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## RESIDENCY REQUIREMENTS FOR MUNICIPALLY-FINANCED CONSTRUCTION CONTRACTS AND THE DORMANT COMMERCE POWER: *WHITE V. MASSACHUSETTS COUNCIL OF CONSTRUCTION EMPLOYERS*

State and local governments play an important role in the economic development of their jurisdictions.<sup>1</sup> Some states and municipalities may attempt to influence employment opportunities by enacting measures that provide employment preferences for their residents.<sup>2</sup> In

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1. States and cities actively promote economic growth. Most states and local governments offer a package of incentives to attract and retain businesses. These incentives include: 1) Financial assistance, such as state or local revenue bond financing, state loans, and other forms of low-cost financing; 2) tax exemptions on property and income taxes (some states tie their tax credits to economically lagging areas and to the number of employees hired by the business); and 3) special services, such as state supported training and retraining of the unemployed, use of state university facilities, and state programs to increase exports and to promote research and development. See *THE BOOK OF THE STATES 1980-81* 492-96 (J. Gardner ed. 1980); *THE BOOK OF THE STATES 1978-79* 491-95 (P. Albright ed. 1978).

There is substantial competition among states to attract businesses. See J. FESLER, *THE FIFTY STATES AND THEIR LOCAL GOVERNMENTS* 148 (1976). For a summary of state development programs, see Note, *Survey of Current State Economic Development Programs*, 17 *COLUM. J.L. & SOC. PROBS.* 355 (1983).

2. There are two types of employment preference statutes. One type provides preferential treatment for state or city residents for employment with state or municipal government. The other type involves a hiring preference for resident state or city workers imposed upon private contractors that wish to receive public works contracts. Note, *Construction Worker Residency Requirements: A Constitutional Response*, 17 *NEW ENG. L. REV.* 461, 463-64 (1981). Several states impose hiring preferences upon private contractors. See, e.g., *ALA. CODE* § 39-3-2 (1975); *ARIZ. REV. STAT. ANN.* § 34-302 (1974); *ARK. STAT. ANN.* § 14-607 (1979); *CONN. GEN. STAT.* § 31-52 (1983); *DEL. CODE ANN.* tit. 29, § 6913 (1983); *IDAHO CODE* § 44-1001 (1977); *ILL. REV. STAT.* ch. 48, § 271 (1983); *IOWA CODE ANN.* § 73.3 (West 1973 & Supp. 1982); *MASS. ANN. LAWS* ch. 149, § 26 (Michie/Law. Co-op. 1976); *MISS. CODE ANN.* § 31-5-17 (1972); *MONT. CODE ANN.* § 18-2-403 (1983); *NEV. REV. STAT.* § 338.130 (1979); *N.M. STAT. ANN.* § 13-4-1 (1978); *N.D. CENT. CODE* § 43-07-20 (1978); *OKLA. STAT. ANN.* tit. 61, § 10 (West 1963 & Supp. 1984); *PA. STAT. ANN.* tit. 43, § 154 (Purdon 1964); *S.D.*

*White v. Massachusetts Council of Construction Employers*,<sup>3</sup> the United States Supreme Court held that cities constitutionally may require private contractors to reserve a certain percentage of jobs on city-financed construction projects for city residents.<sup>4</sup>

In an effort to reduce unemployment in Boston,<sup>5</sup> Mayor White issued an executive order<sup>6</sup> mandating that Boston residents perform at least fifty percent of all work on city-financed or administered construction projects.<sup>7</sup> The Massachusetts Council of Construction Employers, local construction unions, and local contractors challenged the

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CODIFIED LAWS ANN. § 5-19-6 (1980); UTAH CODE ANN. § 55-3-33 (1953); VT. STAT. ANN. tit. 19, § 27 (1968); WASH. REV. CODE ANN. § 39.16.005 (1972 & Supp. 1984).

3. 406 U.S. 204 (1983).

4. The Court found no intrusion upon Congress' "dormant" commerce power. *Id.* at 215. See *infra* notes 14-17 and accompanying text for discussion of the dormant commerce power.

5. See *Massachusetts Council of Constr. Employers v. Mayor of Boston*, 384 Mass. 466, 472, 425 N.E.2d 346, 350 (1981). In October of 1981, construction workers faced the highest unemployment rate of any occupation in the nation. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR 81-519 (Table A-5) (1981).

6. The order also applied to projects for which the city merely administered federal funds. See *infra* note 7. The order affected approximately \$54 million in federal funds, including Urban Development Action Grants, 42 U.S.C. § 5318 (1982), Community Development Block Grants, 42 U.S.C. § 5301 (1982), and Economic Development Administration Grants, 42 U.S.C. § 3131 (1982). 460 U.S. at 212. Regulations implementing these programs provide that low income persons residing in the area of the project receive preferential employment opportunities. See 24 C.F.R. § 135.1(a)(2)(i) (1984); *id.* § 570.307(m); 13 C.F.R. § 305.54(a) (1984).

The *White* Court, including the dissent, 460 U.S. at 215, concluded that these regulations permit favoring local residents at project sites. *Id.* at 214.

7. The applicable portion of the mayor's executive order, enacted in Sept. 1979, states the following:

- 1) On any construction project funded in whole or in part by City funds, or funds which, in accordance with a federal grant or otherwise, the City expends or administers, and to which the City is a signatory to the construction contract, the worker hours on a craft-by-craft basis shall be performed in accordance with the contract documents established herewith, as follows:
  - a. at least 50% by bona fide Boston residents;
  - b. at least 25% by minorities;
  - c. at least 10% by women.

384 Mass. at 467-68 n.4, 425 N.E.2d at 347-48 n.4.

The executive order comported with state policy. A Massachusetts statute provides that:

In the employment of mechanics and apprentices, teamsters, chauffeurs and laborers in the construction of public works by the commonwealth, or by a county, town or district, or by persons contracting or subcontracting for such works, preference shall first be given to citizens of the commonwealth. . . .

MASS. ANN. LAWS ch. 149, § 26 (Michie/Law Co-op. 1976). Mayor White invoked the

executive order.<sup>8</sup> These groups alleged that the executive order was repugnant to the commerce clause<sup>9</sup> of the United States Constitution.<sup>10</sup> The Massachusetts Supreme Court agreed and found the executive order unconstitutional.<sup>11</sup> On appeal, the United States Supreme Court reversed, finding no violation of the commerce clause.<sup>12</sup>

The drafters of the Constitution created the commerce clause to prevent the establishment of economic barriers between the states.<sup>13</sup> The commerce power authorizes Congress to regulate interstate com-

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authority of Chapter 149 when he issued the executive order. Respondent's Brief at 3, *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983).

8. Labor unions and construction firms oppose such trade barriers for several reasons. Contractors, under these laws, no longer have a free hand in hiring employees and may have to hire less qualified workers as a result of a quota for city residents. Boston's executive order also clearly limits employment opportunities for non-resident construction workers. Finally, the effect of the quota may well extend to projects performed for private firms. Contractors that perform private and public contracts will not want to spend time and money to hire and fire new employees for every new project, and residency quotas may deter contractors from bidding at all. *See, e.g., St. Louis Post-Dispatch*, Oct. 11, 1984, at 3A, col. 2 (voicing concerns of a labor leader about a proposed public construction residency quota bill).

9. In addition, the Council claimed that the order violated the privileges and immunities clause (U.S. CONST. art. IV, § 2, cl. 1: "The Citizens of Each State shall be entitled to all Privileges and Immunities of Citizens of the several States."), the contract clause (U.S. CONST. art. I, § 10, cl. 1: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . ."), and the due process clause (U.S. CONST. amend. XIV, § 1: "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."). 384 Mass. at 470, 425 N.E.2d at 349.

10. U.S. CONST. art. I, § 8, cl. 3. Under the commerce clause, Congress has the power "to regulate Commerce . . . among the several states." *Id.* *See infra* notes 13-17 and accompanying text.

11. 384 Mass. at 466, 425 N.E.2d at 346. The court found the Massachusetts preference statute (*see supra* note 7) violative of the privileges and immunities clause. *Id.* at 478, 425 N.E.2d at 353. The court did not decide whether the executive order violated the privileges and immunities clause. *Id.* at 478, 425 N.E.2d at 354.

Under the commerce clause claim, the fact that in-state residents are burdened is immaterial so long as some out-of-state residents also are burdened. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951). The plaintiff contractors included 12 non-Massachusetts residents. Respondent's Brief at 3 n.4, *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983).

12. 460 U.S. 204 (1983).

13. Justice Cardozo once stated the source of the commerce clause as follows: "The Constitution was framed under the domination of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1934).

merce.<sup>14</sup> The Supreme Court's interpretation of the commerce clause also recognizes a "dormant" commerce power.<sup>15</sup> The dormant commerce clause requires courts to invalidate state or municipal laws that unreasonably burden the flow of interstate commerce<sup>16</sup> even if Congress has not regulated the subject matter covered by the state or municipal statute.<sup>17</sup>

In the late nineteenth and early twentieth centuries, state courts found no commerce clause limitations on states acting in a "proprietary" capacity.<sup>18</sup> Proprietary actions consist of state activity as buyer

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14. For a general discussion of Congress' regulatory power over commerce, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 5-1 to 5-87 (1978).

15. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824). The dormant commerce power originated with the so-called "Madisonian interpretation" of the Constitution that Chief Justice Marshall espoused in *Gibbons*. This interpretation is premised on the view that the Articles of Confederation failed largely because of trade wars among states. The Madisonian interpretation advocated the notion that Congress has authority over economic matters affecting more than one state. See L. TRIBE, *supra* note 14, at 322.

The Constitution contains no language forbidding state interference with interstate commerce. The Supreme Court, however, has found that only Congress may regulate certain areas of commerce. See *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319 (1851). For the commerce clause effectively to reduce economic barriers between the states, the *Cooley* Court concluded that it must prevent states from impeding the free flow of interstate commerce and recognized the need for uniform national regulations in certain areas. *Id.*

The Supreme Court has employed the commerce clause to strike down state legislation impairing interstate commerce. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (city ordinance forbidding local sale of milk unless locally pasteurized held invalid); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (a state may not prevent a milk processor serving another state from establishing a new plant within the state's borders); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945) (state regulation of train length declared invalid); *Wabash, St. L. & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (state law regulating interstate railway rates charged to state customers declared invalid). For additional perspectives on the development of the dormant commerce clause, see Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979).

16. See, e.g., *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating state restriction on out-of-state packing of cantalopes).

17. See, e.g., *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976) (reciprocity requirement for sale of milk from outside state); *Freeman v. Hewit*, 329 U.S. 249, 252 (1946) (state taxation of securities).

18. See, e.g., *City of Denver v. Bossie*, 83 Colo. 329, 266 P. 214 (1928) (state may require that all bidders on public works contracts use products made in the state whenever possible); *In re Gemmill*, 20 Idaho 732, 119 P. 298 (1911) (state may require that all printing done for the state government occur within the state); *State ex rel. Collins v. Senatobia Blank Book Stationery Co.*, 115 Miss. 254, 76 So. 258 (1917) (state may for-

or seller of goods or services in the marketplace.<sup>19</sup> Like any other participant in the marketplace, the state retains the right to choose freely its bargaining partners.<sup>20</sup>

In *American Yearbook Co. v. Askew*,<sup>21</sup> a federal district court applied the proprietary action doctrine<sup>22</sup> to uphold Florida's claim of immunity from commerce clause restraints when the state acted as a purchaser.<sup>23</sup> The Supreme Court affirmed the decision in a memorandum opinion.<sup>24</sup> In *American Yearbook*, a publishing company challenged a Florida statute that required publishers working on state contracts to conduct their printing in Florida.<sup>25</sup> The publisher asserted that the statute clearly burdened interstate commerce.<sup>26</sup> The district court, however, found that no commerce clause restraints applied because the

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bid counties from buying books from non-resident sellers); *Hersey v. Nelson*, 47 Mont. 132, 131 P. 30 (1913) (newspapers holding public printing contracts they cannot perform must sublet the contract to an in-state printer); *Tribune Printing & Binding Co. v. Barnes*, 7 N.D. 591, 75 N.W. 904 (1898) (county may use only resident county printers).

For a discussion of these cases, see Note, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 IOWA L. REV. 576 (1973); Comment, *In-State Preferences in Public Contracting: States' Rights versus Economic Sectionalism*, 49 U. COLO. L. REV. 205, 216-19 (1978).

19. These proprietary actions are similar to those in which an individual or business engages. Governmental action, on the other hand, involves traditional governmental activities, such as police protection and regulation of the citizenry. For a discussion of the governmental-proprietary distinction in commerce clause analysis, see Wells & Hellerstein, *The Government-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1121-25 (1980); Comment, *supra* note 18, at 205, 219.

20. See, e.g., *Tribune Printing & Binding Co. v. Barnes*, 7 N.D. 591, 75 N.W. 904 (1898). The court found no reason to forbid the state from doing that which an individual or a business may legally do when purchasing goods and contracting for services. *Id.* at 597, 75 N.W. at 906. This rationale, however, fails to consider that states' political considerations may affect, or even guide, their actions. See Note, *supra* note 18, at 584.

21. 339 F. Supp. 719 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972).

22. The "proprietary action doctrine" refers to the state's immunity from commerce clause restraints when acting in a propriety capacity. See *supra* notes 18-20 and accompanying text.

23. 339 F. Supp. at 721-23.

24. 409 U.S. 904 (1972).

25. The statute provides: "All public printing of this state shall be done in the state. . . ." FLA. STAT. ANN. § 283.03 (West 1974).

26. 339 F. Supp. at 723. The publisher engaged in the business of printing yearbooks for schools and universities. Because the publisher lacked printing facilities in Florida, it could not obtain a contract to print yearbooks for state-owned universities. *Id.* at 720.

state purchased services in a "proprietary capacity."<sup>27</sup> As a result of this "immunity" from the commerce clause, the state could impose conditions upon its purchases.<sup>28</sup> Hence, Florida could restrict its purchases to those companies that perform their printing in Florida, despite the fact that out-of-state publishers were subject to discrimination.<sup>29</sup>

In *Hughes v. Alexandria Scrap Corp.*,<sup>30</sup> the Supreme Court first addressed directly the issue of state immunity from commerce clause restraints. In *Hughes*, the Maryland Legislature attempted to rid state highways of abandoned automobiles<sup>31</sup> by offering a cash bounty to scrap processors for every abandoned vehicle that the processors converted into scrap.<sup>32</sup> To receive the bounty, the state required proof of ownership of the automobile.<sup>33</sup> Five years later the legislature amended the statute to require more exacting ownership documentation from out-of-state processors than that required of in-state proces-

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27. *Id.* at 725. The court explicitly stated the reasons for this exception to commerce clause restraints as follows: "When the state exercises its proprietary or business power, however, it is subject to no more limitation than a private individual or corporation would be in transacting the same business . . . the letting of public contracts, particularly those providing for internal needs of government, is a proprietary function." *Id.* The court based its holding on *Field v. Barber Asphalt Paving Co.*, 194 U.S. 618 (1904) (upholding a municipal ordinance specifying that the city use a particular kind of asphalt in paving city streets); *Atkin v. Kansas*, 191 U.S. 207 (1903) (upholding the states' right to prescribe working conditions for private firms working on public contracts); and *MacMillan Co. v. Johnson*, 269 F. 28 (E.D. Mich. 1920) (upholding a state statute that dictated conditions under which a book dealer could sell textbooks to public schools). 339 F. Supp. at 721-24. In addition, the court mentioned state cases upholding statutes that required printers to perform state or municipal printing contracts within the state or city. *Id.* at 724. See *supra* note 18.

A recent Seventh Circuit case challenges *American Yearbook's* implicit holding that states can require local governments to employ in-state printers. See *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 495 (7th Cir. 1984). For a discussion of *W.C.M. Window*, see *infra* note 71.

28. 339 F. Supp. at 725. See also *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill. 2d 258, 335 N.E.2d 469 (1975), where the Illinois Supreme Court upheld a law that required the state to hire Illinois residents for all public construction projects unless Illinois laborers are not available. The court relied on *American Yearbook*, finding the state's action immune from the commerce clause. *Id.* at 275, 335 N.E.2d at 479.

29. 339 F. Supp. at 725.

30. 426 U.S. 794 (1976).

31. *Id.* at 796.

32. *Id.* at 797.

33. *Id.* at 798.

sors.<sup>34</sup> The Court found that the amendment effectively denied out-of-state scrap processors the opportunity to collect the bounty.<sup>35</sup> A Virginia scrap processor who had received thousands<sup>36</sup> of bounties from Maryland challenged the constitutionality of the amendment on commerce clause grounds. The plaintiff contended that the amendment unlawfully burdened interstate commerce.<sup>37</sup> The Court, however, found that the amendment did not warrant commerce clause scrutiny because the state acted as a "market participant." Therefore, as a result of its market participant status, Maryland could favor its own residents.<sup>38</sup>

The Supreme Court applied the *Hughes* analysis in *Reeves, Inc. v. Stake*.<sup>39</sup> *Reeves* upheld the policy of a state-owned cement plant that, in the event of a cement shortage, limited sales to South Dakota residents.<sup>40</sup> The Court found that the state acted as a market participant;<sup>41</sup> consequently, it found an analysis of the burden on interstate commerce unnecessary.<sup>42</sup> In addition, the Court identified "state sovereignty"<sup>43</sup> and states' rights to choose freely their bargaining partners

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34. *Id.* at 800-01.

35. *Id.* at 803 n.13.

36. During the six months before the amendment became effective, the Virginia scrap processor received 14,253 abandoned automobile hulks from Maryland. In the six months following the effective date of the amendment, the number of hulks processed by the Virginia processor declined by almost one-third. *Id.* at 801 n. 11.

37. *Id.* at 802. The plaintiff claimed that the amendment "burdened" the flow of automobile hulks, eligible for a bounty, across state lines. *Id.*

38. *Id.* at 810. The Court stated that "nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* For comments on the Court's analysis, see Wells & Hellerstein, *supra* note 19, at 1131-33; Note, *State Purchasing Activity Excluded from Commerce Clause Review—Hughes v. Alexandria Scrap Corp.*, 18 B.C. IND. & COM. L. REV. 893 (1977); Note, *Proprietary Powers: A New Policy Tool for the States?*, 31 U. MIAMI L. REV. 729 (1977). These articles suggest that, in *Hughes*, the Court implicitly accepted the proprietary action doctrine. *Hughes*, however, failed to make any reference to *American Yearbook*.

39. 447 U.S. 429 (1980).

40. *Id.* at 430. The state built the plant in response to local cement shortages. *Id.*

41. *Id.* at 440.

42. *Id.* at 436. Justice Powell, dissenting, stated that the issue the Court should address is whether the state has undertaken integral governmental operations in an area of traditional governmental functions or whether it has participated in the marketplace as a private firm. *Id.* at 449-50 (Powell, J., dissenting). Justice Powell stated that if the latter applied, a determination of the burden on interstate commerce is necessary. *Id.*

43. *Id.* at 438. The Court cited *National League of Cities v. Usery*, 426 U.S. 833 (1976), which the Court handed down on the same day as *Hughes*. *National League of*



as the rationale for the states' market participant immunity from the commerce clause.<sup>44</sup>

In *White v. Massachusetts Council of Construction Employers*,<sup>45</sup> the Supreme Court first confronted the issue of whether a city may limit the percentage of work performed by nonresident employees of private contractors working on construction projects funded wholly by the city.<sup>46</sup> The Boston executive order<sup>47</sup> differed from the statutes at issue in *Hughes* and *Reeves* because the mayor's order imposed conditions on the contractual relationship between private contractors and their employees,<sup>48</sup> and not merely on parties dealing directly with the state.<sup>49</sup> The *White* Court found, nevertheless, that the "market participant exemption"<sup>50</sup> applied to the executive order.<sup>51</sup>

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*Cities* stands as a landmark case because of its "re-emphasis" of state sovereignty. The *National League of Cities* Court held that Congress may not invoke the commerce power to regulate a state government's "integral operations in areas of traditional governmental functions." *Id.* at 852. *National League of Cities*, however, has been expressly overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), by a 5-4 vote.

44. 447 U.S. at 438-39. Although the Court characterized the doctrine as "market participation," this concept developed from the proprietary action cases. *See supra* notes 18-20 and accompanying text.

45. 460 U.S. 204 (1983).

46. *Id.* at 209. The Court also addressed the issue of whether the city can apply such a policy to projects funded partly by the federal government through Urban Development Action Grants (UDAGs). *See supra* note 6. It found that the federal statute was in "harmony" with the executive order. *Id.* at 213. Both the majority and the dissent concluded that the order is constitutional as applied to projects involving federal funds. *Id.* at 215. As a result, no dormant commerce clause issue arose because of the existence of congressional approval. *Id.* *See supra* notes 13-17 and accompanying text.

47. *See supra* note 7.

48. The dissent asserted that Boston imposed conditions on the relationship between private parties. 460 U.S. at 213 (Blackmun, J., dissenting). The majority noted the dissent's interpretation of the order, but failed to provide an alternative interpretation. *Id.* at 211 n.7.

49. The statutes at issue in *Hughes* and *Reeves* involved conditions on private businesses that deal directly with the state. *See Note, supra* note 2, at 491-92. In *Hughes*, Maryland imposed the conditions for receiving a bounty on the scrap processors, who dealt directly with the state to collect their bounties. *See supra* notes 30-38 and accompanying text. In *Reeves*, South Dakota merely refused to sell its concrete to out-of-state buyers that sought to purchase its cement. *See supra* notes 39-44 and accompanying text.

50. 460 U.S. at 215. The market participant exemption doctrine holds that when states or cities enter the marketplace as buyers or sellers, they are immune from commerce clause scrutiny. The doctrine evolved from the proprietary action cases that exempted states from commerce clause scrutiny when states acted as market partici-

Justice Rehnquist, writing for the majority, employed the analysis of *Hughes* and *Reeves* to determine whether the Boston executive order violated the commerce clause.<sup>52</sup> He stated that the only issue facing the Court was whether Boston acted as a market participant.<sup>53</sup> The

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pants. See *supra* notes 18-29 and accompanying text. The *Hughes* Court adopted the term "market participant" in defining the states' exemption from the commerce clause. See *supra* note 38 and accompanying text. The *White* Court employed the term "market participant" in describing the *Hughes* precedent. 460 U.S. at 206.

51. 460 U.S. at 214-15. The New Jersey Supreme Court came to the same conclusion in a factually similar case. See *United Bldg. & Constr. Trades Council v. Camden*, 88 N.J. 317, 443 A.2d 148 (1982), *rev'd on other grounds*, 104 S. Ct. 1020 (1984). In that case, the city of Camden required that 40% of the labor force on city-funded public works projects be city residents. *Id.* at 321, 443 A.2d at 149. The New Jersey court, after noting *Hughes* and *Reeves*, stated that if the city conducted its own construction work, it could require that all employees be city residents. *Id.* at 340, 443 A.2d at 159. See *infra* note 64. The court further stated that the city retains the power to prefer its residents when it purchases "construction services" from contractors. 88 N.J. at 338-40, 443 A.2d at 159. The majority in *White* made the same argument in a footnote, stating that "everyone affected by the order is, in an informal sense, 'working for the city.'" 460 U.S. at 211 n.7.

52. 460 U.S. at 208.

53. Although the privileges and immunities clause, see *supra* note 9, was not argued, and, thus, not an issue in *White*, the commerce clause and the privileges and immunities clause share the common function of preventing state protectionism and interstate rivalries. See Note, *supra* note 2, at 494. In *Hicklin v. Orbeck*, 437 U.S. 518 (1978), the Supreme Court invalidated an Alaska statute favoring state residents on privileges and immunities clause grounds. *White*, 460 U.S. at 211. The statute required that Alaska residents have preference over non-residents in all work connected with oil and gas leases to which the state was a party. *Id.* The *Hicklin* Court noted that the commerce clause and the privileges and immunities clause are "mutually reinforcing" because of their shared vision of federalism. 437 U.S. at 531-32. The Court cited dormant commerce clause cases to support the privileges and immunities analysis. *Id.* at 532. For a comparison of the commerce clause and the privileges and immunities clause as means to invalidate resident employment quotas, see Note, *supra* note 2, at 494-97; Comment, *Hicklin v. Orbeck*, 12 AKRON L. REV. 346, 358 (1978).

In a case decided after *White*, the Supreme Court applied the privileges and immunities clause to a residency requirement for workers employed by contractors working on city-financed construction projects. See *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 104 S. Ct. 1020 (1984). In *United Building*, the Court acknowledged that, under *White*, these residency requirements did not violate the commerce clause. *Id.* at 1028. The Court found, however, that the privileges and immunities clause applies to discrimination based on municipal residency. *Id.* at 1027. In addition, the privileges and immunities clause protects an out-of-state resident's interest in employment by private contractors undertaking public works projects in another state. *Id.* at 1029. The Court did not invalidate the Camden ordinance; it remanded the case to determine whether the ordinance was "carefully tailored" to counteract the city's unemployment problem. *Id.* at 1030. Whether these residency requirements are sufficiently tailored to the municipal unemployment problem is uncertain. Therefore, it is unclear

majority found that some limits exist on the market participant exemption when a state or city places restrictions on parties that never engage in direct dealings with the state or local government.<sup>54</sup> Although the majority declined to delineate the limits of the market participant exemption,<sup>55</sup> the Court held that the exemption covered the Boston executive order because the city acted like a “major participant” in the construction projects funded by the city.<sup>56</sup> Justice Rehnquist stated that employees of private contractors performing city contracts effectively were city employees.<sup>57</sup> Thus, the majority interpreted the scope of *Hughes* and *Reeves* to include situations when a municipality acts as a “major participant” in a particular economic activity.

Justice Blackmun dissented, criticizing the majority’s interpretation of *Hughes* and *Reeves*.<sup>58</sup> Justice Blackmun asserted that the city order dictated to private contractors which class of employees those contractors must hire.<sup>59</sup> He concluded that the order constituted a regulation of the marketplace, and therefore failed to fall within the scope of *Hughes* and *Reeves*.<sup>60</sup>

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whether the privileges and immunities clause will preclude ordinances such as the one at issue in *White*.

“Durational residency requirements”—those that distinguish among citizens according to their length of residency—implicate fourteenth amendment equal protection rights. In *United Building*, the City of Camden had originally adopted a one-year residency requirement for all persons that desired employment on city-financed construction projects as city residents. 104 S. Ct. at 1024. The City, however, later deleted the requirement and mooted the plaintiff’s equal protection claim. *Id.* at 1025. For a comprehensive discussion of durational residency requirements and their validity under the fourteenth amendment equal protection clause, see Comment, *Durational Residency Requirements and the Equal Protection Clause: Zobel v. Williams*, 25 WASH. U.J. URB. & CONTEMP. L. 329 (1983).

54. 466 U.S. at 211 n.7.

55. *Id.* The Court, however, concluded that “the Commerce Clause does not require the city to stop at the boundary of formal privity of contract.” *Id.*

56. *Id.*

57. *Id.* The Court stated that everyone affected by the order is, in an informal sense, “working for the city.” *Id.*

58. *Id.* at 217-23 (Blackmun, J., dissenting). Justice White joined in dissent.

59. *Id.* at 218-19 (Blackmun, J., dissenting). Justice Blackmun distinguished a seller’s or purchaser’s simple choice of a bargaining partner from an attempt to govern private economic relationships. *Id.* He stated that “the power to dictate to another those with whom he may deal is viewed with suspicion and closely limited in the context of purely economic relations.” *Id.*

60. *Id.* at 220 (Blackmun, J., dissenting). Justice Blackmun contended that “[a]ttempts directly to constrict private economic choices through contractual conditions [imposed by the state] are particularly akin to regulation because, unlike simple

In support of his contention that the order went beyond the reach of the market participant exemption, Justice Blackmun examined the rationale behind the exemption as expressed in *Reeves*.<sup>61</sup> For Justice Blackmun, *Hughes* and *Reeves* involved only the states' right to choose their own bargaining partners, and therefore were distinguishable from *White*.<sup>62</sup> He asserted that, in *White*, the city no longer acted like a private business because the executive order imposed restraints on dealings between private contractors and their employees.<sup>63</sup> In addition, Justice Blackmun maintained that state sovereignty interests did not extend to regulating conditions of private hiring.<sup>64</sup> From this analysis, Justice Blackmun concluded that the city order was not within the market participant exemption. Moreover, he found that the order discriminated against interstate commerce, and therefore was repugnant to the commerce clause.<sup>65</sup>

*White* appears to expand the market participant exemption as applied in *Hughes* and *Reeves*. The Supreme Court concluded that a city is a market participant rather than a market regulator even when the city requires private contractors to hire a certain percentage of city

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refusals to deal but like conventional market regulation, they threaten to extend their regulatory impact well beyond the transaction in which the State has an interest." *Id.* He contended that the effect of the mayor's order was identical to a market regulation requiring such quotas. *Id.*

61. *Id.* at 218-22 (Blackmun, J., dissenting). See *supra* notes 43-44 and accompanying text. Note that Justice Blackmun authored the *Reeves* opinion. Justice Blackmun, however, neglected to consider the third rationale that he propounded for the market participant exemption. In *Reeves*, he contended that "competing considerations in cases involving state proprietary action will be subtle, complex, politically charged and difficult to assess under traditional Commerce Clause analysis." 447 U.S. at 339. He concluded that Congress could deal with the conflicting interests more effectively than the Court. *Id.* The majority mentioned this rationale behind the exemption, but did not apply the rationale in its analysis. 460 U.S. at 207 n.3.

62. 460 U.S. at 218-29 (Blackmun, J., dissenting).

63. *Id.* (Blackmun, J., dissenting). See *supra* note 59. One district court interpreted *White* "to hold that, no matter the commercial context or the manner of its acting, when the state itself is merchant or customer the Commerce Clause does not apply." *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128, 1133 (D.D.C. 1984).

64. 460 U.S. at 221 (Blackmun, J., dissenting). Justice Blackmun, however, found that under *McCarthy v. Philadelphia Civil Serv. Comm'n*, 424 U.S. 645 (1976), the city could limit its own hiring to city residents. 460 U.S. at 217 n.2. State sovereignty considerations limit federal interference with the hiring policies of state and local governments. See *supra* note 43 and accompanying text.

65. 460 U.S. at 223-25 (Blackmun, J., dissenting). Justice Blackmun found the executive order a "protectionist measure," and therefore per se invalid under *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). 460 U.S. at 223.

residents on city-financed projects.<sup>66</sup> The Court, in emphasizing that Boston was a major participant in the construction projects,<sup>67</sup> focused on the degree of the city's economic participation in determining whether to apply the market participant exemption. In *White*, the majority determined that full funding of the construction projects by the city constituted sufficient involvement to employ the market participant exemption.<sup>68</sup> *White*, however, failed to delineate when a city's involvement in economic activity becomes that of a market regulator.<sup>69</sup>

*White* does not misrepresent the *Hughes* and *Reeves* precedents because those cases provided no guidance in defining the reach of the market participant exemption.<sup>70</sup> The majority opinion, however, is un-

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66. See *supra* notes 48-51 and accompanying text.

67. See *supra* note 56 and accompanying text.

68. The Court expressly limited its holding to projects wholly funded by the city. 460 U.S. at 209. It held that the respondents failed to offer evidence showing that city and private funds were used jointly. *Id.* The Court, however, stated that the executive order applied to instances of joint funding. *Id.* at 208-09. The fact that the city funded the entire project is crucial. The city may fail to reach the status of a "major participant" in the projects if private funds play a significant role in project funding. Thus, the executive order may not survive judicial scrutiny if applied to projects with a large amount of private funding.

69. See *supra* note 55 and accompanying text. The Supreme Court clarified some of the limits on the market participant doctrine in *South-Central Timber Dev. Inc. v. Wunnicke*, 104 S. Ct. 2237 (1984). In *South-Central Timber*, the Court concluded that the market participant doctrine is not "carte blanche" to impose any conditions that the state has the economic power to dictate. *Id.* at 2245. Furthermore, the doctrine does not validate any requirement merely because the state imposes it upon a party with whom it is in "contractual privity." *Id.* The Court limited the doctrine to permit state-imposed conditions that have a regulatory effect only on the particular market in which the state is a participant. *Id.* at 2245-46. Therefore, Alaska could not require lumber companies that purchase timber from the state to process that timber in-state, because Alaska did not participate in the lumber-processing market. *Id.* at 2246-47.

In *Western Oil and Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984), the Ninth Circuit declined to apply the market participant exemption. Oil companies contested a California tax based on the volume of oil passing over state-owned submerged lands on commerce clause grounds. California argued that it was merely a market participant because some submerged lands are owned by private interests, therefore, making the state like any other property owner. *Id.* at 1342. The court held, however, that because oil companies cannot move their wells and California owns its submerged lands in a sovereign capacity, California is a market regulator and not just another competitor. *Id.* at 1343. The importance of city contracts for the construction industry is somewhat analogous to the position of oil companies in *Cory* who must funnel their oil over state-owned submerged lands.

70. *Hughes* and *Reeves* both found that the state acted as a market participant, but these cases dealt with a situation where state-regulated parties had direct dealings with the state. See *supra* note 49.

satisfactory as a matter of public policy. The majority's failure to define the scope of the market participant exemption will enable cities and states to utilize their market participant status as a pretext for regulating private parties. Courts may invoke the term "market participant" merely as a label, without examining the nature and effect of the state's<sup>71</sup> or city's activity. Thus, cities and states may justify discriminatory regulations by claiming that they act as market participants.<sup>72</sup>

The dissenting opinion's analysis of the market participant exemption reflects a sounder policy. By rendering the market participant exemption inapplicable in situations where the state or city regulates dealings between private parties, the dissent effectively limited the scope of the exemption. The dissent's focus on the nature and effect of

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71. In a case decided subsequent to *White*, the Seventh Circuit held that a state participating in the market may enact laws favoring state residents. See *W.C.M. Window Co. Inc. v. Bernardi*, 730 F.2d 486, 494 (7th Cir. 1984). The statute at issue required contractors involved in any state or municipal public works project to employ only Illinois residents, unless the contractor and the contracting officer found that Illinois residents are unavailable. See ILL. REV. STAT. ch. 48, § 269 (1981). The court found, however, that Illinois no longer acted as a market participant when it dictated to local governments who they must engage in business with. 730 F.2d at 495. Therefore, the court concluded that the Illinois residence preference statute violated the commerce clause by forcing third parties, the local governments, to favor state residents. *Id.* at 496. Noting that the Supreme Court summarily affirmed a state law that required local governments to have all their printing done in the state in *American Yearbook*, see *supra* notes 21-29 and accompanying text, the court nevertheless found that Illinois acted as a market regulator. *Id.* at 495.

72. Since 1980, several states have tried to justify discriminatory statutes by asserting that the state is a market participant, even in defending statutes in which the state clearly acted as a regulator. See, e.g., *New Eng. Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (Court rejected state's argument that, in a statute giving state residents preferred access to electricity produced by private in-state utilities, the state acted as a market participant); *Shayne Bros. Inc. v. Prince George's County*, 556 F. Supp. 182 (D. Md. 1983) (county argued that an ordinance forbidding unauthorized dumping of out-of-state trash in county landfills is valid because the county acted as a market participant; the court rejected the argument); *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982) (state acts as a market regulator, rather than a market participant, in giving a tax reduction for gasahol produced within the state); *Gould v. Wisconsin Dep't of Indus., Labor & H. Rel.* 576 F. Supp. 1290 (W.D. Wis. 1983) (state relied on market participant doctrine to justify a law barring employers that have three or more adverse NLRB findings from conducting business in Wisconsin). The use of the market participant argument in areas far removed from state market participation shows the need for more guidance by the Supreme Court.

Following *White*, some courts have upheld the policies of state or county owned landfills that exclude refuse from other jurisdictions under the "market participant" doctrine. See *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128, 1133-34 (D.D.C. 1984); *County Comm'rs of Charles County v. Stevens*, 299 Md. 203, —, 473 A.2d 12, 19 (1984).

the city's activity<sup>73</sup> more sharply defines and limits the doctrine than does the majority opinion's vague focus upon the significance of the city's economic involvement in the activity. Applying the dissenting opinion will prevent states and cities from masking discriminatory regulations in the guise of market participation.

*White* permits states and cities to favor their own residents in any economic activity in which the state or city is a major market participant. When states or cities employ private firms to provide goods or services, they can require the firms to implement employment quotas for state or city residents as a condition to receiving the contract. Significant territorial barriers in the labor market may arise if other cities or states enact statutes similar to the Boston executive order.<sup>74</sup> A proliferation of employment quotas for residents of particular jurisdictions will cause dislocation among employees in industries that are heavily dependent on government contracts. Dislocation of workers based on residency clearly falls within the scope of the evils that the commerce clause sought to prevent.

*Michael W. Straus*

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73. See 460 U.S. at 220 (Blackmun, J., dissenting).

74. One commentator stated that general immunity for states as market participants could exacerbate trade barriers between states, which could have serious impacts on interstate commerce. See L. TRIBE, *supra* note 14, at 337.

## **RECENT DEVELOPMENT**



