985).

131. *Id.* at 1279.

132. For an example, see Supreme Court of N.H. v. Piper, 105 S. Ct. 1272, 1279-80 (1985). The *Piper* Court struck down a New Hampshire rule which limited admission to the state's bar to residents. *See id.* at 1280-81. The Court found some merit in the state's contention that nonresident lawyers would be more likely to miss unscheduled hearings or proceedings, but stated that precluding nonresidents from practice altogether could not be condoned when less restrictive means were available. *Id.* at 1280. The nonresident, for example, could retain a local attorney to attend such meetings in his or her place. *Id.* As to the state's concern that nonresidents would be less likely to perform pro bono work, the Court noted that the state could adopt the less restrictive condition that nonresidents devote a certain proportion of their time to representing indigents. *Id.* A total bar to practice was unnecessary.

133. *Id.* at 1279 n.17.

134. Toomer v. Witsell, 334 U.S. 385, 396 (1948). Even so, the Court was not clear on the comparative strictness of this review. The "considerable leeway" test does not sound as stringent as "strict scrutiny" or "less restrictive means." The *Toomer* Court's test stated that the discrimination must bear a "close relation" to the state's objectives, *see id.*, an arguably strict test. Later in the opinion, however, when the Court summarized its holding and restated the test, it used the words "reasonable relationship" as the connection between the degree of discrimination and the justification. *See id.* at 403. The Court also noted that a state may not "discriminate without reason against citizens of other States." *Id.* at 402.

Guidance on the meaning of such language of scrutiny might be found in the Court's equal protection clause analyses. If the state has neither discriminated against a "suspect class" nor infringed a "fundamental right," San Antonio Indep. School Dist. v. Rodri-

drawing on *Toomer*'s "considerable leeway" language, had interpreted the Court's opinions to require a less strict standard of review in privileges and immunities clause cases than in equal protection clause cases.[135]

In any case, whatever the other eight members of the *Piper* Court may have believed the standard to have been in earlier cases under the privileges and immunities clause, the lone dissenter, Justice Rehnquist, believed that the Court had taken a dramatic step.[136] Justice Rehnquist strongly opposed what he called the majority's "loose language concerning 'less restrictive means,' "[137] as "ill-advised and potentially unmanageable."[138] But the majority explicitly rejected Justice Rehnquist's urging

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guez, 411 U.S. 1, 17 (1973), then the standard of review of legislation which affects one group differently from another is whether it "bears some rational relationship to a legitimate state purpose." *Id.* at 44. Under the "rational basis" standard of review, state legislation that results in "some inequality" need not be struck down solely because it "imperfectly effectuates the State's goals" or because the state could have implemented "less drastic" means. *Id.* at 51.

135. *See, e.g.*, Opinion of the Justices to the Senate, 393 Mass. 1201, 1208, 469 N.E.2d 821, 826 (1984) (quoting "considerable leeway" language of Toomer v. Witsell, 334 U.S. 385, 396 (1948)); Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 131-32, 654 P.2d 67, 72 (1982) (en banc) (privileges and immunities analysis calls for at least intermediate level of scrutiny and may require strict scrutiny); J. Nowak, R. Rotunda & J. Young, *supra* note 31, ch.12, § I.C., at 414 ("reasonably relate to legitimate state or local purposes"); L. Tribe, *supra* note 30, § 6-33, at 411 & n.17 (suggesting existence of different standards of review under privileges and immunities clause and equal protection clause).

Indeed, the Court itself added to the confusion. In invoking the *Toomer* test in Hicklin v. Orbeck, 437 U.S. 518, 525-27 (1978), Justice Brennan first quoted the *Toomer* language of "reasonable relationship" (the later *Toomer* wording), *see id.* at 526, but then referred to the need to find a "substantial relationship," *see id.* at 527, the language used subsequently in *Piper*, 105 S. Ct. at 1279.

136. *See* 105 S. Ct. at 1281 (Rehnquist, J., dissenting).

137. *Id.* at 1282 n.1 (Rehnquist, J., dissenting).

138. *Id.* at 1284 (Rehnquist, J., dissenting). The majority's analytical standard, Justice Rehnquist feared, "when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it." *Id.* (Rehnquist, J., dissenting). Justice Rehnquist noted that the Court's "less restrictive means" analysis came from the Court's first amendment jurisprudence, and argued that it was "out of place in the context" of the privileges and immunities clause. *See id.* (Rehnquist, J., dissenting). For privileges and immunities purposes, he urged that the policy should be to uphold a statute if the state's legislature had "merely a legitimate reason" for having chosen one solution over another less restrictive alternative. The state's discriminatory statute, he suggested, could be struck down if the state had an illegitimate purpose for making distinctions between residents and nonresidents. *See id.* (Rehnquist, J., dissenting).

Such a low standard of review may have been in Justice Rehnquist's mind when he quoted with approval the *Toomer* "considerable leeway" language in his opinion in *Camden*. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222-23 (1984) (quoting Toomer v. Witsell, 334 U.S. 385, 396 (1948)). If so, then the Wyoming Chief Justice correctly interpreted the *Camden* holding by finding no reason for the Wyoming Court to remand the case before it on the constitutionality of Wyoming's preference act. *See* State v. Antonich, 694 P.2d 60, 65 (Wyo. 1985) (Thomas, C.J.,

that they adopt a standard as limited as the one he proposed.[139]

The Court has not yet considered what "less restrictive means" signifies in a case where the state compels nongovernmental entities to discriminate against nonresidents as a condition for receiving state funds. *Piper* involved a complete bar to nonresident lawyers at no direct financial cost to the state, which differs from the situation before the Court in *Camden*, where the city was funding public works projects. In *Camden*, the Court quoted the *Toomer* "considerable leeway" language,[140] and observed that a state's spending its own money to remedy local ills was "perhaps the crucial factor" in determining whether the state's action should sustain challenge under the privileges and immunities clause.[141]

This dictum in *Camden* suggests that the Court might balance the feasibility of a state's choices in determining whether to allow the state to discriminate through a hiring preference act. The Court noted that the Camden ordinance lacked the overbroad "ripple effect" of the act struck down in *Hicklin v. Orbeck*, and was "limited in scope to employees working directly on city public works projects."[142]

But, if *Camden*'s dictum should be read as narrowing the otherwise unqualified more recent wording in *Piper*, then the Court's dictum in *Hicklin v. Orbeck* also may be read as qualifying that in *Camden*. Although in *Hicklin v. Orbeck* the state was merely allocating its natural resources, not spending its own funds, the Court did state that it was a "dubious" assumption that a state could ever discriminate against nonresidents to solve an unemployment problem,[143] and one that "may present serious constitutional questions."[144]

Because the Court has used the words "less restrictive means" only in its most recent privileges and immunities clause decision, it remains uncertain whether the Court will view this consideration as requiring a stringent review in all cases, or, depending on a particular case's facts, as permitting different degrees of review along a continuum from "considerable leeway" to "strict scrutiny." In cases prior to *Piper*, the language

concurring). Certainly, Wyoming could have shown a "mere legitimate basis" for improving its local employment situation by limiting jobs to residents. See *supra* note 100.

"And in any event," Justice Rehnquist concluded, "courts should not play the game that the Court has played here—independently scrutinizing each asserted state interest to see if it could devise a better way than the State to accomplish that goal." *Piper*, 105 S. Ct. at 1284 (Rehnquist, J., dissenting).

139. *See Piper*, 105 S. Ct. at 1279 n.17. Writing for the Court, Justice Powell responded that Justice Rehnquist's view would lead to condoning a state's discriminatory means in every case unless the state had discriminated "for its own sake." *Id.* Justice Powell believed that a test as limited as that proposed by Justice Rehnquist was insufficient to ensure constitutional protection under the privileges and immunities clause. "In some cases," he observed, "the State may be required to achieve its legitimate goals without unnecessarily discriminating against nonresidents." *Id.*

140. *See Camden*, 465 U.S. at 222-23.

141. *See id.* at 221.

142. *Id.* at 223.

143. *See* Hicklin v. Orbeck, 437 U.S. 518, 526 (1978).

144. *See id.* at 528.

the Court used to apply a standard of review under the privileges and immunities clause is similar to the language used to discuss the "strict scrutiny" standard which the Supreme Court has applied in analyzing state discrimination under other clauses.[145] Thus, if the Court intends to view "less restrictive means" as a standard with a fixed degree of review, its earlier practice suggests that the standard might be similar to the standards of review applied in cases of discrimination involving "suspect classes" and in cases of infringement of "fundamental rights" under the equal protection clause of the fourteenth amendment.[146] To justify racial or ethnic distinctions, the state has been required to prove a compelling interest in rectifying past violations of a particular group's rights, and to prove that the particular remedy is "necessary" to effect that interest.[147] The Court has used similar language to describe the standard under the privileges and immunities clause, and has required that the means of discrimination be "closely tailored" to remedy the state's concern.[148]

145. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 957-58 (1982) (commerce clause); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (discussing standards under equal protection clause of fourteenth amendment); *see also* United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).

146. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-18 (1973).

147. *See* Fullilove v. Klutznick, 448 U.S. 448, 480, 491 (1980) ("most searching examination" required to evaluate whether remedy is "narrowly tailored" to state's goal); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291-99 (1978) ("exacting judicial scrutiny" used to determine whether remedy is "precisely tailored to serve a compelling governmental interest").

The Court has distinguished the degree of scrutiny required to analyze gender-based distinctions under the equal protection clause. According to the Court, gender-based classifications constitute a "middle-tier" level of discrimination requiring a somewhat less strict approach. *See* Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring). Here, the Court need find only that the classification serves a "fair and substantial relation to the object of the legislation." *Id.* at 211. The Court has been less inclined to require a "strict scrutiny" approach to gender-based classifications because, as there are only two "groups," the burdens of the preferences given one group are more easily identified than the burdens of preferences concerning multiple racial or ethnic groups. *See Bakke*, 438 U.S. at 302-03. Furthermore, the Court believes that it can more easily determine and review the effect of the burden to be placed on the one sex or the remedial steps giving preference to the other. *See id.* Therefore, the Court has not found that gender-based distinctions are inherently suspect. *See id.*

However, the Court's justifications for requiring a lower level of review to gender-based distinctions do not apply well to discrimination against nonresidents. In particular, the gender group put at a disadvantage by a gender-based classification, by definition, has an "equal" opportunity, not available to nonresidents, to remedy the discrimination at the polls. It is just such a political power that the Court found important in determining whether a group could constitute a "suspect class" justifying strict scrutiny for its protection. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (clause protects class which has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"). True, nonresidents may seek to remedy discrimination through enacting similar statutes in their own states, but such retaliatory measures are precisely what the privileges and immunities clause was designed to prevent. *See* Austin v. New Hampshire, 420 U.S. 656, 662-63 (1975) (nonresidents taxed under challenged scheme had no access to state's legislative process).

148. *Compare* Hicklin v. Orbeck, 437 U.S. 518, 528 (1978) (privileges and immunities

Similarly, in its review of commerce clause cases, the Supreme Court has stated that, when a state's "facial discrimination" restricts the flow of commerce, the state's purposes and means require the "strictest scrutiny . . . and the absence of nondiscriminatory alternatives."[149] Because the "mutually reinforcing"[150] clauses were designed to protect similar concerns in the interests of interstate harmony and the free flow of commerce between the states,[151] it follows that the standard of review under one clause could be similar in degree to the standard under the other clause.

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clause decision stating that state's remedy "must be more *closely tailored*") (emphasis added) *and* Toomer v. Witsell, 334 U.S. 385, 398 (1948) (privileges and immunities clause decision stating that even if state's concerns were valid, they would not "necessarily support a remedy so *drastic*") (emphasis added) *with* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973) (An equal protection clause decision stating that "strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its . . . system has been structured with 'precision,' and is *'tailored' narrowly* to serve legitimate objectives and that it has selected the *'less drastic means'* for effectuating its objectives.") (emphasis added).

149. Hughes v. Oklahoma, 441 U.S. 322, 337 (1979) (striking down state bar to exports of minnows naturally seined in its streams). In South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237 (1984), the Court struck down an Alaska statute which required customers of state-owned lumber to process their logs at mills within the state. Such a "regulation" of the purchasers' downstream private transactions, after their direct dealings with the state had ended, inhibited the interstate trade in timber. *Id.* at 2246-47. Had Alaska offered a subsidy to timber purchasers as an inducement to their sending their timber to Alaskan processors, the state could have achieved its aim of promoting the in-state timber processing industry, and would have done so without violating the commerce clause. *Id.* at 2244. The timber purchaser would not have been forced to accept the state's conditions to obtain the lumber, but would have had, in effect, the "less restrictive" choice of accepting the subsidy and using an Alaskan processor, or foregoing the subsidy and transporting the timber out of the state. This lack of choice between buying the timber subject to the state's "regulation" or not buying it at all was a key element in the plurality's holding against the state. *See id.*

It was unimportant, Justice White wrote, "that the State could support its processing industry by selling only to Alaska processors, by vertical integration, or by direct subsidy." *Id.* at 2246. Thus, while Alaska had available numerous ways to accomplish its goals, it had chosen a discriminatory means which was not the least restrictive. Because nondiscriminatory, less restrictive means were available, the Court would not tolerate those the state had chosen in violation of the Constitution.

The Court has taken similar measures in numerous commerce clause cases. *See* Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 957-58 (1982) ("facially discriminatory legislation" which is subject to the "strictest scrutiny" was not "narrowly tailored to the conservation and preservation rationale"); Great Atl. and Pac. Tea Co. v. Cottrell, 424 U.S. 366, 376-77 (1976) (Mississippi reciprocity requirement barring Louisiana milk was not least restrictive means); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951) ("reasonable nondiscriminatory alternatives"); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935) (goal of healthy milk could be attained through normal certification and inspection rather than complete bar).

150. Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978).

151. See *supra* Part I.A.

IV. THE EFFECTS OF A "LESS RESTRICTIVE MEANS" STANDARD OF REVIEW

The constitutionality of any hiring preference act will depend on the degree of scrutiny which the Court chooses to apply in its standard of review of state action. If the Court retains its *Camden* language of "considerable leeway" and balances the possible additional economic and political costs of the available means which are less restrictive against the degree of discrimination against nonresidents, a hiring preference act, like the Model Hiring Preference Act constructed above, might comply with the Court's other privileges and immunities clause concerns, raised in *Camden* and *Hicklin v. Orbeck*, and survive constitutional challenge.[152] If, however, the Court interprets its recent *Piper* language as requiring a state to adopt a nondiscriminatory alternative, then a statute will fail to survive constitutional challenge if the Court finds that a state has available means which are less restrictive.

The Supreme Court's ultimate decision will be significant because the state may have a number of choices to remedy unemployment. A private contractor may turn down a resident and choose to hire a nonresident who can better perform the job, or who is willing to work at a lower wage or for fewer benefits. The Supreme Court suggests that a state probably may not discriminate against nonresidents on the ground of ability to perform the work,[153] but the Court has not foreclosed a state from finding that such a disparity in the cost of nonresident labor had led to nonresidents constituting a peculiar source of the evil, if their willingness to work at a lower cost had made it difficult for residents to secure employment. If a state offered a direct subsidy to private contractors for each resident worker they employed, a direct subsidy which erased the cost advantage held by nonresidents, the private contractor could choose to hire either worker.[154] But a bar to nonresidents would allow private contractors no choice and would discriminate against nonresidents.[155]

Because a state may condition payments for direct subsidies or unemployment benefits on residency without violating the privileges and immunities clause,[156] these forms of remedying unemployment would be

152. See *supra* Part III.

153. *See* Hicklin v. Orbeck, 437 U.S. 518, 525-27 (1978).

154. Whether the possible increase in administrative burden would make offering direct subsidies an impractical way to secure higher employment for residents is beyond the scope of this Note.

155. It was this lack of choice on whether to send lumber to an in-state mill, which the State's conditions of sale forced on purchasers of Alaska's timber, that the Court found significant in holding that the state violated the commerce clause. *See* South-Central Timber Dev., Inc. v. Wunnicke, 104 S. Ct. 2237, 2244 (1984).

156. *See id.* at 2244 (subsidies for timber processing). *Cf.* Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 809-10 (1976) (considering under the commerce clause subsidies for automobile hulks); Memorial Hosp. v. Maricopa County, 415 U.S. 250, 254 (1974) (under the equal protection clause striking down only durational residency requirement of program for state-supported free nonemergency medical care); Shapiro v. Thompson,

less restrictive than using a preference act to ban nonresidents from working in the state.

Rather than imposing conditions on private contractors, the state could avoid constitutional challenge by directly hiring unemployed construction workers.[157] Indeed, the state could hire even those who were "available" or employed. This remedy for unemployment would also be less restrictive than a hiring preference act.

Finally, the Supreme Court would probably see no difficulty with a state's creating job training programs[158] or adopting "aggressive referral practices."[159] These are further examples of less restrictive means.

Any of these programs would avoid discrimination and would relieve the state of the burdens of forming a procedure flexible enough to survive constitutional challenge. The Supreme Court's requirement that a state show a causal connection would probably make difficult and inefficient the task of monitoring closely whether nonresidents ceased to be a peculiar source of the evil of unemployment, or constituted an evil in the first place. Even if a state could form a constitutionally permissible procedure incorporated in a hiring preference act, the procedure of close monitoring would probably present an administrative nightmare. Thus, the tremendous effort of drafting such a statute would hardly seem worth the time and expense, especially when the benefits could extend only to employees of the state's primary contractors.

In addition, if the Court does adopt a stringent "less restrictive means" standard of review, it effectively will render all hiring preference acts—including statutes as limited in scope and as procedurally flexible as the Model Hiring Preference Act constructed above—violations of the privileges and immunities clause.

The Court should adopt a stringent "less restrictive means" standard of review for hiring preference acts. A person's being deprived by the state of job opportunities offered by a private employer runs counter to the purpose of a unified American economy. Ultimately, allowing such discrimination leads to retaliation.[160]

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394 U.S. 618, 627 (1969) (striking down only durational residency requirement to qualify for welfare benefits).

157. *See* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 646-47 (1976) (per curiam) (civil service employment); *see also* White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 211 n.7 (1983) (city was not a regulator because private contractors' employees were essentially "working for the city"); Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980) (state-owned and operated cement plant); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) (no fundamental right to government employment under the equal protection clause).

158. *See* Hicklin v. Orbeck, 437 U.S. 518, 527-28 (1978) (dictum).

159. *See* White v. Massachussetts Council of Constr. Employers, Inc., 460 U.S. 204, 225 (1983) (Blackmun, J., concurring in part, dissenting in part).

160. See *supra* Part I.A. The Supreme Court distinguishes between public and private employment in reviewing state action to compel discrimination against nonresidents. A discussion of whether this distinction makes sense, in light of the purpose to promote a unified economy and to prevent retaliation, is beyond the scope of this Note.

The already widespread use of preference acts attests to their retaliatory effects and the ease of adoption as a potential remedy. Those who are hurt by the acts' enforcement cannot vote against the legislators who choose that form of discrimination to benefit their constituents.

A state has numerous means, other than hiring preference acts, to discriminate against nonresidents by allocating benefits solely to residents to reduce the pain of unemployment. But, a state's use of direct subsidies, unemployment benefits, or direct hiring of workers to benefit its local residents would be far more difficult to initiate and administer than merely enforcing a preference act barring nonresidents. The state's direct action, such as allocating subsidies or benefits, would require the appropriation of tax revenue. Taxes are unpopular and involve the disadvantages of a political check, which a state might avoid by passing a statute and shifting the "harm" to those who are not members of the electorate.

Indeed, by creating a political check on a state's choice to benefit its own citizens at the expense of nonresidents, the state could encounter political hurdles as difficult to clear as the constitutional requirements of the privileges and immunities clause. Where a state would be unable to justify to its own residents the extra cost associated with benefiting only their unemployed, the Constitution should not permit making such discrimination any easier.[161]

CONCLUSION

The Supreme Court's opinions require a substantial narrowing of the scope of preference acts and make necessary substantial procedural safeguards. The *Camden* Court required a state show a relation between nonresidents and the unemployment suffered by its residents. Such a requirement may be too stringent to permit a state to draft a statute which would be manageable for the state to administer. Furthermore, if the Court adopts a strict standard of review, a question left open after *Piper*, it will, in effect, render all hiring preference acts violations of the privileges and immunities clause.

The Court should adopt a strict standard of review. The privileges and immunities clause seeks to preclude the states from creating a multitude of discriminatory pockets, a situation made more likely by the Wyoming court's recent holding. The Supreme Court should act before other states follow the unwise lead of the Supreme Court of Wyoming in up-

161. *See* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938) ("when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state"); J. Nowak, R. Rotunda & J. Young, *supra* note 31, ch. 9, § III, at 280-81.

holding their own state's acts, and should clarify this area of the law by holding definitively that hiring preference acts are per se unlawful.

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