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Constitutional Law - Constitutional Assessment of State and Municipal Residential Hiring Preference Laws

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CONSTITUTIONAL LAW—CONSTITUTIONAL ASSESSMENT OF STATE AND MUNICIPAL RESIDENTIAL HIRING PREFERENCE LAWS

I. INTRODUCTION

Many states and municipalities have recently enacted legislation providing hiring preferences for residents of their jurisdictions — laws requiring the hiring of state or municipal residents.[1] These laws are generally intended to alleviate local unemployment and funnel local resources back to the constituents of the enacting authority.[2] Additionally, residence

1. *See* ALA. CODE § 39-3-2 (1992) (requiring hiring of workers with two years of continuous residence for public works); ARIZ. REV. STAT. ANN. § 34-302 (1990) (requiring hiring of workers with minimum of one year of continuous residence for public works); CAL. LAB. CODE § 2015 (West 1989) (giving preference on public works, first to Californians, second to nonresident United States citizens, third to aliens in California); CONN. GEN. STAT. ANN. § 31-52 (West 1987) (requiring hiring of residents for public works whenever possible); DEL. CODE ANN. tit. 29, § 6913 (1991) (giving hiring preference for public works to those with minimum of 90 days of continuous residence); FLA. STAT. ANN. § 255.04 (West 1991) (requiring hiring of residents for public works whenever cost is no greater than hiring nonresidents); HAW. REV. STAT. § 103.57 (1985) (requiring hiring of residents for public works whenever possible); IDAHO CODE § 44-1001 (Supp. 1995) (requiring 95% of workers on public works be residents); ILL. ANN. STAT. ch. 30, para. 560/3 (Smith-Hurd 1986) (requiring hiring of residents for public works whenever possible); IOWA CODE ANN. § 73.3 (West 1991) (same); ME. REV. STAT. ANN. tit. 26, § 1301 (West 1988) (same); MISS. CODE ANN. § 31-5-17 (1990) (requiring hiring of workers with two years of continuous residence for public works); MONT. CODE ANN. § 18-2-403 (1993) (requiring hiring of residents for public works whenever possible); NEV. REV. STAT. ANN. § 338.130 (Michie 1994) (same); N.D. CENT. CODE § 43-07-20 (1995) (requiring hiring preference on public works for residents, only where in accord with federal law); OKLA. STAT. ANN. tit. 40, § 193 (West 1986) (requiring 90% of workers on public works be residents); PA. STAT. ANN. tit. 43, § 154 (1992) (giving hiring preference for public works to those with minimum of 90 days of continuous residence); S.D. CODIFIED LAWS ANN. § 5-19-6 (1994) (requiring hiring of residents for public works whenever possible); UTAH CODE ANN. § 55-3-33 (1995) (same); WASH. REV. CODE ANN. § 39.16.005 (West 1991) (requiring hiring of at least 95% residents for workers public works whenever possible, with exception for residents of reciprocating border states); WIS. STAT. ANN. § 101.43 (West 1988) (giving preference to residents for public works in periods of extraordinary unemployment); WYO. STAT. § 16-6-203 (1990) (requiring hiring of residents for public works whenever possible); *see also* Werner Z. Hirsch, *The Constitutionality of State Preference (Residency) Laws Under the Privileges and Immunity Clause*, 22 SW. U. L. REV. 1, 3 n.9 (1992) (citing state hiring preference statutes and discussing common provisions of those statutes); Thomas H. Day, Note, *Hiring Preference Acts: Has the Supreme Court Rendered Them Violations of the Privileges and Immunities Clause*, 54 FORDHAM L. REV. 271, 272 n.13 (1985) (same).

2. *See* Hirsch, *supra* note 1, at 1-2 (quoting legislative debates and asserted purposes of particular preference laws); Day, *supra* note 1, at 271-72 (noting relatively high unemployment in construction and primacy of local and state government in funding construction).

preference laws are premised upon simple parochialism, which raises particular concerns for the courts.[3]

Obviously, because these laws disadvantage nonresidents, such preferences have potential discriminatory effects upon interstate commerce and the "privileges and immunities" of non-residents, and may deny "equal protection."[4] Accordingly, hiring preferences have been challenged as constitutionally suspect.[5] The results of these challenges vary with both the particularized facts of each case and with the constitutional provision at issue.[6]

This Casebrief addresses the Third Circuit's development of the law regarding the constitutionality of local hiring preferences. First, Part II provides an historic overview of the relevant constitutional provisions.[7] Part II also provides a summary of recent United States Supreme Court holdings with respect to hiring preference laws.[8] Next, Part III specifically explores the treatment of local hiring preferences by the United States

3. *See* Supreme Court of N.H. v. Piper, 470 U.S. 274, 285 n.18 (1985) (quoting Smith, *Time for a National Practice of Law Act*, 64 A.B.A. J. 557, 557, 560 (1978) (noting that protecting in-state lawyers from "professional competition" through state bar residency requirements is type of economic protectionism Privileges and Immunities Clause is intended to prevent)); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 217-18, 217 n.9 (1984) (noting concern for regionalism and parochialism that could defeat purpose of Privileges and Immunities Clause of Article IV); *id.* at 230-31 (Blackmun, J., dissenting) (stressing clause is necessary "because state parochialism is likely to go unchecked by state political processes when those who are disadvantaged are by definition disenfranchised as well"); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 443-46 (1982) (arguing courts should look to Privileges and Immunities Clause to prevent state parochialism from disadvantaging out-of-state commercial actors); Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097, 1100-06 (1988) (discussing tension between interstate equality and state sovereignty); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1092 (1986) (stating that Supreme Court should focus exclusively on "preventing states from engaging in purposeful economic protectionism"); Bryan H. Wildenthal, Note, *State Parochialism, the Right to Travel, and the Privileges and Immunities Clause of Article IV*, 41 STAN. L. REV. 1557, 1557 (1989) (noting that recent Supreme Court jurisprudence indicates strong aversion to state parochialism).

4. *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress power "[t]o regulate Commerce . . . among the several States"); U.S. CONST. art. IV, § 2, cl. 1 (providing "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); U.S. CONST. amend. XIV, § 1 (prohibiting states from denying "to any person within its jurisdiction the equal protection of the laws."). For a discussion of challenges to preferential laws, see *infra* notes 20-89 and accompanying text.

5. For a discussion of challenges to preference laws and the standards applied by the United States Supreme Court, see *infra* notes 13-89 and accompanying text.

6. For a discussion of the case law regarding constitutional challenges to resident hiring preference laws, see *infra* notes 13-130 and accompanying text.

7. For a discussion of Supreme Court holdings and history, see *infra* notes 13-89 and accompanying text.

8. For a discussion of Supreme Court cases, see *infra* notes 20-89 and accompanying text.

Court of Appeals for the Third Circuit, and examines other courts' approaches to these laws.[9] Finally, Part IV focuses on the Third Circuit's recent pronouncement regarding hiring preferences in *Salem Blue Collar Workers Ass'n v. City of Salem*[10] and assesses the consistency of the this holding with Supreme Court jurisprudence.[11] In conclusion, this Casebrief examines potential difficulties that arise when courts analyze hiring preferences, and moreover, identifies *Salem*'s significance within this dialogue.[12]

II. UNITED STATES SUPREME COURT JURISPRUDENCE: PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV AND THE COMMERCE CLAUSE

The Supreme Court reviews preference laws under both the Privileges and Immunities Clause of Article IV[13] and the Commerce Clause of the United States Constitution.[14] This dual analysis is not surprising in light of the clauses' "mutually reinforcing relationship" and their common origin within the Articles of Confederation.[15] However, the Court's analyses

9. For a discussion of the United States Court of Appeals for the Third Circuit and other circuits' jurisprudence regarding resident hiring preferences, see *infra* notes 90-182 and accompanying text.

10. 33 F.3d 265 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995).

11. For a discussion of the Third Circuit's application of the Supreme Court's jurisprudence in this area, see *infra* notes 142-82 and accompanying text.

12. For conclusions of the difficulties that arise when courts evaluate hiring preference laws, see *infra* notes 180-82 and accompanying text.

13. U.S. CONST. art. IV, § 2, cl. 1. This Casebrief will generally refer to this clause as the Privileges and Immunities Clause of Article IV in order to distinguish it from the similarly worded clause of the Fourteenth Amendment. That clause provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment addresses state discrimination with respect to state law, while the Article IV clause applies to rights of national citizenship. *See* The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72-77 (1872) (limiting Fourteenth Amendment to rights of state citizens and article IV to "privileges and immunities of *citizens of the United States*"); Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 379 n.1 (1979) (distinguishing the two clauses).

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

15. Hicklin v. Orbeck, 437 U.S. 518, 531-32 (1978) (invoking Commerce Clause although appellants raised only privileges and immunities challenge because of clauses' "mutually reinforcing relationship . . . and their shared vision of federalism" and citing ARTICLES OF CONFEDERATION art. 4 as common source). The precise language of the Articles stated:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein

under the Privileges and Immunities Clause and the Commerce Clause are not identical, and therefore must be considered separately.[16]

A. *The Protection of the Privileges and Immunities Clause*

Courts have traditionally viewed the Privileges and Immunities Clause of Article IV as primarily intended "to help fuse into one Nation a collection of independent, sovereign States."[17] The Privileges and Immunities

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all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively

. . . .

ARTICLES OF CONFEDERATION art. IV; *see* Supreme Court of N.H. v. Piper, 470 U.S. 274, 279-80 (1985) (noting common origin of Commerce Clause and Privileges and Immunities Clause); Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379-80 (1978) (same); W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 496 (1984) (stating that clauses are so closely related "it would be artificial to ignore one of them"); David S. Bogen, *The Privileges and Immunities Clause of Article IV*, 37 CASE W. RES. L. REV. 794 (1987) (analyzing historical development of fourth article of Articles of Confederation and Privileges and Immunities Clause of Article IV); Gergen, *supra* note 3, at 1118-28 (detailing origin of Privileges and Immunities Clause of Article IV, as well as origin of Article Four of Articles of Confederation); Day, *supra* note 1, at 273-74 (noting common origin and need to consider Commerce Clause and Privileges and Immunities Clause in analyzing hiring preferences).

16. *Compare* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984) (finding Camden ordinance that required that 40% of employees on city construction projects be Camden residents was within purview of Privileges and Immunities Clause) *with* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 214-15 (1983) (upholding against Commerce Clause challenge executive order by Mayor of Boston requiring at least half of work force on publicly funded construction to be Boston residents).

Supreme Court precedent suggests that this separation was possibly due to concern that the Commerce Clause would be read too narrowly. *Baldwin*, 436 U.S. at 379-80; *see Camden*, 465 U.S. at 219-20 (holding *White*'s Commerce Clause analysis not dispositive because Privileges and Immunities Clause has "different aims" and "standards for state conduct"); People *ex rel.* Bernardi v. Leary Constr. Co., 464 N.E.2d 1019, 1022 (Ill. 1984) (holding Commerce Clause "market participant" exception not relevant to Privileges and Immunities Clause challenge); Eule, *supra* note 3, at 447-48 (arguing Privileges and Immunities Clause was originally intended to provide protection subsequently placed in Dormant Commerce Clause). *But see* Michael J. Polelle, *A Critique of the Market Participant Exception*, 15 WHITTIER L. REV. 647, 677-82 (1994) (criticizing such distinctions between clauses because constitutionality turns on characterization of challenge). For a discussion of the varying applications in *White* and *Camden*, see *infra* notes 64-89 and accompanying text.

17. Toomer v. Witsell, 334 U.S. 385, 395 (1948). In *Toomer*, the Court stressed that the goal of bringing the states together should be accomplished by insuring to "a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Id.* This clause was required, as the citizens of State A would otherwise be restricted to the "uncertain remedies" of diplomacy. *Id.*; *see* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180 (1869) (stating "the object of the clause . . . [was] to place the citizens of each State upon the same footing with citizens of other States" with respect to advantages of state citizenship). Despite its goals, the Privileges and Immunities Clause has not been extensively litigated. *See Baldwin*, 436 U.S. at 379 (stating that contours of clause have not been "precisely shaped by the process and wear of constant litigation and judicial interpretation"); Bogen, *supra* note 15, at 795-96 (noting lack of judicial, historical and scholarly discussion

Clause is intended to prevent discrimination against nonresidents by securing to nonresidents "those privileges and immunities" common to citizens of the United States "by virtue of their being citizens."[18] While the scope of this protection is not completely clear, it does not secure state provided "special privileges" to local citizens and very clearly does not extend to corporations.[19]

The Supreme Court's modern jurisprudence under the Privileges and Immunities Clause stems from *Toomer v. Witsell*.[20] This 1948 decision struck down a South Carolina statute requiring nonresident shrimp boat owners to pay a license fee 100 times greater than that charged to resident boat owners.[21] *Toomer* held that the Privileges and Immunities Clause of Article IV was not absolute and announced a two-part test for assessing the

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of Privileges and Immunities Clause of Article IV). However, as one commentator noted, litigation in recent years has refined the Privileges and Immunities Clause of Article IV — particularly with respect to hiring preferences. Hirsch, *supra* note 1, at 11.

The Privileges and Immunities Clause of Article IV also provides the basis for nonresidents' right of access to courts. *See, e.g.*, Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (stating that "privileges and immunities" include right to maintain actions in courts). Additionally, Justice O'Connor and some commentators would place the right to travel within this clause. *See* Zobel v. Williams, 457 U.S. 55, 81 (1982) (O'Connor, J., concurring) (placing right to travel in clause would "at least begin the task of reuniting this elusive right with the constitutional principles it embodies"); Bogen, *supra* note 15, at 845-52 (discussing right to travel under Article IV and stating constitutional right to travel is supported "with Constitutional text" of Article IV); Seth F. Kreimer, *"But Whoever Treasures Freedom . . .": The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 917-21 (1993) (noting that Americans traveling from state to state are "entitled to the privileges and immunities of local citizens").

18. *Paul*, 75 U.S. (8 Wall.) at 180 (noting that clause does not give laws of one state operation in another, but protects privileges and immunities of national citizenship); *see* Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972) (upholding discrimination against nonresidents regarding in-state voting); Blake v. McClung, 172 U.S. 239, 254-55 (1898) (holding state law barring nonresidents' receipt of distribution from insolvent foreign corporations infringed right secured by national citizenship, and violated Privileges and Immunities Clause).

Although the Clause refers to "citizens," the terms "citizens" and "residents" are interchangeable in the context of the Privileges and Immunities Clause. *Camden*, 465 U.S. at 216; Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975); *Blake*, 172 U.S. at 247 (1898).

19. *Paul*, 75 U.S. (8 Wall.) at 180-81 (holding grant of corporate charter is "a grant of special privileges"); *see Zobel*, 457 U.S. at 73-74 n.3 (O'Connor, J., concurring) (stating that it is settled law that Privileges and Immunities Clause of Article IV does not protect corporations).

20. 334 U.S. 385 (1948); *see Hicklin*, 437 U.S. at 525 (citing *Toomer* as "the leading modern exposition of the limitations the [Privileges and Immunities] Clause places on a State's power to bias employment opportunities"); Hirsch, *supra* note 1, at 12 (stating that *Toomer* marks beginning of Supreme Court's modern Privilege and Immunities Clause analysis); Day, *supra* note 1, at 274 (describing *Toomer* as "parent" of modern Privileges and Immunities Clause cases).

21. *Toomer*, 334 U.S. at 389. Specifically, the statute required South Carolina residents to pay $25 per shrimpboat, while charging non-residents $2500 per boat. *Id.*

constitutionality of discrimination against non-citizens.[22] This two-pronged test allows discrimination "where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective."[23] The Court noted that to satisfy the first prong of the test, a state must demonstrate that nonresidents "constitute a peculiar source of the evil at which the statute is aimed."[24] The Court also stated that in determining whether the state satisfies the test's second prong, courts should consider the availability of less restrictive means.[25]

Under this standard, the *Toomer* Court found that the record failed to indicate that either the nonresident shrimp fishers' equipment or techniques constituted a "peculiar source" of evil.[26] The Court further noted that even if "substantial reason" existed, the discrimination did not bear a reasonable relationship to the supposed danger.[27] Thus, the Court concluded that South Carolina's statute violated the Privileges and Immunities Clause.[28]

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22. *Id.* at 396.

23. Supreme Court of N.H. v. Piper, 470 U.S. 274, 284 (1985) (citing *Toomer*, 334 U.S. at 396) (distilling two-pronged test formulated in *Toomer* to single sentence); *see* Barnard v. Thorstenn, 489 U.S. 546, 552 (1989) (citing *Piper* for formulation of test); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 222 (1984) (citing *Toomer* test); *Hicklin*, 437 U.S. at 525-26 (citing *Toomer* as leading precedent and stating test).

24. *Toomer*, 334 U.S. at 398; *see* Day, *supra* note 1, at 275 (setting forth *Toomer* test and noting Supreme Court's subsequent development of test).

25. *Toomer*, 334 U.S. at 398-99 (noting that state could protect interests with less restrictive means); *see also Piper*, 470 U.S. at 284 (stating that decision involves consideration of "availability of less restrictive means").

26. *Toomer*, 334 U.S. at 398. The state contended that the nonresident fishermen used methods and boats that endangered South Carolina's shrimp supply. *Id.* However, the Court found nothing in the record to support this assertion. *Id.*

27. *Id.* at 398. The Court noted that in any case, the discrimination did not bear a "reasonable relationship" to the danger posed by non-citizens. *Id.* This was particularly true in light of the fact that the statute did not appear to be aimed at any specific concerns. *Id.* Thus, the statute did not employ the least restrictive means available to remedy a "substantial reason for the difference in treatment." *See id.* at 398-99 (noting South Carolina could have eliminated dangers with less restrictive means); *see also Piper*, 470 U.S. at 284 (noting less restrictive means should be considered in addressing "substantial relationship"); United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 222 (1984) (quoting *Toomer*, 334 U.S. at 396) (stating that valid discrimination must bear "close relation" to "substantial reason").

28. *Toomer*, 334 U.S. at 403. The Court also held that the state's proprietary interest in the shrimp in the "marginal sea" was insufficient to provide an exception to the Clause. *Id.* at 399-402. This was particularly true because shrimp are migratory and not harvested from inland waters. *Id.* at 401-02; *cf.* McCready v. Virginia, 94 U.S. 391, 396-97 (1876) (holding statute to be discriminatory to nonresident commercial fisherman where fish remained in Virginia's inland waters). For a discussion of a state's proprietary interests in resources, see *infra* notes 55-58 and accompanying text.

B. *Fundamental Privileges and Immunities*

Toomer's two-pronged test represents the second step in a Privileges and Immunities claim analysis. The first step requires determining whether state action discriminates against " 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity."[29] In broad terms, determining whether the interest in question is "fundamental" answers this question.[30] Additionally, states may discriminate against nonresidents where the discrimination is "necessary to preserve the basic conception of a political community."[31]

The Supreme Court specifically addressed the issue of "fundamental rights" in *Baldwin v. Fish & Game Commission of Montana.*[32] In *Baldwin*, the Court upheld a Montana elk-hunting licensing scheme against a "Privileges and Immunities" challenge where the law required greater fees for nonresidents than for Montana residents.[33] The Court based its holding upon a determination that elk-hunting is not a fundamental right.[34]

In analyzing fundamental rights, the *Baldwin* Court discussed Justice Washington's opinion in *Corfield v. Coryell*,[35] an early decision in which Justice Washington served as Circuit Justice.[36] While upholding a New Jersey law restricting access to the state's oyster beds, the opinion grounded the Privileges and Immunities Clause in the natural rights belonging "of right" to citizens "of all free governments."[37] The *Baldwin*

29. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 383 (1978).

30. *See Camden*, 465 U.S. at 218 (articulating threshold test as whether nonresidents' asserted interest is sufficiently "fundamental" to fall within clause); *Baldwin*, 436 U.S. at 388 (holding elk hunting was not "sufficiently basic to the livelihood of the nation" to be "fundamental").

31. Dunn v. Blumstein, 405 U.S. 330, 343-44 (1972) (upholding discrimination in bona fide residence requirements, while striking durational requirements).

32. 436 U.S. 371 (1978).

33. *Id.* at 372-74. The scheme required nonresidents wishing to hunt elk in Montana to purchase a "combination" license, which allowed hunting of several types of large game. *Id.* at 373. This license cost $151 in 1975 and $225 in 1976. *Id.* In contrast, Montana residents could purchase a license, solely for elk hunting, for four dollars in 1975 and nine dollars in 1976. *Id.* Additionally, a resident could purchase a "combination" license for $30 in 1976. *Id.* at 373-74.

The Court also upheld this scheme under an equal protection challenge. *Id.* at 388-90. The Court found that Montana's legislature made its determinations based upon legitimate interests in preserving the state's elk population and that the scheme was therefore rational. *Id.* at 390. For a discussion of the Equal Protection Clause in the hiring preference context, see *infra* note 45.

34. *Baldwin*, 436 U.S. at 388, 393-94 (holding that nonresident elk hunting in Montana was not sufficiently basic to Nation's livelihood to be fundamental under "privileges and immunities").

35. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).

36. *Baldwin*, 436 U.S. at 384 (looking to *Corfield* as first exposition of Privileges and Immunities Clause of Article IV); *see also* Austin v. New Hampshire, 420 U.S. 656, 661 (1975) (citing *Corfield* as "the first, and long the leading, explication of the Clause").

37. *Corfield*, 6 F. Cas. at 551-52. In defining the limits of "privileges and immunities," Justice Washington stated:

Court noted that *Corfield* formed the basis for much of the nineteenth century jurisprudence with respect to the Privileges and Immunities Clause.[38] However, the *Baldwin* Court stressed that the "fundamental rights" espoused in *Corfield* actually addressed whether the rights were "essential."[39] From this premise, the Court easily concluded that recreational elk-hunting was not essential or fundamental to the nation's livelihood.[40]

In assessing claims under the Privileges and Immunities Clause, the Supreme Court consistently holds that the pursuit of a "common calling" is fundamental and therefore within the Clause's protection.[41] For exam-

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.

Id. at 551; *see* Bogen, *supra* note 15, at 841-45 (discussing natural law in historical context of clause).

38. *Baldwin*, 436 U.S. at 385.

39. *Id.* at 387. The *Baldwin* Court noted that Justice Washington, while speaking in terms of "natural rights," included only those "where a nonresident sought to engage in . . . essential activit[ies]." *Id.* The Court noted that this is the principle behind the notion of "common callings." *Id.* Ultimately, the Court determined that states must treat residents and nonresidents equally only in activities essential to the "formation of the Union." *Id.*; *see* Day, *supra* note 1, at 276 n.30 (noting modern conception of "fundamental" differs from "natural rights" view).

40. *Baldwin*, 436 U.S. at 388. Justice Brennan argued in dissent for the abandonment of considerations concerning whether the right in question is fundamental. *Id.* at 402 (Brennan, J., dissenting). He encouraged the Court to simply review discrimination by examining the State's justification under the basic principles of *Toomer*. *Id.* (Brennan, J., dissenting).

41. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 219 (1984) (noting "pursuit of a common calling is one of the most fundamental of those privileges protected by the [Privileges and Immunities] Clause."); Hicklin v. Orbeck, 437 U.S. 518, 524 (1978) (noting that Court's decisions hold discrimination against nonresidents seeking to pursue common callings violative of Privileges and Immunities Clause); *Baldwin*, 436 U.S. at 387 (linking "essential activities" to "common callings"); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (noting that "privileges and immunities" include going from one state to another for purposes "of engaging in lawful commerce, trade, or business without molestation"); Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265, 268-69 (3d Cir. 1994) (stating that "common callings" are within protection of Privileges and Immunities Clause), *cert. denied*, 115 S. Ct. 1105 (1995); Bogen, *supra* note 15, at 831 (noting that despite uncertainty of scope, Privileges and Immunities Clause prohibits discrimination against nonresidents engaging in trade or commerce); Gergen, *supra* note 3, at 1129 (noting that Privileges and Immunities Clause protects privileges of trade and commerce); Day, *supra* note 1, at 277, 277-78 n.32 (noting consistent recognition of protection for "common callings" under Clause and citing relevant case law).

Although the courts have not defined "common calling," the phrase appears to be used in terms of the words' everyday meanings. Webster's defines "common" as "known to the community," and "calling" as "the vocation or profession in which one customarily engages." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 265, 198 (1987). Thus, a common calling is a profession or vocation known to the community. *Id.*

ple, in *Supreme Court of New Hampshire v. Piper*,[42] the Court struck down a residency requirement for admission to the New Hampshire bar.[43] In so doing, the Court determined that the practice of law is sufficiently important to the national economy to deserve protection as a fundamental privilege.[44]

C. *Hiring Preferences In Public Employment*

Supreme Court precedent does not definitively state whether public employment constitutes a fundamental right under the Privileges and Immunities Clause; however, the Court has explicitly protected private employers contracting with government entities.[45] For example, in *Hicklin v.*

42. 470 U.S. 274 (1985).

43. *Id.* at 288. The state offered several justifications for denying nonresidents admittance to the bar. *Id.* at 285. However, the Court held that none of these met the standards required under the *Toomer* test — finding each either insubstantial or not sufficiently closely tailored. *Id.* at 285-87. The Court summarized its conclusions: "appellant neither advances a 'substantial reason' for its discrimination against nonresident applicants to the bar, nor demonstrates that the discrimination practiced bears a close relationship to its proffered objectives." *Id.* at 287 (footnote omitted). For a discussion of the *Toomer* test, see *supra* notes 20-28 and accompanying text.

Bar admission standards are litigated frequently under the Privileges and Immunities Clause. *See* Barnard v. Thorstenn, 489 U.S. 546, 559 (1989) (holding that Virgin Island's one-year residency requirement for bar admittance violated Privileges and Immunities Clause); Supreme Court of Virginia v. Friedman, 487 U.S. 59, 70 (1988) (holding that Virginia requirement which otherwise qualified nonresident attorneys take bar exam violated Privilege and Immunities Clause, despite ability to enter bar by passing exam). *Friedman* essentially restated the basic *Toomer* analysis and several lower courts have cited *Friedman* in assessing Privileges and Immunities Clause claims. *See, e.g.*, O'Reilly v. Board of Appeals, 942 F.2d 281, 284 (4th Cir. 1991) (citing *Friedman* for privileges and immunities analysis). For a discussion of *O'Reilly*, see *infra* notes 103-10 and accompanying text.

44. *Piper*, 470 U.S. at 281, 283. New Hampshire contended this discrimination could be justified because attorneys are officers of the court. *Id.* at 282. Therefore, residency requirements for bar admittance would be essential to the state's "ability to function as a sovereign political body." *Id.* In rejecting this contention, the Supreme Court noted that lawyers carry on their own business affairs and are generally uninvolved in matters of state policy formation. *Id.* at 283.

Justice Rehnquist, in his dissenting opinion, strongly disagreed with the majority. *Id.* at 289-97 (Rehnquist, J., dissenting). He argued that the states have a substantial interest in ensuring that lawyers become members of the constituency. *Id.* at 291 (Rehnquist, J., dissenting). Justice Rehnquist premised this contention upon the notion that lawyers play a key role in the formation and application of state policy. *Id.* at 291-94 (Rehnquist, J., dissenting). Justice Rehnquist was also critical of the majority's willingness to "second guess" New Hampshire's justifications and legislative choices. *Id.* at 294-97 (Rehnquist, J., dissenting).

45. *See Salem*, 33 F.3d at 269 (noting that Supreme Court came close to deciding issue in *Camden*). In *Camden*, the Court stated that public employment is "qualitatively different" from employment in the private sector, while concluding that public employment does implicate a fundamental privilege. *Camden*, 465 U.S. at 219. In *Salem*, the Third Circuit stressed that the *Camden* decision held that the Clause only protects "indirect" employment. *Salem*, 33 F.3d at 269-70. However, the Supreme Court has held that there is no fundamental right to public employ-

Orbeck,[46] the Court held that the "Alaska Hire" statute violated the Privileges and Immunities Clause of Article IV.[47] Intending to alleviate Alaska's unemployment problems, "Alaska Hire" mandated preferential hiring of Alaskans in oil and gas related businesses.[48] The statute's mandate reached all "employment which is a result of oil and gas" agreements with Alaska.[49] Thus, "Alaska Hire" reached employers with no direct relation to the state.[50]

In assessing "Alaska Hire" under the *Toomer* analysis, the Court found that Alaska could not demonstrate that nonresidents were a "peculiar source" of the state's high unemployment.[51] Furthermore, even if the state could make such a showing, the statute's grant of a simple preference to all Alaskans was not "substantially related" to the reduction of unemployment.[52] The Court noted that this hiring preference focussed not only on the unemployed, but applied "across the board" to all Alaskans.[53] Accordingly, the Court held that the statute was not "closely tailored to aid the unemployment the Act is meant to benefit."[54]

Alternatively, Alaska argued that its "proprietary interests" in the state's natural resources exempted the statute from the Privileges and Immunities Clause.[55] The Court recognized that both its earlier decisions

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ment under the Equal Protection Clause. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 317 (1976) (upholding mandatory retirement of uniformed police); McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645, 647 (1976) (upholding continuous residency requirement for firefighters).

46. 437 U.S. 518 (1978).

47. *Id.* at 534 ("Alaska Hire cannot withstand constitutional scrutiny.").

48. *Id.* at 520 & n.2 (quoting ALASKA STAT. § 38.40.030(a) (1977) (noting purpose of statute was to reduce unemployment)).

49. *Id.* at 529 (quoting ALASKA STAT. § 38.40.050(a) (1977)). The section provided, in part, that "[t]he provisions of this chapter apply to *all employment which is a result* of oil and gas leases, easements, leases or right-of-way permits *for oil or gas pipeline purposes*, unitization agreements or any renegotiation of the preceding to which the state is a party . . . ." *Id.* (emphasis in original) (footnote omitted).

50. *Id.* at 530 (citing language of statute and noting extension to employers not contracting with Alaska).

51. *Id.* at 526-27. The Court noted that the record indicated Alaska's unemployment problems were not caused "by an influx of nonresidents seeking employment." *Id.* To the contrary, Justice Brennan found that the record indicated that lack of education and geographic remoteness were largely responsible for the state's high unemployment. *Id.* Accordingly, the influx of nonresidents would have little effect upon the employed status of many Alaskans. *Id.*

52. *Id.* at 527 (holding that even if state demonstrated peculiar evil, "Alaska Hire nevertheless fails to pass constitutional muster").

53. *Id.* at 527-28. Specifically, the Court worried that the preference was not limited to the unemployed. *Id.* The preference applied to all jobs within the broad scope of the Act and to all Alaskans. *Id.* at 527. The Court also stressed that highly-skilled and currently employed residents received the same preference over nonresidents as the under-skilled and habitually unemployed. *Id.* at 527-28.

54. *Id.* at 528 (holding that discrimination against nonresidents must be "more closely tailored" to purpose of reducing unemployment).

55. *Id.* (contending state "ownership" of oil and gas is sufficient justification for Act and removes Act from scope of Privileges and Immunities Clause).

and lower court holdings stated that a state's interest in its own natural resources created an "exception" to the Privileges and Immunities protections.[56] Nevertheless, the Court held that the state's proprietary interest in its natural resources, while often a crucial factor in evaluating discrimination against noncitizens, is not necessarily dispositive.[57] Ultimately, the Court found that "Alaska Hire" reached activities "sufficiently attenuated" from the asserted interests to refute the state's justification.[58]

C. *Contrasting the Privileges and Immunities Clause and the Commerce Clause: From* White *to* Camden

Hicklin provided that state ownership of resources is not an interest sufficient to withstand a Privileges and Immunities challenge.[59] However, hiring preferences in public employment necessarily implicate the Commerce Clause, because they affect employers' ability to engage in "interstate commerce."[60] The Commerce Clause appropriates power to Congress to regulate interstate commerce.[61] Additionally, the Commerce Clause includes a negative or dormant aspect, which prohibits state regulation from unduly burdening interstate commerce.[62] Under Commerce

56. *Id.* The state relied on McCready v. Virginia, 94 U.S. 391 (1876), where the Court held that Virginia was free to bar nonresidents from inland oyster beds. *Id.* at 395-96. The Court premised its holding upon the idea that the state "owned" its natural resources and could use or dispose of them as it saw fit. *Id.* at 396. The Court stated: "[W]e may safely hold that the citizens of one State are not invested by this [Privileges and Immunities C]lause of the Constitution with any interest in the common property of the citizens of another state." *Id.* at 395. This argument succeeded in the Alaska Supreme Court, which held that *McCready* created an exception to the Privileges and Immunities Clause. Hicklin v. Orbeck, 565 P.2d 159, 169 (Alaska 1977), *rev'd*, 437 U.S. 518 (1978) .

57. *Hicklin*, 437 U.S. at 529; *see* Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 385 (1978) (holding that state's interest in things it claims to own is not absolute).

58. *Hicklin*, 437 U.S. at 529. For a discussion of the Court's analysis under *Toomer*, see *supra* notes 20-28 and accompanying text.

59. For a discussion of the relevance of the states' proprietary interests, see *supra* notes 55-58 and accompanying text.

60. *See* White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 209 & n.6 (1983) (noting that Massachusetts found "significant impact" on firms with nonresident workers, although questioning this conclusion); W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 494 (7th Cir. 1984) (noting potentially great cumulative effects of preference laws).

61. U.S. CONST. art. I, § 8, cl. 3; *see* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984) (stating that "[t]he Commerce Clause acts as an implied restraint upon state regulatory powers"); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 169-71 (1824) (holding that Congress could legislate with respect to all commerce affecting more than one state, and state law in conflict with valid congressional legislation violates Supremacy Clause). For a discussion of the common origins of the Privileges and Immunities Clause and the Commerce Clause, see *supra* notes 13-16 and accompanying text.

62. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (holding that state could not achieve its end through means that discriminate "against articles of commerce coming from outside the State"); Dean Milk Co. v.

Clause jurisprudence, however, the Commerce Clause does not constrain a state when it acts as a "market participant."[63]

The market participant exception to the Dormant Commerce Clause was at issue in *White v. Massachusetts Council of Construction Employers*.[64] In *White*, the Court upheld an executive order requiring that Boston residents make up at least one-half of all employees on public construction projects in Boston.[65] In construing the Commerce Clause, the Court concluded that the City of Boston was a market participant in the construction industry and was therefore free to give a hiring preference to its own citizens.[66]

The *White* Court began its analysis by reaffirming the "market participant" exception to the Commerce Clause.[67] The Court stressed that when the state is a market participant, the Commerce Clause requires no further inquiry.[68] Accordingly, the Court held that the executive order did not violate the Commerce Clause because the city of Boston expended municipal funds and was consequently a market participant.[69]

Although *White* seemingly condoned hiring preferences, the Court rejected a similar hiring preference just one year later in *United Building &*

City of Madison, 340 U.S. 349, 356 (1951) (holding that restriction of milk sales would invite preferential trade areas); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 316-17 (1851) (holding that states could not regulate aspects of commerce requiring national uniformity); *W.C.M. Window*, 730 F.2d at 493 (noting "dormant" aspect of Commerce Clause).

63. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 95-97 (1984) (stating that market participant doctrine provides exception to Dormant Commerce Clause's limitation imposed on states when state acts as participant in market and not merely regulator); Reeves, Inc. v. Stake, 447 U.S. 429, 436 (1980) (upholding market participant exception because it "makes good sense and sound law"); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (holding that purposes of Commerce Clause are not implicated when state acts as participant in market); *see also* Day, *supra* note 1, at 279-80 n.41 (discussing development of "market participant" jurisprudence in discussing *White*).

64. 460 U.S. 204 (1983).

65. *Id.* at 205-06. The executive order was issued by the Mayor of Boston and it extended to projects funded with city money or city-administered federal money. *Id.* at 205 & n.1. The executive order also provided for "set-asides" for minorities and women. *Id.* at 205. However, the respondents only challenged the residency requirement. *Id.* at 205-06.

66. *Id.* at 214-15. The Supreme Judicial Court of Massachusetts previously held that this order violated the Commerce Clause and the Privileges and Immunities Clause. Massachusetts Council of Constr. Employers v. Mayor of Boston, 425 N.E.2d 346, 355 (Mass. 1981), *rev'd on other grounds*, 460 U.S. 204 (1983). However, the Supreme Court granted certiorari only with respect to the Commerce Clause and did not review the ordinance under the Privileges and Immunities Clause. *White*, 460 U.S. at 214 n.12.

67. *White*, 460 U.S. at 206-08 (reaffirming principle of market participant exception).

68. *Id.* For a discussion of the Commerce Clause and the market participant exception, see *supra* notes 59-68 and *infra* note 69 and accompanying text.

69. *Id.* at 214-15.

Construction Trades Council v. Mayor of Camden.[70] In *Camden*, the Court addressed a state-approved city ordinance requiring that at least forty percent of employees on city construction projects be residents of Camden, New Jersey.[71] Notably, the Court held that the municipal ordinance implicated the Privileges and Immunities Clause, even where the market participant doctrine removed it from the strictures of the Commerce Clause.[72] Thus, the Court recognized a distinction in the purposes of the two clauses.[73] The Privileges and Immunities Clause "imposes a direct restraint on state action in the interests of interstate harmony," while the Commerce Clause "acts as an implied restraint upon state regulatory powers."[74] Nevertheless, the Court remanded the case because the record was insufficient to "evaluate Camden's justification" under the Privileges and Immunities Clause.[75]

In discussing the applicability of the Privileges and Immunities Clause of Article IV, Justice Rehnquist, writing for the majority, noted that the state expressly approved the ordinance in question.[76] Justice Rehnquist then concluded that municipal action must comport with the Privileges and Immunities Clause, even absent direct state involvement, because a municipality, such as Camden, "is merely a political subdivision of the

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70. 465 U.S. 208 (1984).

71. *Id.* at 210. This ordinance was in accordance with New Jersey's statewide affirmative action policies, which permitted the state treasurer to establish hiring requirements. *Id.* at 210 & n.2. The program also permitted municipalities to submit plans to the treasurer for approval. *Id.* Camden submitted such a plan, which the Treasury Department subsequently approved after conducting "brief administrative proceedings." *Id.* at 212.

72. *Id.* at 221. The *Camden* Court held the Commerce Clause did not prevent Camden from pressuring private employers to hire Camden residents, but ordinance implicated Privileges and Immunities Clause. *Id.* This is particularly interesting because *White* appeared to uphold preferences just a year earlier. *Id.* at 214. The Supreme Judicial Court of Massachusetts held that the ordinance in *White* violated the Privileges and Immunities Clause, and Camden's ordinance was very similar to Boston's. *See* Massachusetts Council of Constr. Employers v. Mayor of Boston, 425 N.E.2d 346, 352-53 (Mass. 1981) (holding Mayor's order violated Privileges and Immunities Clause), *rev'd on other grounds*, 460 U.S. 204 (1983). Yet, the Supreme Court did not consider the Privileges and Immunities Clause claim. *White*, 460 U.S. at 214 n.12. Thus, prior to the *Camden* decision, the market participant exception seemed to provide "blanket immunity" for preferences similar to those in *White*. *See* Polelle, *supra* note 16, at 677 (noting that lower courts refused to make factual determinations believing *White* resolved issue).

73. *Camden*, 465 U.S. at 220 (stating that Commerce Clause analysis is not dispositive because its aims and standards differ from those of Privileges and Immunities Clause).

74. *Id.*

75. *Id.* at 223. For a discussion of justification required under *Toomer*, see *supra* notes 20-28 and accompanying text.

76. *Id.* at 214-15. As previously noted, the New Jersey Treasury Department approved Camden's ordinance after a brief administrative proceeding. *Id.* at 212. For a discussion of the state program and its approval, see *supra* note 71 and accompanying text.

State."[77] Additionally, the Court held that although the ordinance discriminated on the basis of city rather than state residence, it was still subject to constitutional challenge.[78] Justice Rehnquist reasoned that a nonresident of a particular state "is *ipso facto* not residing in a city within that State."[79] Therefore, the Court concluded that municipal preferences discriminate against nonresidents.[80]

The Court's decision in *Camden* was significant because it established that municipal hiring ordinances do not constitute per se violations of the Privileges and Immunities Clause.[81] While the city of Camden argued that the ordinance was "necessary to counteract . . . social ills" and would prevent nonresidents from "liv[ing] off" Camden without "living in" Camden,[82] the Court ultimately found it was impossible to evaluate these justifications under the *Toomer* standard because the city did not present any findings of fact.[83]

Thus, analysis under the Privileges and Immunities Clause requires a two-step inquiry.[84] First, there must be a finding of discrimination against

77. *Id.* at 215.

78. *Id.* at 215-16. The city argued that the language of the clause refers to "citizens of each State" and therefore does not apply to municipal residence. *Id.* Justice Rehnquist rejected this argument and stated that the Privileges and Immunities Clause is not to be read so narrowly that it would only apply to distinctions based upon state citizenship. *Id.* at 216; *see* Mullaney v. Anderson, 342 U.S. 415, 419-20 (1952) (holding that Alaska territory could not discriminate in favor of territory's residents any more than states could favor their citizens). Justice Rehnquist then noted that "citizen" and "resident" are synonymous in this context. *Camden*, 465 U.S. at 216 (citing Austin v. New Hampshire, 420 U.S. 656, 662 n.8 (1975)).

79. *Camden*, 465 U.S. at 216-17.

80. *Id.* at 217. Justice Blackmun disagreed with this proposition, arguing that the clause did not reach municipal ordinances such as Camden's. *Id.* at 224 (Blackmun, J., dissenting). Instead, Justice Blackmun believed in history and precedent which indicated that the drafters intended to eradicate the evils of state parochialism. *Id.* at 225-35 (Blackmun, J., dissenting). However, Justice Rehnquist noted in response that to hold otherwise would provide a means to avoid the Privileges and Immunities Clause through intrastate regional preferences. *Id.* at 217 n.9.

81. *See* Hirsch, *supra* note 1, at 14 (noting remand indicated that Court did not expressly reject Camden's justifications); Day, *supra* note 1, at 283 (noting that remand indicated possibility that some discrimination could meet demands of Constitutional scrutiny under Privileges and Immunities Clause).

82. *Camden*, 465 U.S. at 222.

83. *Id.* at 221-23. The Court stressed that no trial ever took place and there was only an administrative hearing before the city approved the ordinance. *Id.* at 223. There was no trial because the Supreme Court of New Jersey certified the challenge for direct appeal. *Id.* The New Jersey high court rejected the Privileges and Immunities claim because the ordinance had substantially the same effects on nonresidents as on residents not living in Camden. United Bldg. & Constr. Trade Council v. Mayor of Camden, 443 A.2d 148, 160 (N.J. 1982), *rev'd*, 465 U.S. 208 (1984).

84. For a further discussion of this inquiry, see *supra* notes 17-44 and accompanying text.

a privilege or immunity fundamental to national unity.[85] In cases involving resident preferences, this issue will turn upon whether there is discrimination against a "common calling."[86] Second, if such discrimination exists, a court must consider the requirements set forth in *Toomer*'s two-pronged test.[87] The first prong requires the state to show a substantial reason for the difference in treatment. This showing entails a demonstration that nonresidents "constitute a peculiar source of evil."[88] The second prong requires that this discrimination bear a substantial relationship to the state's objectives, which involves consideration of the availability of less restrictive means to further these ends.[89]

III. CIRCUIT COURT TREATMENT

In *Baldwin v. Fish & Game Commission of Montana*, Justice Blackmun noted that the Privileges and Immunities Clause of Article IV "is not one of the contours" of the Constitution that has "been precisely shaped by the process and wear of constant litigation and judicial interpretation."[90] Consequently, circuit court case law addressing hiring preferences, including the Third Circuit's, is relatively sparse.[91] However, in view of the prevalence of state and municipal hiring preference laws and the Supreme

85. For a discussion of fundamental interests and the scope of the Privileges and Immunities Clause of Article IV, see *supra* notes 29-44 and accompanying text.

86. For a discussion of "common callings," see *supra* note 41 and accompanying text.

87. For a discussion of *Toomer* generally, see *supra* notes 20-28 and accompanying text.

88. For a discussion of the first prong of the *Toomer* test, see *supra* notes 24-25 and accompanying text.

89. For a discussion of the second prong of the *Toomer* test, see *supra* notes 26-28 and accompanying text.

90. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379 (1978). This part of the Casebrief will focus primarily upon hiring preferences. It is important to note, however, that several other settings may invoke the protections of the Privileges and Immunities Clause. *See* Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1316-17 (4th Cir. 1994) (holding that individual shareholder did not have standing under Privileges and Immunities Clause where harm was to corporation); *In re* Merrill Lynch Relocation Management, Inc., 812 F.2d 1116, 1122 (9th Cir. 1987) (upholding Oregon statute requiring nonresident plaintiff's attorneys to post bond as justified in light of potential difficulties in collecting costs); Aldering v. Ohio High Sch. Athletic Ass'n, 779 F.2d 315, 317-18 (6th Cir. 1985) (holding that participation in interscholastic sports is not fundamental privilege within meaning of Privileges and Immunities Clause); Silver v. Garcia, 760 F.2d 33, 36 (1st Cir. 1985) (holding that right of nonresidents to act as insurance consultants is fundamental and protected under Privileges and Immunities Clause); Smith v. Paulk, 705 F.2d 1279, 1285 (10th Cir. 1983) (holding that one-year durational residency requirement to be licensed employment agency violated Privileges and Immunities, but simple residency requirement did not violate clause).

91. *See Fourth Circuit Review for the Civil Practitioner*, 51 WASH. & LEE L. REV. 213, 259-63 (1994) (discussing recent Fourth Circuit holding in Tangier Sound Waterman's Ass'n v. Pruitt, 4 F.3d 264 (4th Cir. 1993)). This article summarizes the relevant cases within the Courts of Appeals in just over one page of text and

footnotes. *Id.* at 262-63. For a discussion of *Tangier Sound*, see *infra* notes 111-13 and accompanying text.

Nevertheless, several high state courts have addressed resident hiring preferences, with all but one invalidating the laws in question. For example, the Supreme Judicial Court of Massachusetts, in a detailed advisory opinion, found that a proposed preference law would violate the Privileges and Immunities Clause. Opinion of the Justices to the Senate, 469 N.E.2d 821, 826 (Mass. 1984). The pending bill at issue in *Opinion of the Justices* would have required contractors or subcontractors, "during periods of critical unemployment," to allot at least 80% of the positions on state funded projects to Massachusetts residents. *Id.* at 822. Thus, in some circumstances, the bill would compel private employers to hire Commonwealth residents. *Id.*

The court initially recognized that the bill would burden a "protected privilege," thus implicating the Privileges and Immunities Clause. *Id.* at 823; *see* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221 (1984) (holding that employment with private employers is sufficiently basic to nation's livelihood to be fundamental and within protection of clause). Finding that the legislation burdened a fundamental interest, the court analyzed the bill under the Privileges and Immunities framework of *Toomer*. *Opinion of the Justices*, 469 N.E.2d at 823. In accordance with *Toomer*'s test, the court first noted that there were no factual records or legislative findings indicating a "substantial reason" for the discrimination other than citizenship. *Id.* Moreover, the court did not find any indication that nonresidents constituted a "peculiar source of evil." *Id.* at 824 & n.5 (holding bill did not meet first prong of *Toomer*, requiring showing of "substantial reason" for discrimination other than citizenship). Next, the court found that even if it assumed a "substantial reason," the bill's degree of discrimination would not be sufficiently related to this reason. *Id.* at 824-25.

The court then addressed the bill under the assumption that a nondiscriminatory justification based upon increased employment opportunities for residents could be shown. *Id.* at 825. The court noted that there was no assurance that the extent of the preference (80%) bore a close relation to the reasons for the discrimination. *Id.* at 824. The court also noted that the statute applied to all Massachusetts residents. *Id.* Thus, the bill would provide a preference to residents currently employed and living in areas not suffering acute unemployment. *Id.* This finding indicated that the degree of discrimination would not be closely related to the bill's goals. *Id.* at 824-25; *see* Hicklin v. Orbeck, 437 U.S. 518, 528 (1978) (holding that state must closely tailor discriminatory act to aid those unemployed intended to benefit from act). Thus, the bill failed to satisfy either prong of the *Toomer* test, and would violate the Privileges and Immunities Clause of Article IV. *Opinion of the Justices*, 469 N.E.2d at 824-25.

Finally, the Massachusetts court noted that its conclusion was consistent with other jurisdictions' holdings. *Id.* at 825; *see* Robinson v. Francis, 713 P.2d 259, 266 (Alaska 1986) (invalidating statute on ground that state made no showing that nonresidents constitute "peculiar source of the evil"); People *ex rel* Bernardi v. Leary Constr. Co., 464 N.E.2d 1019, 1022 (Ill. 1984) (finding that state made no showing that nonresident labor causes unemployment); Neshamity Constructors, Inc. v. Krause, 437 A.2d 733, 738 (N.J. Ch. 1981) (holding that without showing nonresidents constitute "specific dangers," state cannot discriminate); Salla v. County of Monroe, 399 N.E.2d 909, 913-15 (N.Y. 1979) (holding that reducing unemployment is legitimate interest, but state failed to show nonresidents caused resident unemployment), *cert. denied*, 446 U.S. 909 (1980); Laborers Local 374 v. Felton Constr. Co., 654 P.2d 67, 71 (Wash. 1982) (invalidating statute because state did not demonstrate that nonresidents were a peculiar evil, or that statute was "closely tailored" to achieving legitimate purpose); Hirsch, *supra* note 1, at 15-16 n.74 (citing state court decisions addressing preference laws); Day, *supra* note 1, at 272 nn.11-12 (same). The only state to reach a different conclusion is Wyoming.

Court's recent jurisprudence under the Privileges and Immunities Clause, such litigation is likely to increase in the future.[92]

The Third Circuit recently addressed the validity of a residency requirement for public employment in *Salem Blue Collar Workers Ass'n v. City of Salem*.[93] In *Salem*, the Third Circuit addressed the constitutionality of a Salem, New Jersey ordinance requiring that all Salem city employees be residents of the city.[94] The ordinance's stated purpose was not limited to the alleviation of unemployment; the ordinance also aimed to improve the quality of the city's services and work environment.[95] The majority in *Salem* held that the Privileges and Immunities Clause was inapplicable, determining that there was no fundamental right to direct public employment.[96]

State v. Antonich, 694 P.2d 60 (Wyo. 1985). For a discussion of *Antonich*, see *infra* note 126 and accompanying text.

92. For a discussion of the nature and prevalence of hiring preferences, see *supra* notes 1-3 and accompanying text. For a discussion of the Supreme Court's jurisprudence, see *supra* notes 17-89 and accompanying text.

93. 33 F.3d 265 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995). This section of the Casebrief only discusses the basic facts and majority holding of *Salem*. For a discussion of the majority's analysis and the dissent's disagreement with that analysis, see *infra* notes 142-82 and accompanying text.

94. *Salem*, 33 F.3d at 266. The ordinance required "all full-time permanent and full-time, part-time officers and employees hereinafter to be employed by the City of Salem, are hereby required as a condition of their employment to have their place of abode in the City of Salem and be a bona fide domiciliary therein." *Id.* at 266-67; *see also* Salem Blue Collar Workers Ass'n v. City of Salem, 832 F. Supp. 852, 854-55 (D.N.J. 1993) (detailing related municipal ordinances and state statutes), *aff'd*, 33 F.3d 265 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995). The appellants challenged the ordinance on the grounds of the Privileges and Immunities Clause of Article IV and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Salem*, 33 F.3d at 267. The appellants were a former Salem city employee who was dismissed for violating the ordinance after moving from Salem to suburban New Jersey, and the collective bargaining agent for the blue-collar and clerical workers in the city — the Salem Blue Collar Workers Association. *Id.* at 266-67.

95. *Salem*, 33 F.3d at 267. The ordinance's asserted purpose was as follows:

> Whereas, said residency will not only reduce the high unemployment rate in the City, but will also improve relations among City employees; enhance the quality of employee performance by greater personal knowledge of conditions and problems in the City; promote a feeling of greater personal interest in the City's progress; reduce the possibility of tardiness and absenteeism; provide a ready availability of trained manpower for emergency situations; and provide unto the City economic benefits . . . .

Id. (citing Joint Appendix at 25).

96. *Id.* at 270. The court also upheld the ordinance against Fourteenth Amendment Equal Protection and Due Process Clause challenges. *Id.* at 271-73. However, Chief Judge Sloviter dissented, believing the majority read the Privileges and Immunities Clause and relevant case law too narrowly. *Id.* at 273 (Sloviter, C.J., dissenting). The Chief Judge also noted that the ordinance's validity under the Equal Protection Clause was questionable, and that the case at bar may have involved selective enforcement in violation of the Due Process Clause. *Id.* at 276-77 (Sloviter, C.J., dissenting).

The Third Circuit majority stated that a claim under the Privileges and Immunities Clause requires proof that a fundamental interest or right of citizenship is burdened.[97] If a fundamental right or privilege is burdened, the court must then determine whether the degree of discrimination is closely related to "substantial reasons" for the discrimination.[98]

In *Salem*, the court began this analysis by distinguishing the Supreme Court's holding in *Camden*.[99] The Third Circuit stressed that the instant case dealt with *direct* city employment, while *Camden* addressed only indirect city employment.[100] The *Salem* majority further emphasized that Camden's ordinance touched workers seeking employment with private employers contracting with the city of Camden, while the Salem ordinance affected only workers directly employed by the city.[101] The majority concluded that because there was no historically recognized fundamental right to direct public employment, the Privileges and Immunities protection did not apply.[102]

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97. *Id.* at 268 (citing Baldwin v. Fish Game Comm'n of Mont., 436 U.S. 371, 383 (1978), for proposition that only "fundamental" rights are within protection of Privileges and Immunities Clause). The *Salem* majority first determined that the individual appellant lacked standing because he was a New Jersey resident, but concluded that the Association could proceed because its members included nonresidents. *Id.* at 267-68. For a discussion of "fundamental" rights with respect to Article IV Privileges and Immunities, see *supra* notes 29-44 and accompanying text. For a discussion of standing to proceed under the Privileges and Immunities Clause, see *supra* notes 18-19 and accompanying text.

98. *Id.* at 268. Thus, the Third Circuit's analysis began with a threshold determination of whether the ordinance implicated the Privileges and Immunities Clause, and then turned to whether application of *Toomer*'s two-pronged test was appropriate. *Id.* For a discussion of the *Toomer* test, see *supra* notes 20-28 and accompanying text.

99. *Id.* at 268, 270 (noting that threshold issue is whether right to work for city is sufficiently fundamental to implicate Privileges and Immunities Clause).

100. *Id.* at 270 ("Our case is distinguishable by comparing the direct and indirect nature of the government employment.").

101. *Id.* at 269-70. The Third Circuit majority specifically noted that the Salem ordinance concerned only employment directly with the government entity. *Id.* at 270. For example, the individual appellant in this case worked for the Salem Water and Sewerage Department. Salem Blue Collar Workers Ass'n v. City of Salem, 832 F. Supp. 832, 855 (D.N.J. 1993), *aff'd*, 33 F.3d 265 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995). In contrast, both *White* and *Camden* involved employment with private firms that contracted or subcontracted for city construction projects. *Salem*, 33 F.3d at 270. For a discussion of *White*, see *supra* notes 64-69 and accompanying text. For a discussion of *Camden*, see *supra* notes 70-89 and accompanying text.

102. *Salem*, 33 F.3d at 270. The majority stated that because the ordinance did not implicate a fundamental right, the court did not have to consider "substantial relatedness." *Id.* However, in a footnote, the court noted that the Privileges and Immunities Clause is not absolute. *Id.* at 270 n.6 (citing Toomer v. Witsell, 334 U.S. 385, 396 (1948)). For a discussion of the validity and history of this distinction, see *supra* notes 55-58 and *infra* notes 142-82 and accompanying text.

Similarly, in *O'Reilly v. Board of Appeals*,[103] the United States Court of Appeals for the Fourth Circuit held that the County Board of Appeals for Montgomery County, Maryland, violated the Privileges and Immunities Clause of Article IV in granting taxi licenses for the county.[104] The court found that the county denied the plaintiff's license application because he was a resident of a neighboring Virginia county and not a resident of Montgomery County.[105] The court further concluded that this discrimination was not closely related to the asserted goal of providing efficient taxi service.[106]

The *O'Reilly* court's analysis followed the Supreme Court's application of the *Toomer* test.[107] The Fourth Circuit in *O'Reilly* called for a two-step analysis in assessing the Article IV Privileges and Immunities Clause claim: first, the court must determine whether a fundamental privilege or immunity is involved;[108] and second, it must determine whether the restriction is " 'closely related to the advancement of a substantial state interest.' "[109] Under this approach, the Fourth Circuit found that driving a taxi was a fundamental privilege, and that the state failed to demonstrate that the

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103. 942 F.2d 281 (4th Cir. 1991) (reversing district court's granting of summary judgment for defendant board).

104. *Id.* at 284-85. The Board reconsidered all "passenger Vehicle Licenses" granted by the county transportation department following an appeal by unsuccessful applicants. *Id.* at 282. The Board considered several factors in deciding whom should receive licenses, including familiarity with the county. *Id.* The Board deemed experience as a taxi driver in the area *or* long-time residency to be indicative of "familiarity" with the area. *Id.*

105. *Id.* The transportation department originally granted O'Reilly a license. *Id.* Upon review, however, the Board rejected his application. *Id.* All persons granted licenses were Maryland residents, and several had less experience as taxi drivers in the area than O'Reilly — a Virginia resident. *Id.*

Ultimately, O'Reilly challenged his denial in federal court. *Id.* at 283 (challenging denial under 42 U.S.C. § 1983, which encompasses Privileges and Immunities Clause violations). The Board defended its decision, claiming that residency was not the sole factor in its determination. *Id.* at 284. The court rejected this argument, finding that residency was the "sole factor on which differentiation could be made . . . on the basis of the information before the Board." *Id.*

106. *Id.* at 284-85. The court found that the Board failed to present evidence establishing that familiarity with the area is closely related to the goal of efficient service. *Id.* at 285. Additionally, even if the Board satisfied this requirement, the Board did not establish that there were no less discriminatory means available to determine the applicant's familiarity with the area. *Id.* at 285; *see* Supreme Court of Va. v. Friedman, 487 U.S. 59, 69 (1988) (noting that "other equally or more effective means that do not themselves infringe constitutional protections" could protect state concerns). The court stressed that O'Reilly submitted unchallenged affidavits indicating that similar jurisdictions administered written tests to determine the applicants' familiarity with the area. *O'Reilly*, 942 F.2d at 285.

107. For a discussion of *Toomer* and the *Toomer* test, see *supra* notes 20-28 and accompanying text.

108. *O'Reilly*, 942 F.2d at 284 (citing United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221-22 (1984)).

109. *Id.* (quoting *Friedman*, 487 U.S. at 64).

Board's license approval process was "closely related" to the state's asserted interest in providing efficient taxi service.[110]

Following its decision in *O'Reilly*, the Fourth Circuit reached a similar conclusion in *Tangier Sound Waterman's Ass'n v. Pruitt*.[111] In *Tangier Sound*, the court held that a Virginia licensing scheme that charged much greater fees to nonresident commercial fisherman than to Virginians violated the Privileges and Immunities Clause.[112] The Fourth Circuit reasoned that commercial fishing was a "common calling" and that the state's nonresident licensing fee was not sufficiently related to the state's asserted interest in protecting Virginia's taxpayers.[113]

Likewise, the United States Court of Appeals for the Seventh Circuit assessed a challenge to an Illinois hiring preference law under both the Commerce Clause and the Privileges and Immunities Clause in *W.C.M. Window Co. v. Bernardi*.[114] In *W.C.M. Window*, the Illinois statute in question prohibited the hiring of nonresidents for public works projects unless there were no suitable Illinois residents.[115] The dispute in *W.C.M. Window* arose when an Illinois general contractor hired a Missouri subcontractor to replace windows on a school building in Illinois.[116] Ultimately, the court found that the statute violated both the Commerce and Privileges and Immunities Clauses.[117]

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110. *Id.* at 284-85.

111. 4 F.3d 264 (4th Cir. 1993).

112. *Id.* at 265-68. In *Tangier Sound*, the Fourth Circuit addressed the validity of a Virginia statute that tripled the "harvester's license fee" for nonresident commercial fishermen. *Id.* at 265. Virginia defended this statute by asserting that it served the substantial interest of preventing Virginia's taxpayers from subsidizing the costs of nonresident fishermen. *Id.* at 267. However, the court found that the statute was not "closely related" to the advancement of the state's asserted interests, and therefore imposed impermissible burdens on the privileges and immunities of nonresident fishermen. *Id.*

113. *Id.* at 266-68. The court noted that *Toomer* actually entails two requirements for justifying discrimination under Privileges and Immunities Clause analysis: (1) there must be a substantial state interest, and (2) the discrimination must be "closely related" to that interest. *Id.* at 267. *Tangier Sound* did not reach the issue of whether the asserted purpose was "substantial," because the statute was not closely related to this end. *Id.* at 267-68.

114. 730 F.2d 486, 489 (7th Cir. 1984).

115. *Id.* The Illinois' Preference to Citizens on Public Works Project Act provided:

> [a contractor on] any public works project or improvement for the State of Illinois or any political subdivision . . . thereof shall employ only Illinois laborers . . ., [unless the contractor certifies, and the contracting officer finds, that Illinois laborers either] are not available or incapable of performing the particular type of work involved.

Id. (quoting ILL. REV. STAT. ch. 48, para. 269-74 (1981)).

116. *Id.* at 489-90.

117. *Id.* at 496, 498. The court initially considered whether the district court should have abstained from hearing this case. *Id.* at 490-93. The court held that although Bernardi, the Director of the Illinois Department of Labor, brought an action in state court, the district court properly heard the case. *Id.* at 490, 493; *see* Younger v. Harris, 401 U.S. 37, 46 (1971) (holding that federal district court may

In *W.C.M. Window*, the court first addressed the Commerce Clause challenge,[118] distinguishing *White* on the grounds that the instant case did not involve the expenditure of state funds.[119] The court noted that the "market participant" was the local school board, with the state acting purely as a market regulator.[120] Accordingly, the court concluded that extending the market participant doctrine to situations like the present case "would do great damage to the principles of free trade" on which the Dormant Commerce Clause is premised.[121]

Although this finding resolved the case, the Seventh Circuit reviewed the Privileges and Immunities claim because of the close relation between the two clauses.[122] Initially, the court recognized that reducing unemployment amongst citizens may be a "valid ground" for discrimination.[123]

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not enjoin state criminal proceeding in civil rights suit if federal claims can be raised in state court as defense to prosecution); *see also* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 431-32 (1982) (noting that *Younger* doctrine may include civil proceeding involving important state interests). The court based this holding upon a weighing of the equities and a conclusion that the state courts may not provide a remedy for the plaintiffs. *W.C.M. Window*, 730 F.2d at 493.

118. *W.C.M. Window*, 730 F.2d at 494-96. For a discussion of the Commerce Clause with respect to hiring preferences, see *supra* notes 59-75 and accompanying text.

119. *Id.* at 495. The court noted that the decentralized school systems in Illinois granted the local school board considerable autonomy. *Id.* Additionally, a school superintendent's uncontroverted affidavit stated that no state money was to be used for the project in question. *Id.* In contrast, the Mayor of Boston's order in *White* affected city projects that were at least partially funded with city money. White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 205 n.1, 210. For a discussion of *White*, see *supra* notes 64-69 and accompanying text.

120. *W.C.M. Window*, 730 F.2d at 495.

121. *Id.* at 496.

122. *Id.* For a discussion of the historic origins of both the Commerce Clause and the Privileges and Immunities Clause, see *supra* notes 13-16 and accompanying text.

123. *Id.* at 497. The Seventh Circuit recognized that the Supreme Court's remand in *Camden* implicitly allowed the City of Camden to discriminate in order to reduce unemployment, if it could justify its measures. *Id.* The Supreme Court reinforced this notion, recognizing that states should be given "considerable leeway" in remedying local "evils." *Id.*; *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) (stating there must be ". . . due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures"). For a discussion of *Camden*, see *supra* notes 70-89 and accompanying text.

The *W.C.M. Window* court went on to express grave concerns as to whether such legislation would succeed on the merits. *W.C.M. Window*, 730 F.2d at 498. In discussing the Commerce Clause, the court anticipated the potential for retaliatory preference laws — stating that the "cumulative effects . . . [of such laws] could be staggering." *Id.* at 494. The court also noted that there could be a boomerang effect, which would increase unemployment by making projects less economically attractive. *Id.* at 498. For example, the Illinois preference law could increase labor costs and ultimately, lead school districts to abandon construction projects and reduce employment. *Id.*

However, rather than explicitly setting forth a standard or test for evaluating a Privileges and Immunities claim, the court spoke of shifting "burdens."[124] Under this analysis, the court determined (1) that the plaintiff established discrimination against nonresidents pursuing common callings,[125] and (2) that the state failed to present evidence justifying this discrimination.[126]

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124. *W.C.M. Window*, 730 F.2d at 498. The court stated that the plaintiff has the initial burden of showing the "statute discriminates explicitly against nonresidents 'in the pursuit of common callings.' " *Id.* (quoting Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 387 (1978)). Essentially, the court looked to whether the statute implicated a fundamental right or privilege. For a discussion of "fundamental" rights under the Privileges and Immunities Clause, see *supra* notes 29-44 and accompanying text. If the plaintiff meets his or her initial burden, the burden shifts to the state to justify the discrimination. *Id.* The court would presumably require the state to satisfy the *Toomer* test in order to uphold this statute. For a discussion of the *Toomer* test and its application, see *supra* notes 20-28 and accompanying text.

125. *W.C.M. Window*, 730 F.2d at 498. The court did not discuss "common callings," but merely referred to them in passing. *Id.* However, earlier Supreme Court cases indicate that working on public construction projects is a "common calling" and thus, protected under the Privileges and Immunities Clause. *See, e.g., Camden*, 465 U.S. at 221-22. For a discussion of "common callings," see *supra* note 41 and accompanying text.

126. *W.C.M. Window*, 730 F.2d at 498 (holding that state failed to present justification despite opportunity). The Supreme Court of Wyoming reached a diametrically opposed conclusion on nearly identical facts in State v. Antonich, 694 P.2d 60 (Wyo. 1985). In *Antonich*, the Wyoming court's Privileges and Immunities analysis stressed that *Toomer* required states be given "*considerable leeway*" as to their analysis of perceived "local evils" and "appropriate cures." *Id.* at 61-62 (quoting *Toomer*, 334 U.S. at 396); *see Toomer*, 334 U.S. at 396 (holding that Privileges and Immunities Clause is not absolute and appropriate tests for measuring discrimination are (1) whether valid reasons for discrimination exist, and (2) whether degree of discrimination closely relates to those reasons). Applying this standard, the court deferred to the statute's stated purpose and found that Wyoming laborers remaining unemployed while nonresidents worked on public works projects constituted a "peculiar source of evil." *Antonich*, 694 P.2d at 62. The opinion cited no facts or findings indicating nonresidents were actually keeping residents from working, but merely recited the statute's asserted purpose. *Id.* One commentator criticized this aspect of the court's opinion because this deference to the statute's stated purpose represents a lack of evidence that was fatal in other cases. *See* Hirsch, *supra* note 1, at 17 (stating that this decision "seems flawed by the court's easy acceptance of Wyoming's justification . . . in the face of a lack of evidence").

Additionally, the Wyoming Supreme Court stated that the statute was closely related to the "unquestionably" valid state goal of reducing unemployment. *Antonich*, 694 P.2d at 62. However, as the Seventh Circuit noted, this proposition is not as clear as the Wyoming court indicated. *W.C.M. Window*, 730 F.2d at 497 (stating that benefits of Illinois' preference law could "not be assumed"); *see also Camden*, 465 U.S. at 222-23 (holding that record was insufficient to determine whether preference law that purported to "counteract grave economic and social ills" was justifiable).

Interestingly, the *Antonich* court made no mention of *W.C.M. Window*, which invalidated a nearly identical statute. *See W.C.M. Window*, 730 F.2d at 497-98. In *W.C.M. Window*, the Seventh Circuit's holding rested upon the notion that the state had to make some showing to justify its discrimination. *Id.*; *see* Hirsch, *supra* note 1, at 17 (noting *W.C.M. Window*'s focus on economic efficiency of preference

The Ninth Circuit never reached such a Privileges and Immunities Clause analysis in *International Organization of Masters, Mates & Pilots v. Andrews.*[127] In *Andrews*, the court addressed the validity of an Alaskan statute seeking to equalize pay between resident and nonresident employees of the Alaska Marine Highway System.[128] The court found that the statute did not violate the Privileges and Immunities Clause because the appellants failed to show that the statute "interfere[d] with interstate relations or with the freedom of nonresidents" to work or live in Alaska.[129] Accordingly, the court did not engage in a Privileges and Immunities Clause analysis because there was no discrimination that the state had to justify.[130]

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law). However, the *Antonich* opinion did not mention any such showing and simply deferred to the legislature's stated purpose. *Antonich*, 694 P.2d at 62 (deferring to stated purpose in finding nonresidents were source of evil); *see* Hirsch, *supra* note 1, at 17-18 (criticizing *Antonich* and stating that "[*W.C.M. Window*] represents a move to a more analytically sound and practical test for justifying [state preference laws] under the substantial reason test").

The Wyoming court went on to distinguish its case from Hicklin v. Orbeck, 437 U.S. 518 (1978). The *Antonich* court stated that the Supreme Court invalidated the Alaska Hire Act in *Hicklin* because Alaska's statute went well beyond the "activities in which the state held a substantial interest." *Antonich*, 694 P.2d at 63. The Wyoming court stated that in contrast to *Hicklin*, the legislature tailored Wyoming's act to the identified evil and limited it to specific areas of unemployment. *Id.* Thus, the Wyoming court concluded that this statute bore a close relation to the evil represented by nonresidents. *Id.* at 64.

127. 831 F.2d 843 (9th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988).

128. *Id.* at 845. The court summarized the statute to require:

> that every labor agreement between public employers in Alaska and any labor organization provide that wages of nonresident employees not increase until the difference between wages paid to residents and wages paid to nonresidents "reflects the differences between the cost of living in Alaska and the cost of living in Seattle, Washington."

Id. (quoting ALASKA STAT. § 23.40.210 (1977)). The plaintiffs in *Andrews* were a union that represented employees of the Alaska Marine Highway System (AMHS) and individual AMHS workers. *Id.* at 844. These plaintiffs included Washington state residents. *Id.* The parties incorporated the preceding statute into the labor agreements between the relevant unions and the AMHS. *Id.* at 845.

129. *Id.* at 846. The court ended its inquiry with the determination that there was no showing that the statute "prevented or discouraged" nonresidents from working for the AMHS. *Id.* Additionally, the court noted that the statute actually enhanced the attractiveness of hiring nonresidents because the statute made such hiring less expensive. *Id.* Similarly, the appellants' challenge under the right to interstate travel also failed because the statute did not affect their freedom to travel from Washington to Alaska. *Id.* Additionally, the court rejected a Commerce Clause claim because the appellants failed to state a cause of action under that clause. *Id.*

130. *Id.*; *see* Lutz v. City of York, 899 F.2d 255, 263 (3d Cir. 1990) (holding ordinance restricting "cruising" through town did not discriminate against nonresidents); *In re* Merrill Lynch Relocation Management, Inc., 812 F.2d 1116, 1122 (9th Cir. 1987) (holding that Oregon statute requiring resident attorney representing nonresident plaintiffs to post bond did not discriminate against nonresidents).

IV. EXAMINATION OF THE THIRD CIRCUIT DECISION IN *SALEM BLUE COLLAR WORKERS ASS'N V. CITY OF SALEM*

The *Salem* decision represents the Third Circuit's only exposition on the Privileges and Immunities Clause with respect to hiring preferences.[131] This is hardly surprising given the infrequency of the clause's use and the relative novelty of hiring preference legislation.[132] Nevertheless, the *Salem* opinion presents several interesting interpretations of Supreme Court jurisprudence in this area.[133]

A. *Facts and Procedural History*

Salem sprang from a challenge to an ordinance requiring Salem, New Jersey's city workers to reside within the city.[134] The individual plaintiff was a worker who moved from the city to suburban New Jersey to ensure the "safety and welfare of his family."[135] Although the city notified the worker that his actions violated the ordinance, he did not move back to Salem and was consequently terminated.[136]

Following his termination, the worker and the union that represented him filed suit in the United States District Court for the District of New Jersey.[137] The plaintiffs alleged that the ordinance violated several provisions of the Constitution, including the Privileges and Immunities Clause and the Commerce Clause.[138] After examining relevant case law, the district court concluded that Salem's residency requirement did not violate the Constitution and granted summary judgment in favor of the city.[139] The plaintiffs appealed to the Third Circuit from this decision.[140] On appeal, the majority of a three judge panel affirmed the district court.[141]

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131. Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265, 273 (3d Cir. 1994) (Sloviter, C.J., dissenting) (stating that this case was apparently issue "of first impression" for Third Circuit), *cert. denied*, 115 S. Ct. 1105 (1995).

132. For a discussion of the infrequency of litigation under the Privileges and Immunities Clause, see *supra* notes 17 & 90-92 and accompanying text.

133. For a discussion of the Supreme Court's interpretations, see *supra* notes 13-89 and accompanying text.

134. Salem Blue Collar Workers Ass'n v. City of Salem, 832 F. Supp. 852, 854 (D.N.J. 1993). For a more detailed discussion of the facts of the *Salem* decision, see *supra* notes 93-96 and accompanying text.

135. *Salem*, 33 F.3d at 266-67.

136. *Id.*

137. *Salem*, 832 F. Supp. at 854-55.

138. *Id.* at 854.

139. *Id.* at 855-65.

140. *Salem*, 33 F.3d at 266.

141. *Id.* at 273. Subsequently, the Third Circuit denied a petition for rehearing. *Id.* at 277. For a discussion of the substantive holding of the majority in the Third Circuit's decision, see *supra* notes 96-102 and accompanying text. For a discussion of the majority's and the dissent's analyses, see *infra* notes 142-82 and accompanying text.

B. *Third Circuit Analysis in* Salem

In *Salem*, Judge Seitz joined by Judge Hutchinson formed the majority, while Chief Judge Sloviter dissented.[142] Notably, the judges markedly disagreed on the appropriate reading of the Supreme Court's decision in *United Building & Construction Trades Council v. Mayor of Camden*.[143] Essentially, the majority read *Camden* as an affirmance of the notion that there is no fundamental right to public employment.[144] In contrast, the dissent viewed *Camden* as an expansion of the Privileges and Immunities Clause's protections, aimed at removing the "obstacles erected by parochialism."[145]

The majority in *Salem* first attempted to limit "privileges" and "immunities" to a commercial context.[146] The court emphasized the "mutually reinforcing relationship" of the Privileges and Immunities Clause, the Commerce Clause and the commercial nature of "common callings."[147] In contrast to the majority, the dissent set forth the broad purpose underlying the Privileges and Immunities Clause — that of fusing the sovereign states into "one Nation."[148] From this perspective, the majority's analysis was much more narrow than that of the dissent.[149]

The majority next referred to dicta from *White*, which noted that employees of independent contractors on city projects were "working for the city."[150] From this dicta, the majority concluded that the workers in *White* did not have "the benefit of the Privileges and Immunities Clause when Boston favored its own citizens."[151] This conclusion constituted a broad leap because the Supreme Court expressly declined to address the Privileges and Immunities Clause in *White*.[152] Additionally, the quoted reference originated in a footnote explicitly limited to the context of the

142. *Id.* at 266, 273.

143. 465 U.S. 208 (1984). For a discussion of *Camden*, see *supra* notes 70-89 and accompanying text.

144. *Salem*, 33 F.3d at 269-70 (holding that "the public/private distinction has not been abandoned").

145. *Id.* at 273 (Sloviter, C.J., dissenting) (stating that *Camden* "significantly expanded the scope of the Privileges and Immunities Clause").

146. *Id.* at 268.

147. *Id.* For a discussion of the historical origins of the Commerce Clause and of the Privileges and Immunities Clause, see *supra* notes 13-16 and accompanying text. For a discussion of "common callings" and "fundamental privileges and immunities" under the Privileges and Immunities Clause, see *supra* notes 29-44 and accompanying text.

148. *Id.* at 273 (Sloviter, C.J., dissenting) (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).

149. For a discussion of the dissent's analysis in *Salem*, see *infra* notes 169-79 and accompanying text.

150. White v. Massachusetts Council of Constr. Employers, 460 U.S. 204, 211 n.7 (noting that Mayor's executive order reached distinct class of activity in which, in an "informal sense," those affected were "working for the city").

151. *Salem*, 33 F.3d at 269.

152. *White*, 460 U.S. at 214 n.12 (remanding without considering Privileges and Immunities Clause).

Commerce Clause.[153] The *Salem* majority's conclusion also runs counter to language in *Camden*, which states that determining whether a privilege is fundamental does not turn upon whether the employees of a contractor can be said to be "working for the city."[154]

The *Salem* majority subsequently set forth its analysis of *Camden*.[155] First, the court acknowledged that the *Camden* Court refused to follow *White*'s Commerce Clause analysis in the context of a Privileges and Immunities challenge.[156] The majority also recognized that the Supreme Court stated that public employment is a "subspecies of the broader opportunity to pursue a common calling."[157] Despite the contrary implications from these quotations, the majority read *Camden* to remove the public employment at issue in *Salem* from the purview of the Privileges and Immunities Clause.[158]

The majority bolstered its reading of *Camden* through an examination of the Privileges and Immunities Clause's historical origin in the Fourth Article of the Articles of Confederation.[159] The majority noted the commercial language of that Article and quoted several commentators to support its contention that the clause does not protect public employment.[160] The quoted language is somewhat misleading, however, because while the language indicates that "trades" and "businesses" are included within the purview of the clause, the clause's protection extends beyond these areas.[161]

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153. *Id.* at 204, 211 n.7 (stating that "Commerce Clause does not require the city to stop at the boundary of formal privity").

154. United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221 (1984).

155. *Salem*, 33 F.3d at 269-70.

156. *Id.* at 269 (noting that challenging Association contended this rejection constituted rejection of distinction between public and private); *see Camden*, 465 U.S. at 219 (declining to mechanically transfer Commerce Clause analysis).

157. *Salem*, 33 F.3d at 269 (quoting *Camden*, 465 U.S. at 219).

158. *Id.* at 269-70 (upholding distinction between public and private based on historical and factual differences).

159. *Id.* at 269. For a discussion of the historical origins of the clause in the Articles of Confederation, see *supra* notes 13-16 and accompanying text.

160. *Id.* at 269-70 (stating that "Article [Four of Articles of Confederation] used terms that were referable to private employment, e.g., 'trade' and 'commerce' ").

161. *Id.* at 270. The court cited Bogen, for the proposition that " '[d]espite uncertainty, one function of article IV . . . remained clear: it prohibited states from imposing any restriction not applicable to residents on nonresidents engaged in trade or commerce.' " *Id.* (citing Bogen, *supra* note 15, at 831). However, when read in context, the quoted material stands for Bogen's proposition that the Continental Congress never defined "privileges" and "immunities," nor did it have the power to enforce the Article. Bogen, *supra* note 15, at 831. Therefore, the Article's reach was unclear. *Id.* Notwithstanding, Bogen notes the Fourth Article did reach trade and commerce, and that the rampant violation of this article was of great concern to the Framers. *Id.* (citing NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 14 (A. Koch ed., 1966)).

Moreover, the *Salem* majority ignored the Founders' ultimate separation of the Commerce Clause and the Privileges and Immunities Clause in the Constitution.[162] Additionally, the majority failed to recognize that the clauses are different in both application and scope.[163] As the Supreme Court has noted on several occasions, the Commerce Clause limits a state's power to regulate, while the Privileges and Immunities Clause acts as "a

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The majority stated that the language of the Fourth Article of the Articles of Confederation provided the "historical basis" that makes "the distinction between public and private employment . . . viable . . . ." *Salem*, 33 F.3d at 270. Immediately after this statement, the majority parenthetically cited Day for the proposition that the Supreme Court distinguishes between private and government employment. Day, *supra* note 1, at 278. However, the student note only supports this proposition with cases upholding residency requirements under the Equal Protection Clause. *Id.*

The *Salem* majority cited Bogen's statement that engaging in a trade or business is a protected privilege or immunity, and argued that this statement supported the distinction between public and private. *Salem*, 33 F.3d at 270 (citing Bogen, *supra* note 15, at 856). This citation seems particularly inappropriate, because there is no question that the Privileges and Immunities Clause protects nonresidents' pursuit of trade or business or common callings. *See, e.g.*, Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (holding that Privileges and Immunities Clause "plainly and unmistakably" protects rights of noncitizens to engage in "lawful commerce, trade or business"). Additionally, the section of Bogen's article from which this statement originated did not mention public employment, but demonstrated the disagreement over the meaning of "privilege or immunity" amongst the Justices of the United States Supreme Court. Bogen, *supra* note 15, at 856-63.

Finally, the majority parenthetically cited Gergen to support its contention that "early cases striking down state laws under the Privileges and Immunities Clause involved the 'core privileges of trade and commerce.' " *Salem*, 33 F.3d at 270 (citing Gergen, *supra* note 3, at 1129). The most interesting aspect of this citation is its failure to mention that the very sentence quoted refers to protected privileges outside commerce — cases involving "an alien friend." Gergen, *supra* note 3, at 1129. Further, this citation also ignores the broad language of Corfield v. Coryell, 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1832), in which Justice Washington indicated that "privileges and immunities" included all rights "which are in their nature fundamental." For a discussion of "common callings" and fundamental rights, see *supra* notes 29-44 and accompanying text. For a discussion of *Corfield*, see *supra* notes 35-40 and accompanying text.

162. *Compare* U.S. CONST. art. I, § 8, cl. 3 & art. IV, § 2, cl. 1, *with* ARTICLES OF CONFEDERATION art. IV. The Supreme Court suggested that this separation may be due to concern that the Commerce Clause would be read too narrowly. Baldwin v. Fish & Game Comm'n of Mont., 436 U.S. 371, 379-80 (1978).

163. *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 220 (1984) (holding that *White*'s Commerce Clause analysis not dispositive because Privileges and Immunities Clause has "different aims" and "standards for state conduct"); Bernardi v. Leary Constr. Co., 464 N.E.2d 1019 (Ill. 1984) (holding Commerce Clause "market participant" exception not relevant to Privileges and Immunities Clause challenge); Eule, *supra* note 3, at 447-48 (arguing that Privileges and Immunities Clause was originally intended to provide protection subsequently placed in Dormant Commerce Clause). *But see* Polelle, *supra* note 16, at 677-82 (criticizing such distinctions between Clauses because constitutionality turns on characterization of challenge). For a discussion of the varying applications in *White* and in *Camden*, see *supra* notes 64-89 and accompanying text.

direct restraint on state action in the interest of interstate harmony."[164] Thus, the Privileges and Immunities Clause gives rise to concerns that both cut across distinctions and that are crucial to a Commerce Clause analysis.[165]

Finally, the Third Circuit in *Salem* upheld the Salem ordinance based upon its view that a distinction between public and private employment survived *Camden*.[166] Judge Seitz noted that the determinative factor in this analysis is the employee's relationship to the employer, not the nature of the employee's work.[167] Therefore, because the plaintiffs in *Salem* worked directly for the city and not for a private employer, the ordinance did not implicate the Privileges and Immunities Clause.[168]

The dissent did not accept the majority's rationale.[169] Chief Judge Sloviter viewed the majority's opinion as resting upon notions of "public ownership" — notions that the Supreme Court has consistently rejected as insufficient to justify such discrimination.[170] More fundamentally, the Chief Judge believed that the majority opinion set forth an overly narrow view of the *Camden* decision.[171] Furthermore, Chief Judge Sloviter asserted that *Camden* did not provide a basis for restricting the scope of the Privileges and Immunities Clause.[172] Rather, *Camden* applied the Privi-

164. *Camden*, 465 U.S. at 220. For a discussion of the historical origins of the Privileges and Immunities Clause and the Commerce Clause, see *supra* notes 13-16 and accompanying text.

165. *Id.* at 220.

166. *Salem*, 33 F.3d at 270.

167. *Id.* The majority stated that its primary concern was not whether the case involved public or private employment. *Id.* Instead, the question turned upon "the nature of the employment relationship between employer and employee, not the character of the job being performed." *Id.* Finally, the majority concluded that *Camden* recognized the distinction between public and private employment, holding that the right to work for private employers was "sufficiently fundamental" to fall within the clause's protection. *Id.* However, in *Camden*, Justice Rehnquist did not mention direct public employment and discussed only the right "to seek employment with . . . private employers." *Camden*, 465 U.S. at 221.

168. *Salem*, 33 F.3d at 270. Because the majority found there was no fundamental right implicated, it did not address the reasons or "substantial relatedness" of the city's ordinance. *Id.* However, the majority noted that states should be given considerable leeway in determining the appropriate means to combat "local evils." *Id.* at 270 n.6; *see* Toomer v. Witsell, 334 U.S. 385, 396 (1948) (stating that Privileges and Immunities Clause is not absolute and states should be given considerable leeway). Additionally, the majority concluded that if a Privileges and Immunities Clause analysis was necessary, the case would require a remand. *Salem*, 33 F.3d at 270 n.6; *see Camden*, 465 U.S. at 223 (remanding due to lack of factual findings).

169. *Salem*, 33 F.3d at 273 (Sloviter, C.J., dissenting) (stating "the majority's conclusion does not follow from *Camden*").

170. *Id.* at 274 (Sloviter, C.J., dissenting). For a discussion of Supreme Court holdings regarding state ownership of its resources, see *supra* notes 55-58 and accompanying text.

171. *Id.* at 273, 275 (Sloviter, C.J., dissenting) (stating *Camden* expanded scope of Privileges and Immunities Clause and should be read broadly).

172. *Id.* at 273 (Sloviter, C.J. dissenting).

leges and Immunities Clause to municipal hiring preferences, while denying similar applicability for the Commerce Clause.[173]

Accordingly, the Chief Judge stressed that *Camden*'s expansion of the clause's reach suggests that the Supreme Court would not follow the *Salem* majority's restrictive interpretation.[174] She concluded that *Camden*'s holding rested upon the clause's "*raison d'etre*."[175] Therefore, in evaluating the Privileges and Immunities Clause challenge, the dissent looked to the extent of discrimination against nonresidents.[176] To illustrate this point, the Chief Judge cited Bureau of Labor statistics demonstrating the quantitative extent and economic importance of public employment.[177] The Chief Judge concluded from these statistics that public employment should be protected under the Privileges and Immunities Clause.[178] Finally, the Chief Judge concluded that the majority's analysis prematurely foreclosed a substantial number of jobs from nonresidents for "what may be insubstantial reasons."[179]

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173. *Id.* at 275 (Sloviter, C.J., dissenting). The dissent noted that the Supreme Court determined that the Privileges and Immunities Clause was applicable even though the City of Camden was "merely setting conditions on its expenditures" of its own funds. *Id.* (Sloviter, C.J., dissenting) (quoting *Camden*, 465 U.S. at 220). Also, the dissent stressed that *Camden* held the Privileges and Immunities Clause applicable, while recognizing that there was no fundamental right to government employment under the Equal Protection Clause. *Id.* (Sloviter, C.J., dissenting) (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976) (per curiam); *Camden*, 465 U.S. at 219). Thus, validity under the Commerce Clause or Equal Protection Clause did not preclude a Privileges and Immunities challenge. *Id.* (Sloviter, C.J., dissenting).

174. *Id.* at 276 (Sloviter, C.J., dissenting).

175. *Id.* (Sloviter, C.J., dissenting). *Raison d'etre* is defined as the "reason or justification for existence." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 973 (1987). Consequently, the dissent viewed *Camden* as emphasizing the underlying purposes of the Privileges and Immunities Clause. *Salem*, 33 F.3d at 275 (Sloviter, C.J., dissenting). In fact, the dissent quoted *Camden* for the proposition that " '[i]t is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause . . . .' " *Id.* (Sloviter, C.J., dissenting) (quoting *Camden*, 465 U.S. at 220). For this reason, Chief Judge Sloviter read *Camden* to require an examination of preferences' effects on "national unity" and "fundamental interests." *Id.* at 273, 275 (Sloviter, C.J., dissenting).

176. *Salem*, 33 F.3d at 276 (Sloviter, C.J., dissenting).

177. *Id.* (Sloviter, C.J., dissenting). The Chief Judge noted the undisputed expansion of public employment in recent years. *Id.* (Sloviter, C.J., dissenting). In fact, the statistics cited indicated that one-sixth of all jobs in New Jersey and one-fifth of all jobs in the United States are "public." *Id.* (Sloviter, C.J., dissenting). These proportions translated to over 500,000 public employees in New Jersey and over 18 million throughout the United States. *Id.* (Sloviter, C.J., dissenting).

178. *Id.* (Sloviter, C.J., dissenting). The Chief Judge recognized that this conclusion would not end the inquiry under the Privileges and Immunities Clause. *Id.* (Sloviter, C.J., dissenting). The conclusion merely meant that the two-pronged test announced in *Toomer* would have to be applied. *Id.* (Sloviter, C.J., dissenting). For a discussion of the *Toomer* analysis, see *supra* notes 20-28 and accompanying text.

179. *Id.* at 276 (Sloviter, C.J., dissenting). In concluding the first part of her dissent, the Chief Judge stated the majority's analysis was "incompatible with the Privileges and Immunities Clause." *Id.* (Sloviter, C.J., dissenting). Chief Judge

Public employment constitutes a much larger portion of available jobs than other "common calling" employment previously held fundamental.[180] In *Salem*, there was no distinction between "common callings," protected under the Privileges and Immunities Clause, and those jobs falling under the ordinance at issue — except the occupation's relationship with the municipality.[181] Although this distinction may ultimately be significant, such a distinction should not foreclose the analysis under the guiding principles of the Privileges and Immunities Clause.[182]

V. CONCLUSION

The Supreme Court has yet to clearly define the scope of the Privileges and Immunities Clause of Article IV. This is particularly true of the clause's influence upon state and municipal hiring preferences. Although the Court is clearly concerned with overt discrimination against nonresidents, it has not delineated exactly what evidence a state must produce to justify preference laws. The stark disagreement between the majority and dissent in *Salem Blue Collar Workers Ass'n v. City of Salem*[183] is indicative of the tension that this deficiency creates. Specifically, direct government employment constitutes a substantial amount of overall available work. This fact indicates that such employment is "sufficiently fundamental" to render the Privileges and Immunities Clause applicable. Nonetheless, there is uncertainty as to whether public employment truly constitutes a protected "common calling." This uncertainty creates the potential for

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Sloviter then discussed the appellants' Equal Protection Clause claims. *Id.* at 276-77 (Sloviter, C.J., dissenting). The Chief Judge expressed concern that the residency scheme had so many exceptions that it could be considered irrational. *Id.* (Sloviter, C.J., dissenting). She also suggested that the worker dismissed in *Salem* may have been a victim of selective enforcement. *Id.* at 277 (Sloviter, C.J., dissenting).

180. *Id.* at 276 (Sloviter, C.J., dissenting) (stating economic importance of public employment exceeds other trades held "fundamental"); *see* Supreme Court of N.H. v. Piper, 470 U.S. 274, 283 (1985) (holding practice of law to be fundamental); Toomer v. Witsell, 334 U.S. 385, 493 (1948) (holding shrimp fishing to be fundamental); Silver v. Garcia, 760 F.2d 33, 36 (1st Cir. 1985) (holding insurance consulting to be fundamental).

181. *See Salem*, 33 F.3d at 270 (holding that public employment does not implicate Privileges and Immunities Clause because there is distinction between public and private employment).

182. *See id.* at 276 (Sloviter, C.J., dissenting) (stating that majority analysis "pretermits" Privileges and Immunities Clause analysis). However, this speaks only to the initial inquiry into whether there is discrimination against a fundamental interest. *Id.* Moreover, one must recognize that Salem's use of its own funds was a significant factor in the assessment of the preference's reasons and "substantial relatedness." *See* United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 221 (1984) (stating fact that Camden was expending funds was "perhaps a crucial factor" in determining whether its ordinance violated Privileges and Immunities Clause, but did not remove ordinance from purview of clause).

183. 33 F.3d 265 (3d Cir. 1994), *cert. denied*, 115 S. Ct. 1105 (1995).

genuine infringement upon privileges and immunities of noncitizens deserving protection.

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