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

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I. Introduction

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

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

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

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

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2 See infra notes 7-8.
3 See infra notes 4-5.
4 "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8.
8 Id. at 204 n.3.
9 Id. at 204 n.12.
11 Id. at ___, 104 S. Ct. at 1023.
the state market-participant doctrine.

II. Camden: Background and Decision

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

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

1977 U.S. at 104 S. Ct. at 1025; 88 N.J. at 337-38, 443 A.2d at 158. 88 N.J. at 329 n.1, 443 A.2d at 149 n.1. The city's total population in 1980 was 84,910 of which 25,739 were Caucasian.

Id. at 1024.

Id. at 1025.

Id. at 149 n.1.

Id. at 153.

Id. at 151.

Id.

Id.

Id.

Id. at 153.
Construction contractors did not challenge Camden’s ordinance, rather, an association of labor unions did. The labor unions challenged Camden’s affirmative action program as a denial to whites of the equal protection of the laws guaranteed by the fourteenth amendment. The primary basis for this claim was the fact that the hiring preferences mandated rigid quotas rather than goals for minority workers. In addition, the unions claimed that the program had to be supported by state administrative or legislative findings of discrimination. The New Jersey Supreme Court disagreed emphasizing that federal legislative, executive and judicial findings of pervasive discrimination in the construction industry were widespread. Before the Supreme Court, the unions relinquished this direct assault upon Camden’s affirmative action plan and, ultimately, relied exclusively upon the interstate privileges and immunities clause. The New Jersey Supreme Court, upholding Camden’s ordinance and affirmative action plan, had ruled that this clause did not protect nonresidents of the regulating state from discriminatory classifications upon residence in a city rather than residence in a state. The Supreme Court, however, disagreed, reversed judgment for the city of Camden, and remanded the case for the construction of a factual record to determine whether the local-hire ordinance violated the interstate privileges and immunities clause. The Court observed that while the association of labor unions had at least some members who did not reside in New Jersey, the ordinance struck a balance of employment opportunities primarily between citizens of New Jersey, namely the inhabitants of the city of Camden, and its suburbs in New Jersey.

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

26 Id. at 335, 443 A.2d at 157.
27 ___ U.S. ___, 104 S. Ct. at 1024.
28 88 N.J. at 331, 443 A.2d. at 155 n.7.
29 Id.
30 Id. at 330, 443 A.2d at 154.
31 Id. at 333, 443 A.2d at 156.
32 Id.
37 ___ U.S. at ___, 104 S. Ct. at 1024 n.5.
38 Id. at ___, 104 S. Ct. at 1025.
39 Id. at ___, 104 S. Ct. at 1026.
40 Id. at ___, 104 S. Ct. at 1023.
41 Id. at ___, 104 S. Ct. at 1023, 1029-30.
42 Id. at ___, 104 S. Ct. at 1024 n.4.
part, by racial and other deprived minorities, and it is surrounded by sub-
urbs that are affluent by comparison.

The majority of the jobs affected by the ordinance could have been
held by commuters into Camden. Nevertheless, the Court said that the
local hire ordinance must satisfy the strict\(^{43}\) demands of the interstate
privileges and immunities clause.\(^{44}\) A crucial factor in the ultimate deci-
sion may be that Camden’s local-hire program involves the spending of
the city’s own funds.\(^{45}\) Similarly, the city’s grave social and economic ills
may also be assigned great weight.\(^{46}\) The ability to predict the final out-
come, however, seems doubtful at best.\(^{47}\)

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

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

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

\(^{43}\) Id. at __, 104 S. Ct. at 1029. See infra text accompanying notes 111-122.
\(^{44}\) Id. at __, 104 S. Ct. at 1023.
\(^{45}\) Id. at __, 104 S. Ct. at 1029.
\(^{46}\) Id. at __, 104 S. Ct. at 1030.
(Blackmun, J., concurring and dissenting). See infra text accompanying notes 155-69.
\(^{48}\) See infra text accompanying note 209-220.
\(^{49}\) 239 U.S. 175 (1915).
\(^{50}\) See infra text accompanying notes 147-50.
\(^{51}\) See infra text accompanying notes 52-66.
\(^{52}\) Hicklin v. Orbeck, 437 U.S. 518, 532-35 (1978); Baldwin v. Montana Fish and Game
(1978).
clause, for example, does not protect corporations, while the commerce clause does; the former does not protect conduct that occurs outside the regulating state, while the later does. Further, prior to Camden the standard of protection of the privileges and immunities clause appeared to be much less restrictive than that of the commerce clause. Before Camden, the recognized measure of protection due nonresidents of a state under the privileges and immunities clause was the same as that the state gave to its own residents. A state was, therefore, permitted to discriminate against nonresidents to the same extent that it discriminated against its own citizens. This standard essentially would permit a state to favor residents of a city at the expense of both its own residents and those of other states. In his dissenting opinion in Camden, Justice Blackmun observed that the hiring preference for residents of the city of Camden satisfied the interstate privileges and immunities clause based upon these grounds.

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

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

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63 Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869).
64 Crutcher v. Kentucky, 141 U.S. 47, 57, 59 (1891); Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1, 12-13 (1878).
70 Id. at 351. When the case arose, there were 5600 dairy farms in Dane County, of which Madison is the county seat, and they produced 600,000 pounds of raw milk annually which was more than 10 times the requirements of Madison. Id. at 351-52.
was pasteurized in a local dairy. The Court held that the application of this regulation to milk from out-of-state farms violated the commerce clause. The state's health interest in pure milk did not justify a trade preference for a few local dairies when the reasonable alternative means of inspecting dairies outside Wisconsin would permit safe milk for Madison consumers.

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

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

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

The Commerce Clause acts as an implied restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce. When the state acts solely as
a market participant, no conflict between state regulation and federal authority can arise . . . . The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony . . . . This concern with comity cuts across the regulator-market participant distinction that is crucial under the Commerce Clause. It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce. Thus, the fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.8

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

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

The Supreme Court reports are replete with commerce clause precedents that protect nonresidents from state discrimination that is hostile to national unity.72 In 1821, Chief Justice John Marshall said: "In all

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68 U.S. at , 104 S. Ct. at 1028-29.
69 426 U.S. 794, 810 (1976); see L. Tribe, supra note 52, at 336.
70 Hicklin, 437 U.S. at 531-32 n.16; Baldwin, 436 U.S. at 379-80.
71 Hicklin, 437 U.S. at 531.
73 See infra text accompanying notes 98-110.
commercial regulations, we are one and the same people.” From the perspective of state discrimination against nonresidents, it is inconceivable that particular commercial activity can be essential to interstate harmony under the interstate privileges and immunities clause without also being essential to interstate harmony under the commerce clause. As a result of *Camden*, however, the inconceivable now exists.

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

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

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

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75 See *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652-53 (1981)(Congress authorized state retaliatory tax upon foreign insurance companies when their home states taxed the taxing state’s insurance companies at a higher rate than that approved by the taxing state.).
76 *Hicklin*, 437 U.S. at 531; *Hughes*, 441 U.S. at 334.
77 See infra text accompanying notes 89-94.
78 See infra text accompanying notes 125-134.
79 See infra text accompanying notes 125-126, 135-39.
80 See infra text accompanying notes 140-161.
the state-market-participant doctrine.  

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

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

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

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

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82 See supra text accompanying notes 66-69.
83 See infra text accompanying notes 174-189.
84 ___ U.S. at __, 104 S. Ct. 1024 n.4.
85 294 U.S. 511 (1935).
86 294 U.S. at 519 (Court’s reference to Nebbia v. New York, 291 U.S. 502 (1934)).
87 291 U.S. at 515.
88 Id. at 539.
89 __at 518 n.2 (paragraph 6).
90 294 U.S. 511.
bring the milk back to New York.91

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

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

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

91 Id. at 520.
92 Id. at 527.
93 Id.
94 Id. at 523.
95 314 U.S. 160 (1941).
96 Id. at 173.
97 Id. at 173-74.
98 Id. at 174-75.
99 Id. at 177.
100 294 U.S. 511.
precluded Alaska from awarding Alaskans a preference to all private sector work generated by the development of Alaska’s enormous oil wealth, including construction of the Alaska pipeline.\footnote{105}

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

Although the Court has said that facial discrimination against interstate commerce “invokes the strict scrutiny of any purported legitimate local purpose and of the absence of any nondiscriminatory alternatives,”\footnote{112} the precedents do not require application of the strict scrutiny test,\footnote{113} which is usually a fatally-invalidating test,\footnote{114} when a state has to discriminate against nonresidents to protect some local interest other than a trade preference.\footnote{115} Rather, it seems that careful judicial review,
akin to that demanded by the equal protection clause, of some classifications that are subjected to the so-called "intermediate test" of equal protection is all that is required.\textsuperscript{116} The applicable standard, taken from Toomer v. Witsell\textsuperscript{117} and approved in Camden,\textsuperscript{118} permits discrimination against nonresidents when there are substantial reasons for it and when the discrimination bears a close relation to these reasons.\textsuperscript{119}

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

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

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

A. The Commerce Clause

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

Subsequently, the Court curtailed the reach of this statement by holding that the commerce clause applies when the state licenses private enterprise to catch its free swimming shrimp and market them in interstate commerce. In Foster Fountain Packing Co. v. Haydel,\textsuperscript{122} Louisiana re-
quired its shrimp to be shelled and hulled at private local canneries before being removed from the state. The Court held that the requirement was invalid under the commerce clause because it was a trade preference that impermissibly discriminated against canneries in other states. State ownership of the shrimp was not decisive because the state permitted the shrimp to be marketed in interstate commerce rather than reserved for local use and consumption, as Geer would have allowed.

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

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

B. The Interstate Privileges and Immunities Clause

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

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122 Id. at 13.
123 Id. at 11-13.
124 Toomer, 334 U.S. at 402.
127 Id. at 335.
128 Id. at 338.
129 Hicklin, 437 U.S. at 528-29, 531-34.
130 94 U.S. 391 (1877).
131 Id. at 396.
132 334 U.S. 385 (1948).
commercial fishermen access to its shrimp in the marginal sea. Eventually, in *Hicklin v. Orbeck* the Court found that the interstate privileges and immunities clause does provide some protection from arbitrary state discrimination against nonresidents when the state develops property to which it has title.135

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

**C. Both Clauses**

This pronouncement was adequate to resolve a case requiring only a construction of the interstate privileges and immunities clause; however, the court further explained why this reasoning also applied to the commerce clause although none of the parties to the case invoked this latter clause.139 The Court underscored its explanation by emphasizing its decision in *Foster Foundation Packing Co. v. Haydel* in which the state had licensed private enterprises to catch and market its shrimp in interstate commerce.140 The commerce clause applied to this disposition of state property although the disposition itself was clearly nonregulatory and the act of a state market-participant in any ordinary sense of those words. Not yet content, the Court proceeded to clarify *Heim v. McCall,* a comparatively old case that had been justifiably understood as holding that the interstate privileges and immunities clause permits a state to stipulate with public contractors who do the state’s construction work for a discriminatory hiring preference for the state’s citizens. This proposi-

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135 Id. at 528-29.
136 Id. at 529.
137 94 U.S. 391 (1877).
138 437 U.S. at 528.
139 Id. at 529.
140 Id. at 532-34.
141 278 U.S. 1 (1928).
142 437 U.S. at 533.
143 239 U.S. 175 (1915).
tion, in fact, appeared at the forefront of the Court’s opinion, and the
law challenged in Heim provided for such a discriminatory hiring prefer-
ce. Heim, however, explicitly held only that the equal protection
clause of the fourteenth amendment and certain treaties did not prohibit
a state from denying aliens employment in construction work done for
the state. The Hicklin Court emphasized only this explicit ruling and
thereby deprived Heim of any status as an authority allowing state dis-
crimination against citizens of other states in awarding public construc-
tion contracts. Hicklin’s reinterpretation of Heim was approved by a
unanimous Court. Combined with the discourse about state property dis-
positions and the commerce clause, the Court clearly made public con-
struction contracts with discriminatory hiring preferences subject to the
restrictions of commerce clause.

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

VI. LOCAL HIRE AND UNEMPLOYMENT RELIEF

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

114 Id. at 176.
115 Id. at 176-77.
116 Id. at 193-94.
117 437 U.S. at 531, n.15.
118 Alexandria Scrap, 426 U.S. at 810.
119 See infra text accompanying notes 157-209.
120 437 U.S. at 518.
121 Id. at 520-21.
122 Id. at 528-29.
123 Id. at 526.
124 Id. at 526-28.
left open the possibility that a state might have a larger power to help its unemployed by discriminating against nonresidents in managing and disposing of its own property.\textsuperscript{186}

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

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

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

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

\textsuperscript{156} \textit{Id.} at 528.
\textsuperscript{157} \textit{Id.} at 528-29.
\textsuperscript{158} 314 U.S. 160 (1941).
\textsuperscript{159} 437 U.S. at 526 n.9.
\textsuperscript{160} 314 U.S. at 173-74.
\textsuperscript{161} \textit{Id.}; cf. \textit{Hicklin}, 437 U.S. at 534.
chance of being upheld. The validity of such an ordinance would depend upon the appropriate use of a state's power of property and subsidy to attract and hold industry and jobs, and these matters, in turn, implicate the recent state-market-participant doctrine.

VII. THE NEW STATE-MARKET-PARTICIPANT DOCTRINE

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

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

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

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

\(^{162}\) \textit{Hughes}, 426 U.S. at 810.

\(^{163}\) 424 U.S. 645 (1976).

\(^{164}\) \textit{Id.} at 646.

\(^{165}\) \textit{Id.} at 647.
damental to the national unity that ensues when each state is deprived of the power to treat fellow Americans as though they were aliens.\textsuperscript{166} Therefore, nonfundamental status for the right to engage in direct transactions with the state is an arguable possibility. The right to hunt elk from a state's elk herds, for example, is not fundamental in this sense.\textsuperscript{167}

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

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

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

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

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

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\textsuperscript{166} \textit{Baldwin}, 436 U.S. at 380-81.
\textsuperscript{167} \textit{Id.} at 388.
\textsuperscript{168} \textit{Id.} at 388; \textit{Id.} at 388-389.
\textsuperscript{170} 447 U.S. 429 (1980).
\textsuperscript{171} \textit{Id.} at 430-32.
\end{footnotesize}
cement business because private enterprise was not providing enough cement for its citizens. It is arguable, then, that if the commerce clause required the state to behave as an ordinary entrepreneur, it would perpetuate the defects of the private market when the state's reason for entering the market in the first place was to alleviate these defects. Ordinarily, a state should have authority to subsidize or assist cement purchases for its citizens free of the frustration that would ensue from having to share the benefits of its assistance program with nonresidents.

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

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

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

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172 Id. at 430.
173 426 U.S. 794.
175 426 U.S. at 809.
176 Id. at 797, 803 n.13.
177 Id. at 824-26 n.6 (Brennan, J., dissenting).
178 447 U.S. 429.
179 See supra text accompanying notes 174-82.
states could choose whether to subsidize their local firms. This type of competition between the states is fair and has taken place in one form or another for many years.

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

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

C. South-Central Timber

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

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

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180 *Id.* at __, 104 S. Ct. at 1023.
181 *Id.* at __, 104 S. Ct. 2237 (1984).
182 *Id.* at __, 104 S. Ct. 2243-44.
183 *Id.* at __, 104 S. Ct. at 2239 n.4.
184 *Id.* at __, 104 S. Ct. at 2239.
185 *Id.*
ing requirement. Justice Rehnquist and O'Connor, however, were of the opinion that the market-participant doctrine validated the requirement. Justice Powell and Chief Justice Burger, on the other hand, thought that further proceedings were necessary to determine whether the local timber processing requirement was consistent with the market-participant doctrine. They and the four plurality justices voted to reverse the judgement of the Ninth Circuit Court of Appeals which had upheld the requirement on other grounds. Justice Marshall did not participate in the decision.

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

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

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

186 Id. at —, 104 S. Ct. at 2245-47.
187 Id. at —, 104 S. Ct. at 2248-49.
188 Id. at —, 104 S. Ct. at 2248.
189 Id. at —, 104 S. Ct. at 2240.
190 Id. at —, 104 S. Ct. at 2247.
191 Id. at —, 104 S. Ct. at 2246.
192 Id. at —, 104 S. Ct. at 2246.
193 278 U.S. 1 (1928).
the point where the transfer is to private enterprise for export.\textsuperscript{194} Rationally, this analogy should also preclude Alaska from imposing the sawmilling tie by vertical integration, if vertical integration means state ownership of the sawmills and perhaps the logging business as well as the standing timber. This would follow because the effect of a state’s release of its resources for export upon the validity of a tie for their local processing should be the same regardless of whether there is vertical integration of the required economic processes and their property components.

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

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

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

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\item[\textsuperscript{194}] Id. at \textendash, 104 S. Ct. at 2245 n.9.
\item[\textsuperscript{195}] Id. at \textendash, 104 S. Ct. at 2246.
\item[\textsuperscript{196}] 424 U.S. 645 (1976).
\item[\textsuperscript{197}] Cf. Id. U.S. at \textendash, 104 S. Ct. at 2245 n.9.
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business.

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

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

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

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

\[198 \text{Id. at } \ldots, 104 \text{ S. Ct. at } 2244.\]
\[199 \text{Id. at } \ldots, 104 \text{ S. Ct. at } 2245-46.\]
\[200 \text{Id.}\]
\[201 \text{Id.}\]
and assistance, and low wage and tax scales, to mention only some that are familiar. All states can use these incentives. On the other hand, a state that has a deficit of jobs, like a state that has a timber shortage may remain unnecessarily short on population as well if other states have the power to tie living in a state to working there.

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

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

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

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

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202 See supra text accompanying notes 89-122.
203 U.S. at __, 104 S. Ct. at 2245-46.
not want to add to them with a requirement that would increase the city's rate of growth. Further, a stable city will need more than a city-residence rule if its goal is to provide an impetus for expansion. The practical reasons for having a change-of-residence rule suggest that its exercise would essentially be limited to cases of need where a large core city is facing or experiencing deterioration of its tax base.

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

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

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


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

296 See supra text accompanying notes 22-23.
Court, probably would disqualify many of them for city construction work. Still, this disqualification should have been met head on by the Court, it is not an adequate reason for invalidating a change-of-residence rule that discriminates on the ground of state citizenship rather than race.

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

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

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

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

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207 See supra text accompanying notes 29-40.
208 See supra text accompanying notes 1-14.
209 See supra text accompanying notes 72-76.
210 See supra text accompanying notes 67-78.
211 278 U.S. 1 (1928).
212 See supra text accompanying notes 140-151.
214 Robbins v. Shelby County Taxing Dist., 120 U.S. 489, 492-94 (1887).
The Supreme Court, however, could use the state-market-participant doctrine to withdraw most labor relations in the private sector from the regulatory power of Congress. The course of adjudication to accomplish this objective would involve a two-step process. First, most state employment relations would be withdrawn from Congress' commerce power. Second, this enclave of immunity would be used as a springboard to get similar results in the private sector. The state-market-participant doctrine lends itself to both steps. The doctrine appears to stand for the proposition that activity subject to it does not touch the concerns of the commerce clause.\footnote{Hughes, 426 U.S. at 805, 823 n.4.} Taken literally, this would mean that activity within the doctrine would fall beyond the reach of Congress' affirmative power to regulate interstate commerce, as well as outside the negative restraints of the commerce clause.\footnote{Id.}

If this literal interpretation is valid, the hiring of the employees of public contractors who do construction work for the state falls within the state-market-participant doctrine.\footnote{Camden, ___ U.S. at ___, 104 S. Ct. at 1025.} A state, of course, also participates in the marketplace when it hires its own employees. State employment relations, consequently, must also fall within the state-market-participant doctrine. It is arguable, therefore, that state employment relationships, as well as the employment of employees of public contractors, are ordinarily beyond the reach of Congress' commerce power.

State employees, moreover, unlike the employees of public contractors, are also likely to be beyond the protection of the interstate privileges and immunities clause. The Supreme Court will probably hold, when the occasion for a ruling arises, that state employment is not a fundamental right or privilege essential to national unity and, therefore, is not protected by the interstate privileges and immunities clause.\footnote{See supra text accompanying notes 167-77.}

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

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

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

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

\[\text{References:}\]
220 426 U.S. at 845, 851-52.
221 421 U.S. 542 (1975).
222 Id. at 544-45.
223 Id. at 548.
224 426 U.S. 853.
225 Id.
227 Id. See also L. Tribe, supra note 52, at 234-35. Admittedly, the direct-indirect effects test put labor relations in producing activities largely beyond the reach of Congress' commerce power regardless of the magnitude of their impact upon interstate commerce; Carter, 298 U.S. at 308. It would be possible to formulate or manipulate a magnitude test that would classify industrial labor relations as isolated multitudinous fragments that are completely local in nature and, therefore, beyond the reach of Congress' commerce power. Thus, the Court once said: "The relations of employer and employee is a local relation. At common law, it is one of the domestic relations . . . ." Id. Federal antitrust law validly reached industrial labor union activity in intrastate commerce when it was aimed at interstate commerce although, at the time, most labor relations were beyond the reach of Congress' commerce power, especially when the power was exercised to protect labor. Compare the discussion approving application of federal antitrust law to labor unions in Carter, 298 U.S. at 304-05, and Schecter, 295 U.S. at 547, with the decisions in these two cases holding that
statement of a version of this test with its consequences. That would en-
sue from the inability of Congress to regulate wages, hours and working
conditions in the mines, mills, factories and farms in the nation. Due to a
disincentive by states to increase wage scales and other costs that make
industry within their territory noncompetitive in the interstate market,
loss of congressional control over industrial labor relations probably
would mean loss of any effective governmental power over these relations
and restoration of a constitutional regime of laissez-faire. 228

It is true, of course, that there are assurances throughout the National
League of Cities opinion that these developments will not come to pass. 229
These assurances, however, failed to reassure the four Justices
who dissented from the Court's judgment 230 and nothing would prevent
the court from later concluding that the assumptions upon which these
assurances rest are in reality ill-founded. Nor is it significant that, after
National League of Cities, a unanimous Court held that Congress can
apply the Railway Labor Act 231 to the employees of a state railroad. 232
The commerce clause allowed Congress to regulate the intrastate aspects
of railroading when it was also powerless to touch employment relations
in the nation's production activities. 233

Moreover, it is also true that those members of the Court who might
want to free industrial labor relations from Congress' commerce power
have not yet secured a firm position for this purpose within the subject of
state employment relations. Thus, the Court in EEOC v. Wyoming 234
recently held that the federal Age Discrimination in Employment Act, an
exercise of Congress' commerce power, 235 validly forbids a state from for-
cing state game wardens to retire when they become fifty-five years old.
The decision, however, was fought hard and close 236 and could easily be
overturned with a change in the Court's membership.

This foregoing outline of possible developments that could ensue from

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

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

229 426 U.S. at 840-42, 844-45.
230 Id. at 867-68, 875, 880.
233 See the Court's discussion in Schecter, 295 U.S. at 544.
235 Id. at --, 103 S. Ct. at 1064.
236 Id. at --, 103 S. Ct. at 1068 (Burger, C.J., dissenting).
the state-market-participant doctrine is speculative, to be sure, but rests upon more than mere speculation. Hughes v. Alexandria Scrap Corp.\footnote{237} the initial recent state-market-participant case that removed discriminatory state transactions from the negative restraints of the commerce clause,\footnote{238} sits next to National League of Cities in the Supreme Court reports.\footnote{239} The latter case, of course, definitely removes some of the market transactions of a state with its own employees from Congress' commerce power.\footnote{240} Further, the dissenting opinion in Alexandria Scrap asked (in a footnote) whether the state market participant doctrine withdrew state bounty transactions for processing junked cars from Congress' power to regulate commerce as well as from the negative restraints of the commerce clause.\footnote{241} The answer of the majority judges (also given in a footnote) was not responsive to the question.\footnote{242}

Under all of the circumstances, speculation about the significance of the state-market-participant doctrine is appropriate and unavoidable. The doctrine has caused a partial estrangement of two clauses in the constitution that have travelled hand-in-hand\footnote{243} from their common origin.\footnote{244} The state-market-participant doctrine is amenable to uses that are far more precedent-shattering than National League of Cities. Perhaps some day the Supreme Court will explain what the state-market-participant doctrine is really all about, especially considering its far reaching implications.

\footnote{237} 426 U.S. 794 (1976).
\footnote{238} Id. at 810.
\footnote{239} Id. at 832; National League of Cities, 426 U.S. at 883.
\footnote{240} See supra text accompanying notes 225-29.
\footnote{241} 426 U.S. at 822 n.4 (Brown, J., dissenting).
\footnote{242} Id. at 810 n.19.
\footnote{243} See supra text accompanying notes 89-122, 125-161.
\footnote{244} Hicklin, 437 U.S. at 531-32 n.16; Baldwin, 436 U.S. at 379-80.