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Local Hire and the State-Market-Participant Doctrine: A Trojan Horse for the Commerce Power of Congress

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LOCAL HIRE AND THE STATE-MARKET-PARTICIPANT DOCTRINE: A TROJAN HORSE FOR THE COMMERCE POWER OF CONGRESS

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I. INTRODUCTION

“Local hire” laws require that when units of local government hire employees a preference be given to residents of the governmental unit.

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These laws affect employees directly hired by the city or state,¹ as well as employees hired by private contractors to do construction work.² Naturally, this employment preference for residents discriminates against those who do not reside within the city or state. Nonresidents, however, are afforded extensive protection against discrimination by states and their political subdivisions by two clauses of the Constitution:³ the commerce clause⁴ and the interstate privileges and immunities,⁵ or comity,⁶ clause.

In two cases recently decided by the Supreme Court, nonresidents of a regulating state invoked these constitutional clauses to challenge local hire laws that were enforced against private contractors employed by cities to perform construction work. The first of these cases, *White v. Massachusetts Council of Construction Employees, Inc.*,⁷ held that while local hire laws as applied to private contractors discriminate against nonresidents, these laws do not invoke the protection afforded by the commerce clause.⁸ The *White* court, however, expressly reserved the question of whether such local hire laws violate the interstate privileges and immunities clause.⁹ The Court responded to this question during its next term in *United Building & Construction Trades Council v. Mayor of Camden*.¹⁰ In this case, the Court held that local hire laws as applied to contractors employed by a city to perform construction work must satisfy the requirements of the interstate privileges and immunities clause.¹¹

This Article will analyze the Court's decision in *Camden* and cases that preceded it. The commerce and privileges and immunities clauses will be examined with respect to local hiring preferences, with a consideration of the operation of the two clauses in the private sector and their impact on the control and disposition of state property. Attention will then turn to recent market-participant decisions. This discussion will show that a change-of-residence local-hire law has a good chance of being upheld. Finally, this Article will attempt to explain the Court's decisions concerning

¹ *Detroit Police Officers Ass'n v. City of Detroit*, 385 Mich. 519, 190 N.W.2d 97 (1971), appeal dismissed, 405 U.S. 950 (1972).

² See *infra* notes 7-8.

³ See *infra* notes 4-5.

⁴ "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8.

⁵ "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. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 404 (1978).

⁶ *Austin v. New Hampshire* 420 U.S. 656, 660 (1975). See J. NOWAK, *CONSTITUTIONAL LAW* 300 (2d ed. 1983).

⁷ 460 U.S. 204 (1983).

⁸ *Id.* at 204 n.3.

⁹ *Id.* at 204 n.12.

¹⁰ ___ U.S. ___, 104 S. Ct. 1020 (1984), *rev'g*, 88 N.J. 317, 443 A.2d 148 (1982).

¹¹ *Id.* at ___, 104 S. Ct. at 1023.

the state market-participant doctrine.

II. *Camden*: BACKGROUND AND DECISION

In an attempt to combat discrimination against minorities, New Jersey enacted a state-wide law that required affirmative action in employment for construction work done for state and local governments.¹² The law was administered by the state department of the treasury¹³ and was implemented by individual municipalities. State approval was required for city ordinances that prescribed an affirmative action plan for city construction projects.¹⁴ The city of Camden, New Jersey enacted such an ordinance which was then approved by the state.¹⁵ The ordinance required that private contractors who performed work for the city give a preference to minority workers.¹⁶ The ordinance further mandated that twenty-five percent of the city's construction work be awarded to minority workers, and that residents of the city of Camden receive a hiring preference for forty percent of the construction jobs.¹⁷

These employment preferences were established as goals rather than rigid quotas,¹⁸ and "minority workers" were defined as Blacks, Hispanics, Asians, American Indians and women.¹⁹ The composition of population of the city of Camden was thirty percent Caucasian,²⁰ with minorities including women comprising up to seventy-five percent of the population.²¹ Blacks comprised fifty-three percent of the city's population,²² but constituted barely over fourteen percent of the population of Camden County.²³ According to statistics of the United States Department of Labor for 1977, the unemployment rate was eleven and one-half percent for the city, eight and one-tenth percent for the state, and seven and six-tenths percent for the county.²⁴ The city unemployment rate was eighteen and four-tenths percent for Blacks and fifteen and six-tenths percent for Hispanics.²⁵ These figures served as the basis for the employment preferences.

¹² *Id.* at ___, 104 S. Ct. at 1023 n.2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at ___, 104 S. Ct. at 1024.

¹⁶ 88 N.J. at 320, 443 A.2d at 149.

¹⁷ ___ U.S. at ___, 104 S. Ct. at 1024.

¹⁸ 88 N.J. at ___, 443 A.2d at 155-56. Initially, however the preference for residents took in the form of a quota. ___ U.S. at ___, 104 S. Ct. at 1025; 88 N.J. at 337-38, 443 A.2d at 158.

¹⁹ 88 N.J. at 320 n.1, 443 A.2d. at 149 n.1.

²⁰ *Id.* at 327 n.5, 443 A.2d at 153 n.5. The city's total population in 1980 was 84,910 of which 25,739 were Caucasian.

²¹ *Id.* at 328, 443 A.2d at 153.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 324, 443 A.2d at 151.

²⁵ *Id.*

Construction contractors did not challenge Camden's ordinance,²⁶ rather, an association of labor unions did.²⁷ The labor unions challenged Camden's affirmative action program as a denial to whites of the equal protection of the laws guaranteed by the fourteenth amendment.²⁸ The primary basis for this claim was the fact that the hiring preferences mandated rigid quotas rather than goals for minority workers.²⁹ In addition, the unions claimed that the program had to be supported by state administrative³⁰ or legislative findings of discrimination.³¹ The New Jersey Supreme Court disagreed³² emphasizing that federal legislative,³³ executive³⁴ and judicial findings of pervasive discrimination³⁵ in the construction industry were widespread.³⁶ Before the Supreme Court, the unions relinquished this direct assault upon Camden's affirmative action plan and,³⁷ ultimately, relied exclusively upon the interstate privileges and immunities clause.³⁸ The New Jersey Supreme Court, upholding Camden's ordinance and affirmative action plan, had ruled that this clause *did not* protect nonresidents of the regulating state from discriminatory classifications upon residence in a city rather than residence in a state.³⁹ The Supreme Court, however, disagreed,⁴⁰ reversed judgment for the city of Camden, and remanded the case for the construction of a factual record to determine whether the local-hire ordinance violated the interstate privileges and immunities clause.⁴¹ The Court observed that while the association of labor unions had at least some members who did not reside in New Jersey,⁴² the ordinance struck a balance of employment opportunities primarily between citizens of New Jersey, namely the inhabitants of the city of Camden, and its suburbs in New Jersey.

The demographics of Camden are similar to those of metropolitan areas throughout the nation. The typical example is the relatively poor, perhaps deteriorating, central city that is doing its utmost to save and improve what jobs and tax base it has. The central city is populated, in large

²⁶ *Id.* at 335, 443 A.2d at 157.

²⁷ ___ U.S. ___, 104 S. Ct. at 1024.

²⁸ 88 N.J. at 331, 443 A.2d. at 155 n.7.

²⁹ *Id.*

³⁰ *Id.* at 330, 443 A.2d at 154.

³¹ *Id.* at 333, 443 A.2d at 156.

³² *Id.*

³³ Fullilove v. Klutznick, 448 U.S. 448, 447-78 (1980).

³⁴ See Regents of the University of California v. Bakke, 438 U.S. 265, 301-02 n.40 (1978).

³⁵ United Steelworkers of America v. Weber, 443 U.S. 193, 198 n.1 (1979).

³⁶ 88 N.J. 317, 331-36, 443 A.2d. 148, 155-57 (1982).

³⁷ ___ U.S. at ___, 104 S. Ct. at 1024 n.5.

³⁸ *Id.* at ___, 104 S. Ct. at 1025.

³⁹ *Id.* at ___, 104 S. Ct. at 1026.

⁴⁰ *Id.* at ___, 104 S. Ct. at 1023.

⁴¹ *Id.* at ___, 104 S. Ct. at 1023, 1029-30.

⁴² *Id.* at ___, 104 S. Ct. at 1024 n.4.

part, by racial and other deprived minorities, and it is surrounded by suburbs that are affluent by comparison.

The majority of the jobs affected by the ordinance could have been held by commuters into Camden. Nevertheless, the Court said that the local hire ordinance must satisfy the strict⁴³ demands of the interstate privileges and immunities clause.⁴⁴ A crucial factor in the ultimate decision may be that Camden's local-hire program involves the spending of the city's own funds.⁴⁵ Similarly, the city's grave social and economic ills may also be assigned great weight.⁴⁶ The ability to predict the final outcome, however, seems doubtful at best.⁴⁷

A local-hire law requiring that city employees live within the city would appear to be constitutional.⁴⁸ Generally, such an ordinance would offer equal employment opportunities to all nonresidents of the city. Further, preservation of the city's tax base would serve to distinguish the law from those laws condemned by the commerce and interstate privileges and immunities clause as economic protectionism. Camden's local hire law, on the other hand, is a wall of protectionism that insulates the city's residents against competition from outsiders in the area of city construction jobs. Despite the fact that these two constitutional clauses are generally hostile toward state economic protectionism, until the decision in *Camden*, there was no reason to believe that such a local-hire law would not be valid. In fact, a previous case, *Hein v. McCall*,⁴⁹ had found that local-hire laws for public contractors did not violate the interstate privileges and immunities clause.⁵⁰ *Camden* changed both this result and the standard used to construe this clause.⁵¹

III. THE OPERATION OF THE COMMERCE AND INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSES

The commerce clause and the interstate privileges and immunities clause provide overlapping, but not identical, protection to nonresidents of a state from state discrimination.⁵² The privileges and immunities

⁴³ *Id.* at ___, 104 S. Ct. at 1029. See *infra* text accompanying notes 111-122.

⁴⁴ *Id.* at ___, 104 S. Ct. at 1023.

⁴⁵ *Id.* at ___, 104 S. Ct. at 1029.

⁴⁶ *Id.* at ___, 104 S. Ct. at 1030.

⁴⁷ Cf. *White v. Massachusetts Council of Const. Employers, Inc.* 460 U.S. 204 (1983) (Blackmun, J., concurring and dissenting). See *infra* text accompanying notes 155-69.

⁴⁸ See *infra* text accompanying note 209-220.

⁴⁹ 239 U.S. 175 (1915).

⁵⁰ See *infra* text accompanying notes 147-50.

⁵¹ See *infra* text accompanying notes 52-66.

⁵² *Hicklin v. Orbeck*, 437 U.S. 518, 532-35 (1978); *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 379-80 (1978). See *TRIBE, AMERICAN CONSTITUTIONAL LAW*, 404 (1978).

clause, for example, does not protect corporations,⁵³ while the commerce clause does;⁵⁴ the former does not protect conduct that occurs outside the regulating state,⁵⁵ while the latter does.⁵⁶ Further, prior to *Camden* the standard of protection of the privileges and immunities clause appeared to be much less restrictive than that of the commerce clause. Before *Camden*, the recognized measure of protection due nonresidents of a state under the privileges and immunities clause was the same as that the state gave to its own residents.⁵⁷ A state was, therefore, permitted to discriminate against nonresidents to the same extent that it discriminated against its own citizens. This standard essentially would permit a state to favor residents of a city at the expense of both its own residents and those of other states. In his dissenting opinion in *Camden*, Justice Blackmun observed that the hiring preference for residents of the city of Camden satisfied the interstate privileges and immunities clause based upon these grounds.⁵⁸

Nevertheless, it is not difficult to comprehend why this original standard of protection might prove less than adequate when measured against standards that reject state discrimination against citizens of other states. This standard allows a regulating state to wall off territorial enclaves for the exclusive benefit of its citizens; overall, it allows a regulating state to improve the position of its citizens by allocating to them more of the state's opportunities. Thus, a hiring preference for a city's residents could permit them to have all of the jobs affected by the preference. Naturally, nonresidents of the state would be excluded. As a result, the residents of the regulating state would have more job opportunities after the enactment of the preference than before.

The *Camden* Court found that these results and the standard that permitted them were unacceptable. Rejecting the less restrictive standard of the privileges and immunities clause, the Court endorsed a more restrictive standard of protection prescribed by the commerce clause, an example of which may be found in *Dean Milk Co. v. City of Madison*.⁵⁹ In *Dean Milk*, a dairy farmer in northern Illinois wanted to sell his pasturized milk.⁶⁰ Madison, however, forbade the sale of such milk unless it

⁵³ *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

⁵⁴ *Crutcher v. Kentucky*, 141 U.S. 47, 57, 59 (1891); *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. 1, 12-13 (1878).

⁵⁵ *Cf. Toomer v. Witsell*, 334 U.S. 385, 395-96 (1948).

⁵⁶ *Cf. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE UNITED STATES* 41-43 (1953). For an example of the interstate motive of the commerce clause, see *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978).

⁵⁷ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1873).

⁵⁸ ___ U.S. ___, 104 S. Ct. 1020, 1033-34 (1984) (Blackmun, J., dissenting).

⁵⁹ 340 U.S. 351 (1951).

⁶⁰ *Id.* at 351. When the case arose, there were 5600 dairy farms in Dane County, of which Madison is the county seat, and they produced 600,000 pounds of raw milk annually which was more than 10 times the requirements of Madison. *Id.* at 351-52.

was pasteurized in a local dairy.⁶¹ The Court held that the application of this regulation to milk from out-of-state farms violated the commerce clause. The state's health interest in pure milk did not justify a trade preference for a few local dairies when the reasonable alternative means of inspecting dairies outside Wisconsin would permit safe milk for Madison consumers.⁶²

Dean Milk clearly illustrates that the commerce clause prohibits a local market from discriminating against residents of other states unless there is *substantial* justification for the differential treatment. *Camden* adopted this commerce clause standard of protection under the auspices of the interstate privileges and immunities clause. Thus, territorial enclaves of preferential treatment aimed at nonresidents of a regulating state must be justified where the nonresidents may suffer an adverse change of position. It is immaterial that the regulation also discriminates against many of the regulating state's own citizens.⁶³

A year before the *Camden* decision, the Court in *White v. Massachusetts Council of Construction Employers, Inc.*⁶⁴ held that the commerce clause does not apply to local hiring preferences for government construction work. Both *White* and *Camden* demonstrate that the commerce clause fails to protect nonresidents from discrimination when the state acts as a proprietor or market participant;⁶⁵ the state acts as a proprietor when it imposes local-hire restrictions on private contractors.⁶⁶ Through state proprietorship, unprincipled discrimination against nonresidents of a regulating state is permitted.⁶⁷ Thus, the commerce clause not only fails to protect nonresidents from state discrimination in construction employment but it in fact permits discrimination in all forms of state employment.

The protection not provided by the commerce clause, however, is provided to some extent by the immunities clause. Thus, *Camden* protects nonresidents from state discrimination when they seek jobs with state-employed private contractors. Explaining why one clause provides nonresidents with protection not allowed by the other, the Court stated:

The Commerce Clause acts as an implied restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce. When the state acts solely as

⁶¹ *Id.* at 350, 352.

⁶² *Id.* at 354-55.

⁶³ ___ U.S. at ___, 104 S. Ct. at 1027.

⁶⁴ ___ U.S. at ___, 103 S. Ct. at 1042, 1046 (1983).

⁶⁵ *Reeves v. Stake*, 447 U.S. 429, 438-39 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 808 (1976).

⁶⁶ *Camden*, ___ U.S. at ___, 104 S. Ct. at 1025; *White*, ___ U.S. at ___, 103 S. Ct. at 1046; *Reeves*, 447 U.S. at 438-39; *Hughes*, 426 U.S. at 794.

⁶⁷ ___ U.S. at ___, 104 S. Ct. at 1027.

a market participant, no conflict between state *regulation* and federal authority can arise The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony. . . . This concern with comity cuts across the regulator-market participant distinction that is crucial under the Commerce Clause. It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce. Thus, the fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.⁶⁸

This explanation, however, is deficient in that it fails to address the paradox that identical forms of discrimination can be deemed hostile to interstate harmony under the privileges and immunities clause, yet may *not* hostile to interstate harmony under the commerce clause. The first three sentences of the Court's explanation do suggest that the inhibitions of the commerce clause apply only to a state's regulatory power and perhaps to some other coercive state power, not state action as a market participant or proprietor. It is possible that the Framers of the Constitution only were concerned with state taxation and regulation—including taxes and regulations hostile to other states—when they drafted the commerce clause.⁶⁹ If so, this would support the conclusion that certain types of state action, including the state acting as a proprietor, are not subject to the negative implications of the commerce clause. This assumed fact would, however, also support the conclusion that these different types of state action, including state proprietorship, are not subject to the interstate privileges and immunities clause.

The Articles of Confederation is the common source of both clauses.⁷⁰ The two clauses have a "mutually reinforcing relationship"⁷¹ and the Court has said that both rely on the same reasoning when the state acting discriminates against nonresidents.⁷² Therefore, if the Framers of the Constitution were not concerned with such discrimination when they drafted the commerce clause, they must not have been concerned with it when they proposed the interstate privileges and immunities clause.

The Supreme Court reports are replete with commerce clause precedents that protect nonresidents from state discrimination that is hostile to national unity.⁷³ In 1821, Chief Justice John Marshall said: "In all

⁶⁸ — U.S. at —, 104 S. Ct. at 1028-29.

⁶⁹ 426 U.S. 794, 810 (1976); see L. TRIBE, *supra* note 52, at 336.

⁷⁰ *Hicklin*, 437 U.S. at 531-32 n.16; *Baldwin*, 436 U.S. at 379-80.

⁷¹ *Hicklin*, 437 U.S. at 531.

⁷² *Hughes v. Oklahoma*, 441 U.S. 322, 333 (1979).

⁷³ See *infra* text accompanying notes 98-110.

commercial regulations, we are one and the same people."⁷⁴ From the perspective of state discrimination against nonresidents, it is inconceivable that particular commercial activity can be essential to interstate harmony under the interstate privileges and immunities clause without also being essential to interstate harmony under the commerce clause. As a result of *Camden*, however, the inconceivable now exists.

Congress, of course, can enact legislation freeing the states from commerce clause restrictions.⁷⁵ Its power to free the states from the restrictions of the interstate privileges and immunities clause, however, is another issue.⁷⁶ Whatever this difference may be, it cannot trivialize the essentials of interstate harmony when they implicate one clause of the Constitution rather than another, especially when *both* clauses were intended to secure interstate harmony.

In summary, the Supreme Court has made two findings. First, it has subjected local-hire laws for the employees of public contractors to the fairly rigorous demands of the interstate privileges and immunities clause. Second, the Court has recognized a state-proprietary or market-participant doctrine that permits the states to have an enclave of unprincipled discrimination that is not subject to the usual protective rules of the commerce clause. However, as the local-hire cases show, this "enclave" does not operate under the interstate privileges and immunities clause, although both clauses were meant to provide comparable and mutual protection.⁷⁷ In fact, travelling parallel paths, they have consistently provided such protection.⁷⁸

Moreover, the parallel operation of these two clauses has extended to state discrimination against nonresidents in the disposition of state property.⁷⁹ Initially, these clauses did not provide protection to nonresidents from this kind of discrimination because both clauses had a state-proprietaryship doctrine that permitted the same type of discrimination that is now allowed by the state-market-participant doctrine.⁸⁰ Eventually, however, both of these clauses came to provide nonresidents with protection from state discrimination in the disposition of state property.⁸¹ Then, as the local-hire cases disclose, these two clauses experienced a partial divergince from their parallel paths due to the contradictory operation of

⁷⁴ *Cohens v. Virginia*, 19 U.S. (16 Wheat) 264, 413-14 (1821).

⁷⁵ See *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981)(Congress authorized state retaliatory tax upon foreign insurance companies when their home states taxed the taxing state's insurance companies at a higher rate than that approved by the taxing state).

⁷⁶ 460 U.S. at 215 n.1. (1983)(Blackmun, J., concurring and dissenting); see, L. TRIBE, *supra* note 52, at 403 n.18.

⁷⁷ *Hicklin*, 437 U.S. at 531; *Hughes*, 441 U.S. at 334.

⁷⁸ See *infra* text accompanying notes 89-94.

⁷⁹ See *infra* text accompanying notes 125-134.

⁸⁰ See *infra* text accompanying notes 125-126, 135-39.

⁸¹ See *infra* text accompanying notes 140-161.

the state-market-participant doctrine.⁸²

It would be possible, of course, to discuss the validity of local hire laws under the interstate privileges and immunities clause by ignoring the commerce clause and the market-participant contradiction that it contains. However because of the parallel development that both clauses have had, it is not possible to discuss local hire and the interstate privileges and immunities clause without drawing upon commerce clause principles. Further, consideration of local-hire laws and the interstate privileges and immunities clause requires a discussion of the appropriate use of the state's property power. This involves a state's subsidy power, as well as its power to tie a residence requirement to employment in the state, especially employment that is financed by the state. This discussion of a state's property power will show that the Supreme Court could have reached the same results in the recent state-market-participant cases without using the market-participant doctrine.⁸³

IV. THE OPERATION OF THE COMMERCE CLAUSE AND INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSE IN THE PRIVATE SECTOR

The commerce clause and interstate privileges and immunities clause can both require a state that wants to provide more private sector benefits to its citizens than the private sector allows to satisfy competely the economic claims of all nonresidents first.⁸⁴ Whatever remains, if anything, can then be enjoyed by the residents of the regulating state.

Baldwin v. Seelig,⁸⁵ the leading case, arose out of the Great Depression.⁸⁶ The free market gave New York's dairy farmers a price for their milk that fell far short of production costs.⁸⁷ In an effort to save a basic industry from what might have been total destruction,⁸⁸ New York legislated a higher price, one that would provide viability for farmers with customers who could afford to pay.⁸⁹ As a result of this higher price, there was a disparity between the price of milk in New York and its neighbor, Vermont.⁹⁰ New York was then confronted with the possibility that its residents would purchase Vermont's low-priced milk before they bought the more expensive New York product. New York responded with a law requiring a New Yorker who purchased milk in Vermont to pay the Vermont dairy farmer the high New York price if the purchaser intended to

⁸² See *supra* text accompanying notes 66-69.

⁸³ See *infra* text accompanying notes 174-189.

⁸⁴ — U.S. at —, 104 S. Ct. 1024 n.4.

⁸⁵ 294 U.S. 511 (1935).

⁸⁶ 294 U.S. at 519 (Court's reference to *Nebbia v. New York*, 291 U.S. 502 (1934)).

⁸⁷ 291 U.S. at 515.

⁸⁸ *Id.* at 539.

⁸⁹ *Id.* at 518 n.2 (paragraph 6).

⁹⁰ 294 U.S. 511.

bring the milk back to New York.⁹¹

The Supreme Court unanimously invalidated New York's interstate price-control law,⁹² leaving New York with the choice of giving up its interstate price control or watching while New Yorkers bought Vermont milk before buying more expensive milk from New York's dairy farmers. The court held that the commerce clause prohibits a state from protecting a local economic interest against out-of-state competition.⁹³ It was immaterial that unequal economic competition and the depression threatened one of a state's basic industries. In such circumstances, the Court found that one state cannot save itself at the expense of another state. Rather, the states must "sink or swim" together.⁹⁴

Baldwin applies to a discriminatory trade preference for a state's products in its markets. The same rule also applies to a discriminatory trade preference for the labor of the regulating state's residents in its labor market. *Edwards v. California*,⁹⁵ another depression-era case,⁹⁶ held that an economic crisis did not permit a state to keep out indigent unemployed nonresidents looking for work.⁹⁷ The Court held that welfare costs do not justify a state bar of interstate migration;⁹⁸ the commerce clause forbids it.⁹⁹

Other cases also demonstrate that the commerce clause prevents a state from denying nonresidents equal access to private-sector opportunities within the state. As in *Baldwin*,¹⁰⁰ the clause assures citizens of other states their fair market share whenever a state tries to hoard private opportunities or resources for that state's own citizens. This protective rule has invalidated preferential access for a state's residents to milk,¹⁰¹ fuel,¹⁰² and even waste disposal service.¹⁰³ The Supreme Court has said that the commerce clause creates a domestic common market free from state discriminatory trade preferences favoring local economic interests.¹⁰⁴ In fact, the clause has performed its task so effectively that it has left little parallel supplementary work for the interstate privileges and immunities clause in the private sector. The latter clause nevertheless

⁹¹ *Id.* at 520.

⁹² *Id.* at 527.

⁹³ *Id.*

⁹⁴ *Id.* at 523.

⁹⁵ 314 U.S. 160 (1941).

⁹⁶ *Id.* at 173.

⁹⁷ *Id.* at 173-74.

⁹⁸ *Id.* at 174-75.

⁹⁹ *Id.* at 177.

¹⁰⁰ 294 U.S. 511.

¹⁰¹ *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949).

¹⁰² *Oklahoma v. Kansas Natural Gas Co.*, 221 U.S. 229 (1910).

¹⁰³ *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

¹⁰⁴ *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 803 (1976); *H.P. Hood & Sons*, 336 U.S. at 538-39.

precluded Alaska from awarding Alaskans a preference to all private sector work generated by the development of Alaska's enormous oil wealth, including construction of the Alaska pipeline.¹⁰⁵

The commerce clause and interstate privileges and immunities clause, however, do not completely disable a state from discriminating against nonresidents; a state may do so when discrimination is necessary to accomplish some governmental objective other than the award of a trade preference to its citizens. A state can award its citizens what is in effect a trade preference when it is necessary to further other state interests. Thus, for example, the prevention of disease allows a state compel farmers to burn dead farm animals or sell them to local fertilizer plants although plants in other states were willing to buy the carcasses.¹⁰⁶ A state may also prohibit interstate disposition of its scarce privately-owned ground water if such action is in the interests of health, rather than economic protectionism.¹⁰⁷ Earlier, a similar restriction preventing diversion of a state's streams while allowing ordinary riparian use helped to preserve their navigability although it denied consumers in New York City access to New Jersey waters.¹⁰⁸ States have also been successful in protecting their butter industries against competition from oleomargaine made in other states in the interest of preventing consumer confusion and deception respecting similar products.¹⁰⁹ Similarly, environmental objectives related to waste disposal allowed Minnesota to ban temporarily the use of throw-away plastic milk pouches, although the ban favored the state's paper products industry.¹¹⁰ *Dean Milk*, as stated earlier, indicated that a state could require local pasteurization of out-of-state milk if there were no other means to obtain pure milk for consumers.¹¹¹

Although the Court has said that facial discrimination against interstate commerce "invokes the strict scrutiny of any purported legitimate local purpose and of the absence of any nondiscriminatory alternatives,"¹¹² the precedents do not require application of the strict scrutiny test,¹¹³ which is usually a fatally-invalidating test,¹¹⁴ when a state has to discriminate against nonresidents to protect some local interest other than a trade preference.¹¹⁵ Rather, it seems that careful judicial review,

¹⁰⁵ *Hicklin*, 437 U.S. at 518.

¹⁰⁶ *Clason v. Indiana*, 306 U.S. 439 (1939).

¹⁰⁷ *Sporhase v. Nebraska*, 458 U.S. 941 (1982).

¹⁰⁸ *Hudson Water Co. v. McCarter*, 209 U.S. 349, 356-57 (1908).

¹⁰⁹ *Cf. United States v. Carolene Prod. Co.*, 304 U.S. 144, 151 (1938); *Plumley v. Massachusetts*, 155 U.S. 461 (1894); *Powell v. Pennsylvania*, 270 U.S. 678, 684-85 (1888).

¹¹⁰ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 457 (1981).

¹¹¹ 340 U.S. 349, 354 (1951).

¹¹² *Hughes*, 441 U.S. at 337.

¹¹³ *Shapiro v. Thompson*, 394 U.S. 618, 636 (1969).

¹¹⁴ *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting).

¹¹⁵ *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353-54 (1977).

akin to that demanded by the equal protection clause, of some classifications that are subjected to the so-called "intermediate test" of equal protection is all that is required.¹¹⁶ The applicable standard, taken from *Toomer v. Witsell*¹¹⁷ and approved in *Camden*,¹¹⁸ permits discrimination against nonresidents when there are substantial reasons for it and when the discrimination bears a close relation to these reasons.¹¹⁹

In summary, state discrimination against out-of-state interests to protect local interests is not favored. The commerce and interstate privileges and immunities clauses do not allow state trade preferences for local selfishness and self-aggrandizement. As a rule, the clauses condemn these preferences. This rule, however, has been ironclad only in the private sector. The rules respecting preferential access for a state's citizens to the benefits of resources and enterprise owned by the state, although hardly uniform, have been permissive, lenient and indulgent.

V. STATE PROPERTY DISPOSITIONS: COMMERCE CLAUSE AND INTERSTATE PRIVILEGES AND IMMUNITIES CLAUSE

The restrictions of these two clauses upon the disposition of state property disclose a parallel development. Initially, dispositions of state property were not subject to either clause. Later, state property dispositions became subject to both clauses. Then, a new state-market-participant doctrine freed state property dispositions from the commerce clause, but not from the interstate privileges and immunities clause.

A. *The Commerce Clause*

In *Geer v. Connecticut*,¹²⁰ the Court held that the commerce clause did not invalidate a state law that forbade the taking of game birds killed within the state to other states, although intrastate use and consumption of the birds was permitted. Reaching this conclusion, the Court observed: "The wild game within a state belong to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so."¹²¹

Subsequently, the Court curtailed the reach of this statement by holding that the commerce clause applies when the state licenses private enterprise to catch its free swimming shrimp and market them in interstate commerce. In *Foster Fountain Packing Co. v. Haydel*,¹²² Louisiana re-

¹¹⁶ *Craig v. Boren*, 429 U.S. 190, 197 (1976)(gender classification must serve important government objectives and be substantially related to the achievement of these objectives).

¹¹⁷ 334 U.S. 385 (1948).

¹¹⁸ ___ U.S. at ___, 104 S. Ct. at 1029.

¹¹⁹ 334 U.S. at 396.

¹²⁰ 161 U.S. 519 (1896).

¹²¹ *Id.* at 529.

¹²² 278 U.S. 1 (1928).

quired its shrimp to be shelled and hulled at private local canneries before being removed from the state. The Court held that the requirement was invalid under the commerce clause because it was a trade preference that impermissibly discriminated against canneries in other states.¹²³ State ownership of the shrimp was not decisive because the state permitted the shrimp to be marketed in interstate commerce rather than reserved for local use and consumption, as *Geer* would have allowed.¹²⁴

Ultimately, the state lost the status of property owner of wild fish and game in its territory. The state's ownership claim was deemed to be a fiction¹²⁵ and "pure fantasy."¹²⁶ Similarly, in *Hughes v. Oklahoma*¹²⁷ the court declared that no one can own wild fish and game without reducing them to possession.¹²⁸ *Hughes* overruled *Geer* and held that the commerce clause struck down a state's discriminatory prohibition of the interstate sale of natural minnows from its waters.¹²⁹

The absence of state property rights in fish and game deprives the state of any basis for discriminating against nonresidents as a property owner when the state regulates the acquisition of fish and game. The declassification of wild game and fish as state property, therefore, increases the protection afforded to nonresidents from state discrimination. However, the Court also said, before the recent state-market-participant cases took discernible shape, that state ownership of property would not justify unprincipled discrimination against nonresidents under either the commerce clause or the interstate privileges and immunities clause.¹³⁰ Thus during this time, the precedents concerning the restrictions of the interstate privileges and immunities clause matched those concerning the commerce clause.

B. *The Interstate Privileges and Immunities Clause*

The early case of *McCready v. Virginia*¹³¹ held that a state could let its citizens exploit the state's oyster beds while automatically excluding nonresidents from them altogether without violating the interstate privileges and immunities clause.¹³² Subsequently, however, in *Toomer v. Witsell*¹³³ the Court ruled that the clause forbade a state from denying nonresident

¹²³ *Id.* at 13.

¹²⁴ *Id.* at 11-13.

¹²⁵ *Toomer*, 334 U.S. at 402.

¹²⁶ *Douglas v. Seacoast Prod., Inc.*, 431 U.S. 265, 284 (1977).

¹²⁷ 441 U.S. 322 (1979).

¹²⁸ *Id.* at 335.

¹²⁹ *Id.* at 338.

¹³⁰ *Hicklin*, 437 U.S. at 528-29, 531-34.

¹³¹ 94 U.S. 391 (1877).

¹³² *Id.* at 396.

¹³³ 334 U.S. 385 (1948).

commercial fishermen access to its shrimp in the marginal sea. Eventually, in *Hicklin v. Orbeck*¹³⁴ the Court found that the interstate privileges and immunities clause does provide some protection from arbitrary state discrimination against nonresidents when the state develops property to which it has title.¹³⁵

In *Hicklin*, Alaska awarded an employment preference to its citizens in all employment generated by the exploitation of oil resources owned by the state. The Court struck down the preference because it impermissibly intruded upon private sector employment having only a tenuous relationship to the development of Alaska's property.¹³⁶ The Court went further when it discussed *McCready*¹³⁷ which involved a state's exploitation of its oyster beds and said that the development of state property was not an enclave of permissible arbitrary state discrimination against nonresidents.¹³⁸ Rather, the Court found that discrimination against nonresidents in the disposition of state property had to be justified;¹³⁹ this was true even of property that the state owned without qualification.

C. Both Clauses

This pronouncement was adequate to resolve a case requiring only a construction of the interstate privileges and immunities clause; however, the court further explained why this reasoning also applied to the commerce clause although none of the parties to the case invoked this latter clause.¹⁴⁰ The Court underscored its explanation by emphasizing its decision in *Foster Foundation Packing Co. v. Haydel*¹⁴¹ in which the state had licensed private enterprises to catch and market its shrimp in interstate commerce.¹⁴² The commerce clause applied to this disposition of state property although the disposition itself was clearly nonregulatory and the act of a state market-participant in any ordinary sense of those words.

Not yet content, the Court proceeded to clarify *Heim v. McCall*,¹⁴³ a comparatively old case that had been justifiably understood as holding that the interstate privileges and immunities clause permits a state to stipulate with public contractors who do the state's construction work for a discriminatory hiring preference for the state's citizens. This proposi-

¹³⁴ 437 U.S. 518 (1978).

¹³⁵ *Id.* at 528-29.

¹³⁶ *Id.* at 529.

¹³⁷ 94 U.S. 391 (1877).

¹³⁸ 437 U.S. at 528.

¹³⁹ *Id.* at 529.

¹⁴⁰ *Id.* at 532-34.

¹⁴¹ 278 U.S. 1 (1928).

¹⁴² 437 U.S. at 533.

¹⁴³ 239 U.S. 175 (1915).

tion, in fact, appeared at the forefront of the Court's opinion,¹⁴⁴ and the law challenged in *Heim* provided for such a discriminatory hiring preference.¹⁴⁵ *Heim*, however, explicitly held only that the equal protection clause of the fourteenth amendment and certain treaties did not prohibit a state from denying aliens employment in construction work done for the state.¹⁴⁶ The *Hicklin* Court emphasized only this explicit ruling and thereby deprived *Heim* of any status as an authority allowing state discrimination against citizens of other states in awarding public construction contracts.¹⁴⁷ *Hicklin's* reinterpretation of *Heim* was approved by a unanimous Court. Combined with the discourse about state property dispositions and the commerce clause, the Court clearly made public construction contracts with discriminatory hiring preferences subject to the restrictions of commerce clause.

Naturally, this was exactly the opposite course from that needed to prepare the commerce clause for the reception of a new arbitrary state-market-participant doctrine. At the time, the new doctrine was just a seed, a single case that had been decided two years earlier concerning the use of discriminatory state bounty payments to ameliorate the eyesore of junked automobiles.¹⁴⁸ The rapid growth of this "seed" will be discussed later.¹⁴⁹

VI. LOCAL HIRE AND UNEMPLOYMENT RELIEF

In *Hicklin*,¹⁵⁰ Alaska argued that it acted to relieve state unemployment when it mandated an employment preference for its residents in all work related to the exploitation of its oil wealth, including construction of the Alaska pipeline.¹⁵¹ This discriminatory job preference was held invalid because it intruded too far into the private job sector where blatant state trade preferences harmful to nonresidents are not tolerated.¹⁵² The Court also discussed the power of the state to award a discriminatory job preference to its citizens to alleviate unemployment; the validity of a discriminatory allocation of private sector jobs to unemployed state residents was said to be questionable.¹⁵³ Private sector job discrimination to support a job training program, however, elicited a more sympathetic response,¹⁵⁴ but one that was hardly free from doubt.¹⁵⁵ Further, the Court

¹⁴⁴ *Id.* at 176.

¹⁴⁵ *Id.* at 176-77.

¹⁴⁶ *Id.* at 193-94.

¹⁴⁷ 437 U.S. at 531, n.15.

¹⁴⁸ *Alexandria Scrap*, 426 U.S. at 810.

¹⁴⁹ See *infra* text accompanying notes 167-209.

¹⁵⁰ 437 U.S. at 518.

¹⁵¹ *Id.* at 520-21.

¹⁵² *Id.* at 528-29.

¹⁵³ *Id.* at 526.

¹⁵⁴ *Id.* at 526-28.

left open the possibility that a state might have a larger power to help its unemployed by discriminating against nonresidents in managing and disposing of its own property.¹⁵⁶

Arguably, carefully limited job discrimination against nonresidents ought to be permissible if its purpose is to provide viability in the labor market to persons without marketable job skills. All states are confronted with this problem, and its solution seems to call for some government assistance. The alternative might leave a large underclass in a condition of perpetual helplessness. Once economic viability was attained, however, it seems that the group could accept the same unemployment risks that others have.

The precedents, however, seem to preclude state job discrimination against nonresidents in the private sector. For example, *Edwards v. California*,¹⁵⁷ cited in *Hicklin*,¹⁵⁸ barred California from preventing nonresident indigents from looking for work in the state during the depression, a restriction that would have provided at least short term benefits to unemployed Californians.¹⁵⁹ Similarly, during the depression, New York was not permitted to save its dairy industry from destruction if rescue meant denying Vermont milk access to the New York market.¹⁶⁰ During an economic emergency, one state cannot save itself at the expense of a fellow state; all states must sink or swim together.¹⁶¹

This conception of national unity arguably should control the result when the state wants to help its own unemployed through job discrimination against nonresidents in the operation of the state or state-assisted enterprises, provided that the enterprise is not of the "make work" kind. "Make work" projects for the unemployed are different in kind from economically available enterprises. Like public welfare payments, a state does as much as it can when it provides for its own people. Necessary work, however, whether it is private or state enterprise, seemingly ought to be available to all Americans, regardless of their state citizenship. Arbitrary job discrimination against nonresidents merely because the state owns or assists an enterprise is difficult to defend and may well be unconstitutional.

As a result, there is a good chance that a local-hire ordinance for public construction work will be unconstitutional if it absolutely forecloses nonresidents of the state from participation in the work. On the other hand, a municipal ordinance that offers employment to nonresidents of the state who are willing to move to the municipality should have a better

¹⁵⁵ *Id.* at 528.

¹⁵⁶ *Id.* at 528-29.

¹⁵⁷ 314 U.S. 160 (1941).

¹⁵⁸ 437 U.S. at 526 n.9.

¹⁵⁹ 314 U.S. at 173-74.

¹⁶⁰ *Baldwin*, 294 U.S. at 522-23.

¹⁶¹ *Id.*; cf. *Hicklin*, 437 U.S. at 534.

chance of being upheld. The validity of such an ordinance would depend upon the appropriate use of a state's power of property and subsidy to attract and hold industry and jobs, and these matters, in turn, implicate the recent state-market-participant doctrine.

VII. THE NEW STATE-MARKET-PARTICIPANT DOCTRINE

A. *The Interstate Privileges and Immunities Clause, the Commerce Clause and a State's Employees*

During the same term that marked the appearance of the recent state-market-participant doctrine,¹⁶² the Supreme Court held, in effect although not expressly, that the protection of the interstate privileges and immunities and commerce clauses is not available to nonresidents when the state itself makes hiring decisions. The Court made this ruling without referring to the state-market-participant doctrine or either constitutional clause in *McCarthy v. Philadelphia Civil Service Commission*,¹⁶³ which held that a city's discharge of a policeman who insisted upon living in another state while working for the city did not violate the right of a person to travel from state to state. The court simply stated: "There is no support in our cases for such a claim."¹⁶⁴

Since the policeman in *McCarthy* moved to New Jersey and became one of its residents at the instant he lost his job, he could have argued that the interstate privileges and immunities clause forbade Philadelphia from discriminating against him. Further, his interstate-commuter status would have supported the same claim under the commerce clause. He did not invoke either clause, however. The Court tersely observed that the precedents did not question "the validity of a condition placed upon municipal employment that a person be a resident at the time of his application."¹⁶⁵

Since a state attracts its employees from the labor market, the state-market-participant doctrine would have withdrawn the protection of the commerce clause from the policeman in *McCarthy* has the Court chosen to apply that doctrine. That, in turn, would have left the interstate privileges and immunities clause; however, the protection of that clause could have been easily withdrawn as well. The Court could have held that the right to contract for state employment and to engage in other direct transactions with the state is a nonfundamental right that is not protected by the interstate privileges and immunities clause. The interstate privileges and immunities clause protects only those rights that are fun-

¹⁶² *Hughes*, 426 U.S. at 810.

¹⁶³ 424 U.S. 645 (1976).

¹⁶⁴ *Id.* at 646.

¹⁶⁵ *Id.* at 647

damental to the national unity that ensues when each state is deprived of the power to treat fellow Americans as though they were aliens.¹⁶⁶ Therefore, nonfundamental status for the right to engage in direct transactions with the state is an arguable possibility. The right to hunt elk from a state's elk herds, for example, is not fundamental in this sense.¹⁶⁷

Admittedly, this proposition does not appear to be too persuasive. Collectively, state and local government might be the nation's largest employer. Regardless of whether this proposition is persuasive, a ruling that the right to make contracts with the state is not a fundamental right that is protected by the interstate privileges and immunities clause remains a sound possibility; *Camden* leaves this possibility open,¹⁶⁸ deliberately it would seem, and without explanation.

The Court has yet to explain its reasons for stripping nonresidents of all protection when they want to make employment contracts with the state. A state, of course, can find most of its work force within its borders and the Constitution should not compel a state to conduct an interstate search when it hires employees. However, practical considerations which permit a state to draw its work force primarily from its own residents do not suggest that a state may preclude nonresidents from state jobs.

B. Rational Decision-making Instead of the State-Market-Participant Doctrine

Just as a local government can easily justify having a predominantly resident work force, the results in recent state-market-participant cases could have been reached on rational grounds, without the use of a doctrine that arbitrarily strips nonresidents of the protection of the commerce clause. Thus, the right of a state to grant a subsidy or similar assistance to attract or retain industry would justify the results in several of these cases. A state, for example, can send its printing work exclusively to firms located within the state;¹⁶⁹ local firms generate benefits for the state that are not reflected in their prices. Out-of-state firms can attempt to make their prices more attractive if that seems to be the better course to take.

Similarly, *Reeves v. Stake*¹⁷⁰ held that a state can make preferential sales from the state's cement plant to its residents in times of shortage, although the extensive business of nonresidents customers contributed to the plant's success.¹⁷¹ In *Reeves*, the state asserted that it went into the

¹⁶⁶ *Baldwin*, 436 U.S. at 380-81.

¹⁶⁷ *Id.* at 388.

¹⁶⁸ — U.S. at —, 104 S. Ct. at 1027-28.

¹⁶⁹ *Cf. American Yearbook Co. v. Askew*, 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

¹⁷⁰ 447 U.S. 429 (1980).

¹⁷¹ *Id.* at 430-32.

cement business because private enterprise was not providing enough cement for its citizens.¹⁷² It is arguable, then, that if the commerce clause required the state to behave as an ordinary entrepreneur, it would perpetuate the defects of the private market when the state's reason for entering the market in the first place was to alleviate these defects. Ordinarily, a state should have authority to subsidize or assist cement purchases for its citizens free of the frustration that would ensue from having to share the benefits of its assistance program with nonresidents.

On the other hand, it is more difficult to explain the state's actions in *Hughes v. Alexandria Scrap Corp.*¹⁷³ as an appropriate discriminatory use of its subsidy power against nonresidents. *Alexandria Scrap*, the first of the new state-market-participant cases,¹⁷⁴ held that the commerce clause does not prevent a state from eliminating nonresident scrap processors from the state's bounty payment program to remove unsightly junked automobiles from areas where they accumulate.¹⁷⁵ A nonresident scrap processor in Virginia had challenged his exclusion from Maryland's bounty payment program.¹⁷⁶ He claimed that the program had the effect of barring his acquisition of junked cars that, if not for the program, he would have been able to purchase. He then claimed that the state should let him receive the bounties necessary to buy these cars.¹⁷⁷ The court upheld his exclusion from the program.

Undoubtedly, Maryland could have successfully cleaned up its environment. The case appears to be a stand-off; the state must either unwillingly part with bounty payments or the nonresident must give up a portion of his interstate business. Still, the nonresident's business and that of other scrap processors leave the state with costly clean-up work. With neither party at fault, it appears, nevertheless, that the nonresident's essential claim is a weak one: the commerce clause gives him a right to be part of the solution because he is part of the problem.¹⁷⁸ The cement case, *Reeves v. Stake*, suggests that when private enterprise requires the state to make nonregulatory expenditures, the state can allocate them exclusively to its own residents.¹⁷⁹

A state surely can subsidize purchases for private scrap removal firms in the state even if the only purpose of the subsidy is to aid local firms. Further, it would seem that the state should not have to share this subsidy with competing scrap removal firms in other states. Rather, other

¹⁷² *Id.* at 430.

¹⁷³ 426 U.S. 794.

¹⁷⁴ See *South-Central Timber Dev., Inc. v. Wunnicke*, ___ U.S. ___, 104 S. Ct. 2237, 2243 (1984).

¹⁷⁵ 426 U.S. at 809.

¹⁷⁶ *Id.* at 797, 803 n.13.

¹⁷⁷ *Id.* at 824-26 n.6 (Brennan, J., dissenting).

¹⁷⁸ 447 U.S. 429.

¹⁷⁹ See *supra* text accompanying notes 174-82.

states could choose whether to subsidize their local firms. This type of competition between the states is fair and has taken place in one form or another for many years.

Alexandria Scrap could be decided rationally either way without use of the state-market-participant doctrine, an enclave of constitutional law that permits arbitrary state discrimination against nonresidents. The same is also true of local hire laws; in fact, since local hire laws for the employees of public contractors must now satisfy the demands of the interstate privileges and immunities clause,¹⁸⁰ there is no apparent reason why its companion, the commerce clause, should not also receive the same treatment.

The state-market-participant doctrine, however, may be in trouble. *South-Central Timber Development, Inc. v. Wunnicke*,¹⁸¹ which was decided three months after *Camden*, suggests that the doctrine may collapse from the weight of its own contradictions. If this does happen, the doctrine could be curtailed to the point where its arbitrary impact would only be felt by a party who contracts with the state. It could also be replaced completely by a set of rules prohibiting unfair competition between the states when a state discriminates against nonresidents in the management of state property. Prohibiting this type of discrimination when other states would be incapable of making a competitive response could be the foundation of these rules.

C. South-Central Timber

South-Central Timber is the only recent case concerning the state-proprietorship or market-participant doctrine remaining to be considered.¹⁸² The majority of the export customers for Alaska's timber are located in Japan¹⁸³ and the state required private logging companies which bought timber owned by the state to partially process it in Alaska before exporting it.¹⁸⁴ This requirement was challenged on the ground that it violated the commerce clause.¹⁸⁵ The requirement fragmented the court to such an extent that further proceedings became necessary to determine its validity. Thus, the validity of the local timber processing requirement for export sales remains uncertain.

A plurality opinion subscribed by Justices White, Brennan, Blackmun, and Stevens attempted to apply the state-proprietorship or market-participant doctrine in a way that would invalidate the local timber process-

¹⁸⁰ — U.S. at —, 104 S. Ct. at 1023.

¹⁸¹ — U.S. —, 104 S. Ct. 2237 (1984).

¹⁸² *Id.* at —, 104 S. Ct. at 2243-44.

¹⁸³ *Id.* at — 104 S. Ct. at 2239 n.4.

¹⁸⁴ *Id.* at —, 104 S. Ct. at 2239.

¹⁸⁵ *Id.*

ing requirement.¹⁸⁶ Justices Rehnquist and O'Connor, however, were of the opinion that the market-participant doctrine validated the requirement.¹⁸⁷ Justice Powell and Chief Justice Burger, on the other hand, thought that further proceedings were necessary to determine whether the local timber processing requirement was consistent with the market-participant doctrine.¹⁸⁸ They and the four plurality justices voted to reverse the judgement of the Ninth Circuit Court of Appeals which had upheld the requirement on other grounds.¹⁸⁹ Justice Marshall did not participate in the decision.¹⁹⁰

Both *South-Central Timber* and *Camden* have the same structure; the state in both cases made a contract with a private party. Each contract contained a provision tying local use of its subject matter to the disposition of state property. Further, in each case the private party promised to impose the tie when he contracted with others pursuant to the state contract. The private parties to the state contracts were logging companies in *South-Central Timber* and public contractors in *Camden*. The tie in *South-Central Timber* was designed to increase sawmilling in the state; the purpose of the tie in *Camden*, a local-hire provision, was to direct a share the wages of construction employees to local retail businesses and to local government in the form of property taxes.

The *South-Central Timber* plurality could not have overlooked these similarities. Perhaps that is why they specifically emphasized that in a public contractor case work is being performed for the state and thus the state retains "a continuing proprietary interest in the subject of the contract."¹⁹¹ This statement purports to distinguish *South-Central Timber* from *Camden* with respect to application of the state-market-participant doctrine.

Although the plurality opposed tying local sawmilling to the state's export timber sales to private loggers, they appeared to assume that Alaska could provide for the local sawmilling of its timber in other ways, including "by selling only to Alaska processors, by vertical integration, or by direct subsidy."¹⁹² Interestingly, the plurality found a close factual resemblance between Alaska's sawmilling tie and the comparatively old precedent of *Foster-Fountain Packing Co. v. Haydel*.¹⁹³ The four justices were especially impressed with that part of *Foster-Fountain* that stops a state's power to tie a local use requirement to a transfer of its property at

¹⁸⁶ *Id.* at ___, 104 S. Ct. at 2245-47.

¹⁸⁷ *Id.* at ___, 104 S. Ct. at 2248-49.

¹⁸⁸ *Id.* at ___, 104 S. Ct. at 2248.

¹⁸⁹ *Id.* at ___, 104 S. Ct. at 2240.

¹⁹⁰ *Id.* at ___, 104 S. Ct. at 2247.

¹⁹¹ *Id.* at ___, 104 S. Ct. at 2246.

¹⁹² *Id.* at ___, 104 S. Ct. at 2246.

¹⁹³ 278 U.S. 1 (1928).

the point where the transfer is to private enterprise for export.¹⁹⁴

Rationally, this analogy should also preclude Alaska from imposing the sawmilling tie by vertical integration, if vertical integration means state ownership of the sawmills and perhaps the logging business as well as the standing timber. This would follow because the effect of a state's release of its resources for export upon the validity of a tie for their local processing should be the same regardless of whether there is vertical integration of the required economic processes and their property components.

Nevertheless, drawing the validation line for the tie at vertical integration has some justification. The line allows the tie only when a party to a state timber sale contract has to accept it.¹⁹⁵ Prohibiting the tie here would obviously repudiate the entire state-market-participant doctrine because parties to a state contract would not have to observe an arbitrary tie. The same rule would also apply to nonparties to a state contract. No person would be bound by an arbitrary tie and the state-market-participation doctrine would no longer exist. With the market-participant doctrine no longer applicable, the commerce clause seemingly would apply to all contracts made by the state. The interstate privileges and immunities clause should follow suit. As a result, *McCarthy v. Philadelphia Civil Service Commission*¹⁹⁶ would have to be overruled or at least explained with the change in operation of these two clauses.

Stipulating for local sawmilling by vertical integration is a particular form of a local tie. It may be substantially the same, however, as making a provision for local sawmilling by selling timber only to local sawmills. It is not completely clear, moreover, what the plurality *South-Central Timber* meant when they spoke of this. One possibility is that the state could sell export timber only to private local sawmills who would process it. This approach is no different in form or substance than selling export timber to private loggers subject to a tie for local sawmilling. Further, the four plurality justices disapproved of such a tie. Therefore, it is unlikely that they would approve substantially the same tie simply because it was incident to timber sales to private sawmills rather than to private logging companies.

Another possibility is quite different, however; the state could withdraw its timber from the world and national markets and confine its use to consumption in the state.¹⁹⁷ This withdrawal of the state's timber, obviously, could not be construed as unfair competition. The only timber that the withdrawing state could realistically hope to sawmill for the world is its own timber; withdrawal of its own timber, therefore would also constitute withdrawal from competition for the world's sawmilling

¹⁹⁴ ___ U.S. at ___, 104 S. Ct. at 2245 n.9.

¹⁹⁵ *Id.* at ___, 104 S. Ct. at 2246.

¹⁹⁶ 424 U.S. 645 (1976).

¹⁹⁷ *Cf.* ___ U.S. at ___, 104 S. Ct. at 2245 n.9.

business.

Further, the *South-Central Timber* plurality approved the use of a particular kind of subsidy to get a local sawmilling tie. The approved subsidy was one whereby "the purchaser would retain the option of taking advantage of the subsidy by processing timber in the state or foregoing the benefits of the subsidy and exporting unprocessed timber."¹⁹⁸ This kind of subsidy would increase a state's sawmilling industry only when the state paid a substantial price for it, a price that other states could match by subsidizing their sawmilling industries if that were worth their while. Thus, other states could compete with the subsidizing state measure for measure and the market would influence the outcome. Finally, any benefit to the subsidizing state would not be cost free.

These conditions are absent, however, when a state with market power over a resource such as timber uses this power to prescribe a tie of local use incident to sale.¹⁹⁹ The state imposing the tie may get local work that would be done elsewhere but for the tie because the state selling timber with a tie has the cost-free clout of market power.²⁰⁰ In other words, timber buyers will pay the market price plus the tie rather than seek timber elsewhere at the risk of a higher price or increased costs.²⁰¹ Other states, however, lack the economic clout of the timber-selling state because they lack timber in the quantity that would provide it. Therefore, they cannot compete measure-for-measure with the state that sells timber with a tie. The court should hold, consequently, that state sale of a resource in the world or national market, but with a tie for local use, impermissibly discriminates against competing users in other states. The commerce clause should strike down this kind of tie.

D. *Fair Competition Between States for Local Industry —Inducements Versus Unfair Contractual Ties*

A contractual stipulation tying state timber sales to local sawmilling is the same as one tying performance of local construction work to local labor. This would be especially true in a metropolitan area populated by a work force that may commute daily throughout the region to and from work. Under these circumstances, a state that would tie working in the state to living there would simply be using its market power over jobs to increase its population and tax base to the detriment of a neighboring state. States, of course, can compete fairly with each other for industry without exercising the power to tie jobs to residence within their boundaries. Many inducements to attract business are available to each of the states. These include, for example, subsidies, tax breaks, special services

¹⁹⁸ *Id.* at ___, 104 S. Ct. at 2244.

¹⁹⁹ *Id.* at ___, 104 S. Ct. at 2245-46.

²⁰⁰ *Id.*

²⁰¹ *Id.*

and assistance, and low wage and tax scales, to mention only some that are familiar. All states can use these incentives. On the other hand, a state that has a deficit of jobs, like a state that has a timber shortage may remain unnecessarily short on population as well if other states have the power to tie living in a state to working there.

A state, for example, that has built a large industrial sector, after having won a fair contest for industry and jobs, should not be allowed to use this economic power as leverage to swell its victory. Ordinarily, the commerce clause should prohibit this type of tying power. The clause has this effect relative to state control of private enterprise.²⁰² The nature of the tie remains the same, of course, when imposed by an enterprise owned or controlled by the state. This statement suggests only a general rule, however. Core cities in the nation's metropolitan areas need special assistance in order to improve their tax base. A city arguably should be allowed to require a person who works at a job that the city has bought and paid for to live in the city, and to move if he or she lives elsewhere.

VIII. LOCAL HIRE—A CHANGE-OF-RESIDENCE RULE

The ability of a city to require its employees and others who, in effect, are on the city's payroll to live in the city should be upheld. This approval-of-residence rule would permit modest amelioration of urban metropolitan problems by providing some aid to beleaguered central cities by requiring a more-or-less equal sacrifice from all suburban dwellers who earn a living from the city, including those in neighboring states. Moreover, ordinary easy compliance with the rule would usually provide equal access to the jobs subject to it.

Still, a change-of-residence rule would encounter serious obstacles. The rule would discriminate against nonresidents of the state that adopted it. They would be required to relocate while residents of the city that enacted the rule would not. Further, since the power to adopt such a rule could not appropriately ebb and flow with an index of leading economic indicators, a city must be allowed to adopt the rule regardless of whether there is a present need for it. Thus, a change-of-residence rule related to employment is susceptible to the charge of inherent overbreadth, namely of unnecessarily discriminating against nonresidents of the regulating state when the discrimination would not help an imperiled central city. Further, the rule also might be seen as colliding with precedents that ostensibly restrict the power of a state to ameliorate its own economic hardship by laws that transfer the hardship to other states.²⁰³

The overbreadth objection appears more theoretical than real. Expanding cities usually experience growing pains and undoubtedly should

²⁰² See *supra* text accompanying notes 89-122.

²⁰³ — U.S. at ___, 104 S. Ct. at 2245-46.

not want to add to them with a requirement that would increase the city's rate of growth. Further, a stable city will need more than a city-residence rule if its goal is to provide an impetus for expansion. The practical reasons for having a change-of-residence rule suggest that its exercise would essentially be limited to cases of need where a large core city is facing or experiencing deterioration of its tax base.

A change-of-residence rule has less of an impact than a rule that requires residence within the city before the hiring occurs. Although moving one's home unnecessarily is not a minimal inconvenience, a city that wanted to limit city jobs to its existing residents would get little help from a change-of-residence rule. A nonresident of the state who lived within commuting distance could move when a move would be worthwhile. It is true, of course, that in a metropolitan area that is spread across state lines, a change-of-residence rule for city-related employment would impose some hardship upon suburbs in another state that they otherwise would not experience. At the same time, it would benefit a core city in the regulating state. Thus, the out-of-state loss will result in gain for the regulating state.

This impact of the change-of-residence rule should not invalidate it, however. The situation is *not like* that in *Baldwin*²⁰⁴ where New York was accused of attempting to save its dairy industry by mandating a local trade preference that might have caused the loss of the dairy industry in a neighboring state. A change-of-residence rule for city-related employment cannot be faulted as an attempt by one state to transfer to another state as much of its economic misery as possible. Instead, the rule would impose a moderate and proportionate sacrifice upon all suburbs. This situation is more like one involving a legislated price increase for a state's products.²⁰⁵ All consumers, wherever located, ultimately pay for the increase. The benefit to special producer interests in the regulating state does not cause the law to fail. The same should be true of a change-of-residence rule for city-related employment, although it too brings special benefits to the tax base of a core city.

The protection, however, that ordinarily would be provided by a change-of-residence rule to persons who would observe it would probably not help the suburban construction workers in *Camden*. Most of them were white²⁰⁶ and moving to Camden might not save their jobs; Camden's affirmative action plan, which went unchallenged in the Supreme

²⁰⁴ 294 U.S. 511 (1935). See *supra* text accompanying notes 89-94.

²⁰⁵ The commerce clause allowed California to require its raisin producers to sell raisins through a pool that had a monopoly of almost all domestic raisins as well as one-half of the world's supply. *Parker v. Brown*, 317 U.S. 341, 345-48, 360 (1943). Similarly, the clause does not invalidate a state minimum price control law for all milk sales by producers, *Milk Control Bd. v. Eisenberg Farm Prod.*, 306 U.S. 246 (1939).

²⁰⁶ See *supra* text accompanying notes 22-23.

Court,²⁰⁷ probably would disqualify many of them for city construction work. Still, this disqualification should have been met head on by the Court, it is not an adequate reason for invalidating a change-of-residence rule that discriminates on the ground of state citizenship rather than race.

Moreover, it is possible to uphold a change-of-residence rule under the interstate privileges and immunities clause, regardless of whether the state-market-participant doctrine continues to withhold the protection of the commerce clause from nonresidents who confront local hire laws.²⁰⁸ To a large extent, both clauses mandate the same principles.²⁰⁹ This parallel protection and its contraction by the state-market-participant doctrine renders the doctrine very puzzling, regardless of what ultimately happens to it.

IX. THE STATE-MARKET-PARTICIPANT DOCTRINE AND THE CONTRACTION OF CONGRESS' COMMERCE POWER

Camden seems to explain the state-market-participant doctrine with the observation that the restrictions imposed by the commerce clause upon state power apply only to state regulation.²¹⁰ However, in *Foster-Fountain Packing Company v. Haydel*,²¹¹ which involved what were essentially state contractual dispositions of wild game owned by the state, the Court seemed unaware of the possibility that state enterprise as a whole, including contract and property transactions, was arbitrarily excepted from the restrictions of the commerce clause.²¹²

The case for an arbitrary exception seems dubious in any event. The rationale for the clause's restrictions upon state power does not readily support one. The suggested rationale is that certain burdens upon activity within the scope of the commerce clause are too potentially destructive of common national interests to be imposed without with the approval of Congress.²¹³ Undoubtedly, these burdens are cast primarily in the form of state regulation, including taxation.²¹⁴ However, the emphasis of the clause's protective power seems to be upon the burdens themselves rather than the form in which they appear. *Camden* and the other state-market-participant cases simply do not explain why the burdens that they allow do not have to satisfy the protective rules of the commerce clause.

²⁰⁷ See *supra* text accompanying notes 29-40.

²⁰⁸ See *supra* text accompanying notes 1-14.

²⁰⁹ See *supra* text accompanying notes 72-76.

²¹⁰ See *supra* text accompanying notes 67-78.

²¹¹ 278 U.S. 1 (1928).

²¹² See *supra* text accompanying notes 140-151.

²¹³ J. NOWAK, CONSTITUTIONAL LAW 267-68 (1983). See L. TRIBE, *supra* note 52, at 402-03.

²¹⁴ *Robbins v. Shelby County Taxing Dist.*, 120 U.S. 489, 492-94 (1887).

The Supreme Court, however, could use the state-market-participant doctrine to withdraw most labor relations in the private sector from the regulatory power of Congress. The course of adjudication to accomplish this objective would involve a two-step process. First, most state employment relations would be withdrawn from Congress' commerce power. Second, this enclave of immunity would be used as a springboard to get similar results in the private sector. The state-market-participant doctrine lends itself to both steps. The doctrine appears to stand for the proposition that activity subject to it does not touch the concerns of the commerce clause.²¹⁵ Taken literally, this would mean that activity within the doctrine would fall beyond the reach of Congress' affirmative power to regulate interstate commerce, as well as outside the negative restraints of the commerce clause.²¹⁶

If this literal interpretation is valid, the hiring of the employees of public contractors who do construction work for the state falls within the state-market-participant doctrine.²¹⁷ A state, of course, also participates in the marketplace when it hires its own employees. State employment relations, consequently, must also fall within the state-market-participant doctrine. It is arguable, therefore, that state employment relationships, as well as the employment of employees of public contractors, are ordinarily beyond the reach of Congress' commerce power.

State employees, moreover, unlike the employees of public contractors, are also likely to be beyond the protection of the interstate privileges and immunities clause. The Supreme Court will probably hold, when the occasion for a ruling arises, that state employment is not a fundamental right or privilege essential to national unity and, therefore, is not protected by the interstate privileges and immunities clause.²¹⁸

In any event, the state-market-participant doctrine can cut a fairly large swath; it is capable of putting an indefinite number of state property and contractual transactions beyond the reach of Congress' commerce power. These transactions could constitute an enclave of immunity that would provide a network of support for the core proposition that most state employment relationships are beyond the reach of Congress' regulatory power and lack even the protection of the interstate privileges and immunities clause.

Further, in invalidating application of the minimum wage and maximum hours provisions of the Federal Fair Labor Standards Act to state employees, *National League of Cities v. Usery*,²¹⁹ which overruled *Maryland v. Witz*, already purports to place the employment relations of state

²¹⁵ *Hughes*, 426 U.S. at 805, 823 n.4.

²¹⁶ *Id.*

²¹⁷ *Camden*, ___ U.S. at ___, 104 S. Ct. at 1025.

²¹⁸ See *supra* text accompanying notes 167-77.

²¹⁹ 426 U.S. 833 (1976). With this case the Court overruled *Maryland v. Wirtz*, 392 U.S. 183 (1968). See 426 U.S. at 855.

employees who perform traditional essential sovereign governmental functions largely beyond the reach of Congress' commerce power.²²⁰ The state-market-participant doctrine could increase this enclave to include state employees who perform other functions. Moreover, if this development were ever to occur and become firmly secure, someone would eventually question the contradiction of congressional power over employment relations in the private sector.

National League of Cities provides a basis for differentiating between private sector employees whose employment would lie beyond Congress' regulatory power and those whose employment relations Congress could continue to regulate. *National League of Cities* did not completely insulate state employees who perform governmental functions from Congress' commerce power. Instead, the Court approved *Fry v. United States*,²²¹ a congressional exercise of the commerce power that froze a generous pay increase for Ohio's state employees.²²² The wage freeze for state employees was part of a general wage freeze enacted to prevent the disastrous consequences of runaway inflation.²²³ The Court observed that these consequences are obvious, pervasive and potentially devastating to the nation and all of its parties.²²⁴ However, Congress' lack of power to increase a minimum wage or to mandate one in *National League of Cities* was not comparable as it did not create a risk of comparable magnitude.²²⁵

A magnitude test for a permissible exercise of Congress' commerce power is reminiscent of the once-used direct-indirect effects test.²²⁶ Under this test, most effects of the nation's producing activities upon interstate commerce were indirect, and therefore, the activities that caused them were beyond the reach of Congress.²²⁷ *Fry* might someday permit rein-

²²⁰ 426 U.S. at 845, 851-52.

²²¹ 421 U.S. 542 (1975).

²²² *Id.* at 544-45.

²²³ *Id.* at 548.

²²⁴ 426 U.S. 853.

²²⁵ *Id.*

²²⁶ *Carter v. Carter Coal Co.*, 298 U.S. 238, 304-05 (1936); *Schechter v. United States*, 295 U.S. 495, 544, 546 (1935).

²²⁷ *Id.* See also L. TRIBE, *supra* note 52, at 234-35. Admittedly, the direct-indirect effects test put labor relations in producing activities largely beyond the reach of Congress' commerce power regardless of the magnitude of their impact upon interstate commerce; *Carter*, 298 U.S. at 308. It would be possible to formulate or manipulate a magnitude test that would classify industrial labor relations as isolated multitudinous fragments that are completely local in nature and, therefore, beyond the reach of Congress' commerce power. Thus, the Court once said: "The relations of employer and employee is a local relation. At common law, it is one of the domestic relations" *Id.* Federal antitrust law validly reached industrial labor union activity in intrastate commerce when it was aimed at interstate commerce although, at the time, most labor relations were beyond the reach of Congress' commerce power, especially when the power was exercised to protect labor. Compare the discussion approving application of federal antitrust law to labor unions in *Carter*, 298 U.S. at 304-05, and *Schechter*, 295 U.S. at 547, with the decisions in these two cases holding that

statement of a version of this test with its consequences. That would ensue from the inability of Congress to regulate wages, hours and working conditions in the mines, mills, factories and farms in the nation. Due to a disincentive by states to increase wage scales and other costs that make industry within their territory noncompetitive in the interstate market, loss of congressional control over industrial labor relations probably would mean loss of any effective governmental power over these relations and restoration of a constitutional regime of *laissez-faire*.²²⁸

It is true, of course, that there are assurances throughout the *National League of Cities* opinion that these developments will not come to pass.²²⁹ These assurances, however, failed to reassure the four Justices who dissented from the Court's judgment²³⁰ and nothing would prevent the court from later concluding that the assumptions upon which these assurances rest are in reality ill-founded. Nor is it significant that, after *National League of Cities*, a unanimous Court held that Congress can apply the Railway Labor Act²³¹ to the employees of a state railroad.²³² The commerce clause allowed Congress to regulate the intrastate aspects of railroading when it was also powerless to touch employment relations in the nation's production activities.²³³

Moreover, it is also true that those members of the Court who might want to free industrial labor relations from Congress' commerce power have not yet secured a firm position for this purpose within the subject of state employment relations. Thus, the Court in *EEOC v. Wyoming*²³⁴ recently held that the federal Age Discrimination in Employment Act, an exercise of Congress' commerce power,²³⁵ validly forbids a state from forcing state game wardens to retire when they become fifty-five years old. The decision, however, was fought hard and close²³⁶ and could easily be overturned with a change in the Court's membership.

This foregoing outline of possible developments that could ensue from

Congress could not protect coal miners and food processing employees from the economic power of their employers. Similarly, compare the holding in *National League of Cities* which also denied Congress power to protect the employees of state and local government from the bargaining power of their employers with *Fry v. United States*, 421 U.S. 542 (1975), which allowed Congress to deny a pay increase to these employees although their employers wanted them to have it. See 426 U.S. at 852-53. See also *Id.* at 872 (Brennan, J., dissenting).

²²⁸ *Steward Mach. Co. v. Davis*, 301 U.S. 548, 567-68 (1937)(oral argument of Assistant General Jackson). Cf. *Carter*, 298 U.S. at 260-62 (oral argument of Assistant Attorney General Dickinson).

²²⁹ 426 U.S. at 840-42, 844-45.

²³⁰ *Id.* at 867-68, 875, 880.

²³¹ 45 U.S.C. §§ 151-188 (1983).

²³² *United Trans. Union v. Long Island RR*, 455 U.S. 678 (1982).

²³³ See the Court's discussion in *Schechter*, 295 U.S. at 544.

²³⁴ 460 U.S. ___, 103 S. Ct. 1054 (1983).

²³⁵ *Id.* at ___, 103 S. Ct. at 1064.

²³⁶ *Id.* at ___, 103 S. Ct. at 1068 (Burger, C.J., dissenting).

the state-market-participant doctrine is speculative, to be sure, but rests upon more than mere speculation. *Hughes v. Alexandria Scrap Corp.*²³⁷ the initial recent state-market-participant case that removed discriminatory state transactions from the negative restraints of the commerce clause,²³⁸ sits next to *National League of Cities* in the Supreme Court reports.²³⁹ The latter case, of course, definitely removes some of the market transactions of a state with its own employees from Congress' commerce power.²⁴⁰ Further, the dissenting opinion in *Alexandria Scrap* asked (in a footnote) whether the state market participant doctrine withdrew state bounty transactions for processing junked cars from Congress' power to regulate commerce as well as from the negative restraints of the commerce clause.²⁴¹ The answer of the majority judges (also given in a footnote) was not responsive to the question.²⁴²

Under all of the circumstances, speculation about the significance of the state-market-participant doctrine is appropriate and unavoidable. The doctrine has caused a partial estrangement of two clauses in the constitution that have travelled hand-in-hand²⁴³ from their common origin.²⁴⁴ The state-market-participant doctrine is amenable to uses that are far more precedent-shattering than *National League of Cities*. Perhaps some day the Supreme Court will explain what the state-market-participant doctrine is really all about, especially considering its far reaching implications.

²³⁷ 426 U.S. 794 (1976).

²³⁸ *Id.* at 810.

²³⁹ *Id.* at 832; *National League of Cities*, 426 U.S. at 833.

²⁴⁰ See *supra* text accompanying notes 225-29.

²⁴¹ 426 U.S. at 822 n.4 (Brown, J., dissenting).

²⁴² *Id.* at 810 n.19.

²⁴³ See *supra* text accompanying notes 89-122, 125-161.

²⁴⁴ *Hicklin*, 437 U.S. at 531-32 n.16; *Baldwin*, 436 U.S. at 379-80.

