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## Illinois' New Public Works Employment Residency Requirement: Is Life Boat Economic Policy a Constitutionally Permissible Response to the National Unemployment Problem, 19 J. Marshall L. Rev. 365 (1986)

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## COMMENTS

### ILLINOIS' NEW PUBLIC WORKS EMPLOYMENT RESIDENCY REQUIREMENT: IS LIFE BOAT ECONOMIC POLICY A CONSTITUTIONALLY PERMISSIBLE RESPONSE TO THE NATIONAL UNEMPLOYMENT PROBLEM?

The [United States] Constitution was framed under the dominion 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. B. Cardozo.<sup>1</sup>

On September 20, 1984, new unemployment relief legislation became effective in Illinois. The statute<sup>2</sup> (Preference Act or Act) en-

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1. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935), *quoted with approval in Hicklin v. Orbeck*, 437 U.S. 518, 534 (1978).

2. The 1984 Public Works Employment Preference Act provides:  
EMPLOYMENT OF ILLINOIS WORKERS ON PUBLIC WORKS PROJECTS

\* \* \* \*

#### **2201. Definitions**

§ 1. [T]he following words have the meanings ascribed to them in this Section.

(1) "Illinois laborer" refers to any person who has resided in Illinois for at least 30 days and intends to become or remain an Illinois resident.

(2) "A period of excessive unemployment" means any month immediately following 2 consecutive calendar months during which the level of unemployment in the State of Illinois has exceeded 5% as measured by the United States Bureau of Labor Statistics in its monthly publication of employment and unemployment figures.

#### **2202. Application of Act**

§ 2. [T]his Act applies to all labor on public works projects or improvements, whether skilled, semi-skilled or unskilled, whether manual or non-manual.

#### **2203. Public works projects-employment of Illinois laborers**

§ 3. Whenever there is a period of excessive unemployment in Illinois, every person who is charged with the duty, either by law or contract, of constructing or building any public works project or improvement for the State of Illinois or any political subdivision, municipal corporation or other governmental unit thereof shall employ only Illinois laborers on such project or improvement, and every contract let by any such person shall contain a provision requiring that such labor be used: Provided, that other laborers may be used when Illinois laborers . . . are not available, or are incapable of performing the particular work involved, if so certified by the contractor and approved by the contracting officer.

#### **2204. Non-resident executive and technical experts**

§ 4. Every contractor on a public works project or improvement in this State

hances employment opportunities for Illinois laborers,<sup>3</sup> but eliminates employment opportunities for laborers from neighboring states. The Preference Act requires that contractors employ only Illinois residents<sup>4</sup> on all public works projects<sup>5</sup> in the state whenever there is a "period of excessive unemployment in Illinois."<sup>6</sup> The effect of the Preference Act, therefore, is to deny employment to laborers from neighboring states who seek jobs on Illinois public works projects. Because there is no substantial reason to justify the Act's explicit discrimination against nonresident laborers,<sup>7</sup> and because the degree of discrimination does not bear a close relation to the

may place on such work no more than 3 of his regularly employed non-resident executive and technical experts, even though they do not qualify as Illinois laborers. . . .

**2205. Federal rules and regulations**

§ 5. In all contracts involving the expenditure of federal aid funds . . . this Act shall not be enforced in such manner as to conflict with any federal statutes or rules and regulations.

**2206. Violation-Penalty**

§ 6. Any person who knowingly fails to use Illinois laborers as required in . . . this Act, shall be guilty of a Class C misdemeanor. Each separate case of failure to use Illinois laborers on such public works projects or improvements shall constitute a separate offense.

**2207. Enforcement**

§ 7. [T]his Act shall be enforced by the Department of Labor, which, as represented by the Attorney General, is empowered to sue for injunctive relief against the awarding of any contract or the continuation of any work under any contract for public works or improvements at a time when the provisions of . . . this Act are not being met.

ILL. REV. STAT. ch. 48, ¶ 2201-07 (1985) (footnotes omitted).

3. For the definition of "Illinois laborers," see *id.* at ¶ 2201-(1). See also *supra* note 2, at § 1-(1).

4. Nonresident laborers may be employed only when Illinois laborers are not available or are incapable of performing the type of work involved. ILL. REV. STAT. ch. 48, ¶ 2203 (Supp. 1984). See also *supra* note 2, at § 3.

5. The Preference Act does not define "public works projects." Nevertheless, another section in the "Employment" provisions of the Illinois Revised Statutes (chapter 48—"Wages on Public Works") defines public works as "all fixed works constructed for public use by any public body, other than work done by any public utility company, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds." ILL. REV. STAT. ch. 48, § 39S-2 (1985). Because the Preference Act does not define "public works projects," it appears that the requirements of the Act apply to those projects financed with State of Illinois ("State") tax dollars, and that the Act applies with equal force to those projects which the State does not finance. Intuitively, one would think that if a project is not financed, at least in part, with State funds then it is not a "public" project within the meaning of the Act. Nevertheless, the only definition of "public works" found in the employment provisions of the Illinois Revised Statutes expressly includes projects not financed with State funds. *Id.* Moreover, on its face the Preference Act applies to "any public works project or improvement for the State of Illinois or any political subdivision . . . thereof. . . ." ILL. REV. STAT. ch. 48, ¶ 2203 (1985). See also *supra* note 2, at § 3. For a discussion of the significance of this issue with respect to the constitutionality of the Preference Act, see *infra* notes 94-106 and accompanying text.

6. For the definition of "period of excessive unemployment in Illinois," see ILL. REV. STAT. ch. 48, ¶ 2201-(2) (1985). See also *supra* note 2, at § 1-(2).

7. For a complete discussion of the "substantial reason" requirement, see *infra* notes 61-81 and accompanying text.

particular evil that nonresidents allegedly represent,<sup>8</sup> the Act is unconstitutional under the privileges and immunities clause of the United States Constitution.<sup>9</sup> Furthermore, because the Preference Act overtly blocks the free flow of interstate laborers at the Illinois border in an effort to isolate the state and its citizenry from the national unemployment problem, the Act is also unconstitutional under the commerce clause of the Constitution.<sup>10</sup>

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8. For a complete discussion of the "close relation" test applied in a privileges and immunities clause analysis, see *infra* notes 82-89 and accompanying text.

9. The privileges and immunities clause, U.S. CONST., art. IV, § 2, cl. 1, reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This clause should not be confused with the privileges or immunities clause of the fourteenth amendment, which provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." U.S. CONST. amend. XIV, § 1. Thus, article IV deals with discrimination as to rights recognized by state law, while the fourteenth amendment pertains to the deprivation of rights that are national in origin. Simon, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 379 n.1 (1979) (provides discussion of background and historical development of the Supreme Court's interpretation and application of the clause). See also Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1 (1967) (provides exhaustive discussion of the evolution of Supreme Court and congressional interpretation of the clause). See generally Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 495-99 (1981) (provides historical analysis on the development of privileges and immunities clause jurisprudence and provides comparative analysis under the commerce clause).

For an analysis of the application of the privileges and immunities clause in the context of home state employment preference requirements for public construction projects, see Note, *Construction Worker Residency Requirements: A Constitutional Response*, 17 NEW ENG. L. REV. 461, 461-87 (1982) [hereinafter cited as *Residency Requirements*]. See also Comment, *In-State Preferences in Public Contracting: States' Rights Versus Economic Sectionalism*, 49 U. COLO. L. REV. 205, 209-16, 225-26 (1978) (provides economic analysis of the effects of state preference laws, and constitutional analysis of such laws under the privileges and immunities clause) [hereinafter cited as *Economic Sectionalism*]. See generally Annot., 36 A.L.R. 4th 941, 946-54 (1985) (provides overview of case law examining public works residency requirements under the privileges and immunities clause). For an analysis of the constitutionality of the new Illinois Preference Act under the privileges and immunities clause, see *infra* notes 46-89 and accompanying text.

10. The commerce clause, U.S. CONST. art. I, § 8, cl. 3, reads: "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several states . . ." While on its face the commerce clause simply confers upon Congress the power to regulate commerce among the states, it has long been held that by negative implication (generally referred to as the dormant commerce clause) this constitutional grant of authority to Congress places at least some restrictions on the states regarding the regulation of interstate commerce. See *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2240 (1984) ("the Clause has long been recognized as a self-executing limitation on the power of the states to enact laws imposing substantial burdens on [interstate] commerce"); *Wilson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245, 252 (1829) ("We do not think that the [statute] empowering the . . . company to place a dam across the creek, can . . . be considered as repugnant to the power to regulate commerce in its dormant state. . . ."). See also *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824) (the Court's first encounter with the dormant commerce clause, in which Chief Justice John Marshall found "great force" in the argument that the constitutional grant of power to Congress to regulate interstate commerce precluded any state laws that "would perform the same operation on

In scrutinizing the constitutionality of a statute, courts traditionally find it unnecessary to analyze the statute under more than one constitutional provision. The United States Supreme Court<sup>11</sup> and the United States Court of Appeals for the Seventh Circuit<sup>12</sup>

the same thing." Cf. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (held that the commerce clause precludes state power if the subject of regulation is national in nature, but not if the subject is local).

For a brief but complete discussion regarding the historical development of the restraints implied in the commerce clause, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 320-27 (1978). See also Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 425-35 (1982) (provides comprehensive history regarding the development of dormant commerce clause jurisprudence). See generally Varat, *supra* note 9, at 487-91 (provides history regarding background and development of both the commerce clause and the privileges and immunities clause). Cf. Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 *Wis. L. Rev.* 125 (provides critique of traditional analysis regarding the background and development of commerce clause jurisprudence).

For an illuminating background discussion that reveals the national scope of in-state preference laws and provides a contemporary commerce clause analysis, see *Residency Requirements*, *supra* note 9, at 461-65, 487-94; *Economic Sectionalism*, *supra* note 9, at 209-22 (provides an economic analysis regarding the effects of home-state preference laws, and provides a constitutional analysis of such laws under the commerce clause). See also Note, *Home-State Preferences in Public Contracting: A Study in Economic Balkanization*, 58 *IOWA L. REV.* 576 (1973) (provides comprehensive commerce clause analysis in the context of state preference laws) [hereinafter cited as *Economic Balkanization*]. See generally Annot., 36 *A.L.R.* 4th 941, 958-61 (1985) (provides overview of case law examining public works residency requirements under the commerce clause). For a discussion of the constitutionality of the new Illinois Preference Act under the commerce clause, see *infra* notes 90-132 and accompanying text.

11. *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978) (an Alaska statute, which required that Alaska residents be employed in preference to nonresidents on all projects connected with oil and gas leases to which the state was a party, was held unconstitutional under the privileges and immunities clause). Interestingly, the *Hicklin* Court observed:

Although appellants [nonresidents who were refused employment] raise no commerce clause challenge to the Act, the mutually reinforcing relationship between the Privileges and Immunities Clause of Art. IV and the Commerce Clause — a relationship that stems from their common origin in the Fourth Article of the Articles of Confederation and their shared vision of federalism—renders several Commerce Clause decisions appropriate support for our conclusion [that the Alaska Hire Act violates the privileges and immunities clause].

*Id.* at 531-32 (citation omitted). For the text of the fourth article in the ARTICLES OF CONFEDERATION, see *infra* note 39.

12. *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 496 (7th Cir. 1984) (invalidated Illinois' original preference act under both the privileges and immunities clause, and the commerce clause). Interestingly, after the Seventh Circuit noted that it is normally "otiose, or worse," for a court to unnecessarily decide a constitutional question, *id.* at 496, the court stated that the privileges and immunities clause and the commerce clause "are so closely related in a case of this kind . . . that it would be artificial to ignore one of them." *Id.* Moreover, the court observed that "there is a respectable argument that the framers of the Constitution intended the privileges and immunities clause to play the role that has come to be played instead by the negative [dormant] commerce clause." *Id.* (citing Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 42 at 47-48 (1982)). The Seventh Circuit, therefore, concluded that it "could not be sure that the [original Illinois] preference law does not pass constitutional muster under either clause without considering cases under

have found, however, that the mutually reinforcing relationship between the privileges and immunities clause and the commerce clause necessitates analysis under both clauses when the constitutionality of a state preference act is challenged.<sup>13</sup> This comment, therefore, analyzes the Act under both clauses. Part I traces pertinent background information and the legislative history of the Illinois Preference Act.<sup>14</sup> Part II examines the functional and historical relationship between the privileges and immunities clause and the commerce clause.<sup>15</sup> Part III analyzes the constitutionality of the Act under the privileges and immunities clause<sup>16</sup> and part IV analyzes the Act under the commerce clause.<sup>17</sup>

## I. THE ORIGINS AND LEGISLATIVE HISTORY OF ILLINOIS' PREFERENCE ACT

State legislation requiring public works contractors to employ local residents in preference to nonresident laborers is not unique to Illinois.<sup>18</sup> Many such statutes were passed during the Great Depression when high unemployment caused states to seek some legislative means to reduce the unemployment problem within their borders.<sup>19</sup> Illinois became a part of this wave of protectionist legislation when it enacted its first public works employment preference act in 1939.<sup>20</sup> In essence, the original act required that contractors or sub-

both. . . ." *W.C. M. Window Co.*, 730 F.2d at 496.

13. For an expanded discussion of the interrelationship between the privileges and immunities clause and the commerce clause, see *infra* notes 38-45 and accompanying text.

14. See *infra* notes 18-37 and accompanying text.

15. See *infra* notes 38-45 and accompanying text.

16. See *infra* notes 46-89 and accompanying text.

17. See *infra* notes 90-132 and accompanying text.

18. A majority of the states have enacted legislation that requires contractors and subcontractors to hire local residents as laborers on all public construction projects. *Residency Requirements*, *supra* note 9, at 461 n.3 (lists 27 states). Moreover, one commentator has noted that every state has some sort of resident preference law. Blumoff, *The State Proprietary Exception to the Dormant Commerce Clause: A Persistent Nineteenth Century Anomaly*, 1984 S.I.U. L.J. 73, at 98 n.168 (citing F. MELDER, *STATE AND LOCAL BARRIERS TO COMMERCE IN THE UNITED STATES*, 17-21, 24-32 (1937)).

19. MELDER, *supra* note 18, at 12-14.

20. ILL. REV. STAT. ch. 48, §§ 269-75 (1983). This statute was enacted in 1939 and was never amended. Because this "original" act is virtually identical to the Illinois Preference Act of 1984 and because comparison will serve our constitutional analysis, the original act is reprinted below:

### PREFERENCE TO CITIZENS ON PUBLIC WORKS PROJECTS

#### § 269. Illinois laborers, who are

A person shall be deemed to be an Illinois laborer if he is a citizen of the United States or has received his first naturalization papers and has resided in Illinois for at least one year immediately preceding his employment.

#### § 270. Laborers on public works projects

Laborers on public works projects shall include all labor, whether skilled, semi-skilled or unskilled, and whether manual or nonmanual.

contractors on any public works project for the state or any political subdivision thereof employ only Illinois residents as laborers on such projects.<sup>21</sup>

The legislature never amended the original preference act and the Illinois Supreme Court upheld the constitutionality of the act when it was first challenged.<sup>22</sup> In early 1984, however, both the United States Court of Appeals for the Seventh Circuit<sup>23</sup> and the Illinois Supreme Court<sup>24</sup> declared that the original act violated the Federal Constitution. The Seventh Circuit, in *W.C.M. Window Co.*

**§ 271. Illinois laborers only to be employed on public works projects**

Every person who is charged with the duty, either by law or contract, of constructing or building any public works project or improvement for the State of Illinois or any political subdivision, municipal corporation or other governmental unit thereof shall employ only Illinois laborers on such project or improvement, and every contract let by any such person shall contain a provision requiring that such labor be used: Provided, that other laborers may be used when Illinois laborers . . . are not available, or are incapable of performing the particular type of work involved, if so certified by the contractor and approved by the contracting officer.

**§ 272. Non-resident executive and technical experts**

Every contractor on a public works project or improvement in this state may place on such work not to exceed three (3) of his regularly employed non-resident executive and technical experts, even though they do not qualify as Illinois laborers. . . .

**§ 273. Enforcement not to conflict with federal regulation**

In all contracts involving the expenditure of federal aid funds this Act shall not be enforced in such manner as to conflict with any federal statutes or rules and regulations.

**§ 274. Penalty**

Any person who fails to use Illinois laborers as required in this Act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not to exceed one hundred dollars, or by imprisonment in the county jail for not to exceed thirty days. Each separate case of failure to use Illinois laborers on such public works projects or improvements shall constitute a separate offense.

**§ 275. Department of labor to enforce act**

This Act shall be enforced by the Department of Labor.

ILL. REV. STAT. ch. 48, §§ 269-75 (1983).

21. ILL. REV. STAT. ch. 48, § 271 (1983). At the risk of stating the obvious, the reader should note that this original preference act is substantively identical to the 1984 Preference Act except that the new Act only applies during a "period of excessive unemployment in Illinois," ILL. REV. STAT. ch. 48, § 2203 (1985), whereas the original act contained no such restriction as to its applicability.

22. *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill. 2d 258, 335 N.E.2d 469 (1975). The *Bleigh* court upheld the constitutionality of the original preference act, which was challenged under the United States Constitution as a violation of the privileges and immunities clause of article IV, *id.* at 273-75, 335 N.E.2d at 478-79, and as a violation of the commerce clause. *Id.* at 275, 335 N.E.2d at 479. The court, however, held that the original act's one-year residency requirement for eligibility as an Illinois laborer was unconstitutional under the equal protection clauses of both the Illinois and United States Constitutions. *Id.* at 271, 335 N.E.2d at 477.

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

24. *People ex rel. Bernardi v. Leary Constr. Co.*, 102 Ill. 2d 295, 464 N.E.2d 1019 (1984).

*v. Bernardi*,<sup>25</sup> held that the original Act was unconstitutional under both the privileges and immunities clause<sup>26</sup> and the commerce clause of the Constitution.<sup>27</sup> The Illinois Supreme Court, in *People ex rel. Bernardi v. Leary Construction Co.*,<sup>28</sup> held that the original act was unconstitutional under the privileges and immunities clause without addressing the commerce clause issue.

In response to these two decisions, the Illinois legislature immediately<sup>29</sup> proposed two identical bills to replace the original act.<sup>30</sup> On June 27, 1984, after considerable debate as to the advisability, purpose, and effect of the proposed act,<sup>31</sup> the new Illinois Preference

25. 730 F.2d 486 (7th Cir. 1984).

26. *Id.* at 496-98.

27. *Id.* at 493-96.

28. 102 Ill. 2d 295, 464 N.E.2d 1019 (1984).

29. The timing of the legislature's action indicates its resolve to have some, albeit constitutionally infirm, preference act on the books in Illinois. On March 16, 1984, the Seventh Circuit declared the original act unconstitutional in *W.C. M. Window Co.*, 730 F.2d at 486. On April 4, 1984, the Illinois Supreme Court also declared that the original act was unconstitutional. *Leary*, 102 Ill. 2d at 295, 464 N.E.2d at 1019. The next day, April 5, 1984, a "new" Preference Act, House Bill 2836, was introduced and had its first reading on the floor of the House. *See 2 Legislative Synopsis and Digest*, 15 at 1375-76 (Ill. 83rd Gen. Ass. H.2836, 1984). On April 13, 1984, the same "new" Act was reintroduced as a rider to House Bill 3031. *See id.* at 1449-50. The Senate passed House Bill 3031 on June 25, 1984. *See 83d ILL. LEG. REC. H.3031* at 112 (daily ed. June 25, 1984). The House concurred with the Senate's amendments on June 27, 1984. *See 83d ILL. LEG. REC. H.3031* at 108 (daily ed. June 27, 1984). In less than three months, therefore, the Illinois legislature introduced and passed a new Preference Act, Article 2 in House Bill 3031, which was sent to the Governor for his signature. Governor Thompson signed the bill into law on September 20, 1984. *See P.A. 83-1472*, 1984 Ill. Legis. Serv. 7 at 316-20 (West). The text of the new Illinois Preference Act appears *supra* note 2.

30. *Compare* Ill. H.2836, 83d Gen. Ass. (1984) with Ill. H.3031, 83d Gen. Ass. (1984).

31. The debate in the House immediately preceding final passage of the new Preference Act illustrates the diversity of opinion concerning the purpose, advisability, and effect of the proposed act. For example, representative Vinson, drawing an analogy, rhetorically asked the Act's sponsor, representative Currie, what happened "when the Emperor shut off Japan to the world?" And what happened "when the Chinese built the Great Wall of China?" 83d ILL. LEG. REC. H.3031 at 99 (daily ed. June 27, 1984). Representative Vinson answered his own questions stating:

What happened when the Emperor shut off Japan and what happened when the Chinese built the Great Wall of China was that both civilizations stagnated. There was no economic growth. There was no economic vitality. Now we created in this country a very different philosophy . . . of trade-free enterprise. [H.3031] is a pernicious Bill that would destroy our free enterprise economy. . . .

*Id.* at 99-100. In response, Representative Bowman spoke in support of H.3031, asserting that the "reason that the Chinese's economy stagnated is because they imported Mongolians to build that wall. If they had used Chinese to build that wall, their economy would have moved forward, and that's what we're trying to do here." *Id.* at 100. Later, during the same debate, Representative Friedrich observed that the more he listened,

the more the argument about the Great Wall of China makes sense. This is the United States of America, and people and goods flow freely across state lines. We've got [sic] people in Illinois [who] go to other states and work. Now, [if]



Act, House Bill 3031, was sent to the Governor to be signed into law.<sup>32</sup> Although one might have expected the legislature to draft a completely new act, thereby avoiding the possibility that the Act would be challenged on the same constitutional grounds as its predecessor, the legislature failed to do so.<sup>33</sup> From the constitutional perspective of this comment, the new Preference Act is identical to the original act with one exception. The new Act only applies during a "period of excessive unemployment in Illinois," whereas the original act applied irrespective of the state's unemployment rate.<sup>34</sup>

Before concluding this review of the Preference Act's legislative history, two critical observations must be noted. First, neither the Act nor its legislative record contain any legislative findings of fact. The legislature did not cite any statistics indicating the number of nonresidents who are or have been employed on Illinois public works projects, or indicating the number of Illinois residents, if any, who are unemployed as a result of nonresident employment on such

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we pass this Bill [and] every other state in [the] Union pass[es] a similar Bill, you'll have people confined to their own state. That's just like it is in Russia.

They tell you where you can work, where you can cross a border. . . .

*Id.* at 106-107. In response, Representative Panayotovitch spoke in support of the proposed Preference Act and observed:

This is unemployment relief, economic relief, to help [Illinois residents] that cannot find jobs. And if you're not going to start worrying about the people in your neighborhood, and your county, and your district, [then] you're going to [have] to go back [to your constituents] and say that you did not vote for a Bill that could [have] possibly put them back to work . . . .

*Id.* at 107 (emphasis added). The sponsor of the proposed Preference Act (H.3031), Representative Currie, had the final word prior to the vote. She urged a "yes" vote, and summarized as follows:

House Bill 3031 targets the Illinois worker. It says there will be a preference. . . . [T]he issue is public construction projects, there are no walls being built in this provision. Most states have residential preference . . . statute[s]. We've had the same in . . . Illinois since 1939. I think the discussion today has been a picky discussion. It has not dealt with the real concept here, which is to say let's help our Illinois economy grow.

*Id.* at 107-08.

32. See 83d Ill LEG. REC. H.3031 at 108 (daily ed. June 27, 1984). Governor Thompson signed House Bill 3031 into law on September 20, 1984. See 1984 Ill. Legis. Serv. 7, at 316-20 (West).

33. A side-by-side comparison of the original and "new" Illinois preference acts (see *supra* notes 2 and 20 respectively) reveals that the "new" Act is virtually the mirror image of the original act except: (A) the period of residency to qualify as an "Illinois laborer" has been decreased from one year to 30 days. Compare ILL. REV. STAT. ch. 48, § 269 (1983) with ILL. REV. STAT. ch. 48, ¶ 2201 (1985); (B) the new Act applies only during a "period of excessive unemployment in Illinois," whereas the original act contained no such restriction as to its applicability. Compare ILL. REV. STAT. ch. 48, § 271 (1983) with ILL. REV. STAT. ch. 48, ¶ 2203 (1985); and (C) the new Act adds a *mens rea* requirement, whereas the original act contained no such requirement. Compare ILL. REV. STAT. ch. 48, § 274 (1983) with ILL. REV. STAT. ch. 48, ¶ 2206 (1985).

34. Compare ILL. REV. STAT. ch. 48, § 271 (1983) with ILL. REV. STAT. ch. 48, ¶ 2203 (1985). For a discussion regarding the constitutional significance of the limited applicability of the new Act, see *supra* notes 86-89 and accompanying text.

projects. In short, the need for the Act has not been established because no factual data has been cited indicating that enforcement of the Act will reduce unemployment in Illinois.<sup>35</sup> Second, although the Act's ostensible purpose is to reduce unemployment in Illinois, the legislative record indicates that parochial economic protectionism motivated the legislature to pass the Act.<sup>36</sup> An examination of the legislative debates reveals that the legislature is attempting to insulate its constituents and the state treasury from the economic impact of the national unemployment problem, and that the legislature intended to reach this goal through the enactment of legislation that blocks the interstate flow of laborers at the Illinois border.<sup>37</sup>

## II. RELATIONSHIP BETWEEN THE PRIVILEGES AND IMMUNITIES CLAUSE AND THE COMMERCE CLAUSE

The privileges and immunities clause, and the commerce clause were written into the Constitution in order to help form the several states into a union.<sup>38</sup> Although these clauses are not contained in the

35. For a discussion of the constitutional significance of this absence of fact finding, see *infra* text accompanying notes 68-81.

36. See 83d ILL. LEG. REC. H.3031 at 103-04 (statement of Representative Currie) (daily ed. June 27, 1984). The Preference Act's sponsor, Representative Currie, spoke in support of the Act and indicated that the purpose of the Act is

. . . to reiterate the General Assembly's commitment to the notion that public taxpayer dollars on public construction projects should find their way back into the Illinois economy — help stabilize the Illinois economy by hiring people who live within the state. . . . We're talking about stabilizing an economy. . . . I think this is the kind of [legislation] that will help Illinois get back off the economic ground and put . . . some growth back into our way of doing business.

*Id.* Representative McNamara also spoke in support of the Act, citing a number of reasons to vote for its passage:

Number one, we've seen an economic downturn in Illinois that is unprecedented over the last few years. . . . What this Bill [H.3031] seems to address and does so quite adequately is the fact that Illinois taxpayers' money will be used on projects to hire Illinois people so they become taxpayers and help the economy of Illinois.

*Id.* at 105. Finally, Representative Panayotovitch, a co-sponsor of the Act who apparently failed to see that unemployment is a national problem, urged that the House should adopt the Act because:

We've got to put people [i.e., Illinois residents] back to work. Let's put money in their [our constituents'] pockets. We're going to save the state money by taking them off the unemployment rolls. . . . This [Act] will not cost the state any money. It will basically save the state some money. Unemployment is a statewide problem.

83d ILL. LEG. REC. H.2836 at 82 (statement of Representative Panayotovitch) (daily ed. May 23, 1984). See also *supra* note 31 (statement of Representative Bowman; statement of representative Panayotovitch; statement of Representative Currie).

37. For excerpts from the legislative debates, see *supra* notes 31 and 36.

38. Regarding the privileges and immunities clause, see *United Bldg. & Constr. v. Mayor of Camden*, 465 U.S. 208, 220 (1984) ("The Privileges and Immunities Clause . . . imposes a direct restraint on state action in the interests of interstate harmony. . . . [It is] concern[ed] with [interstate] comity. . . ."); *Hicklin v. Orbeck*,

same section of the Constitution, their common source was the fourth article of the Articles of Confederation.<sup>39</sup> The common purpose of the clauses is to establish a "norm of comity" among the states<sup>40</sup> and eliminate the balkanizing<sup>41</sup> tendency generated when states deny residents of other states the commercial privileges granted to their own residents.<sup>42</sup> The clauses act in conjunction to provide a free flow of people and business activities among the states. The commerce clause protects the common market among the states,<sup>43</sup> while the privileges and immunities clause protects the

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437 U.S. 518, 523-24 (1978) (the clause "establishes a norm of comity . . . that is to prevail among the States with respect to their treatment of each other's residents."); *Toomer v. Witsell*, 334 U.S. 385, 395 (1948) ("The primary purpose of this clause . . . was to help fuse into one Nation a collection of independent, sovereign States."). See generally Simon, *supra* note 9, at 383-85 (provides historical background on purpose and scope of the clause).

Regarding the commerce clause, see *South-Central Timber Dev., Inc. v. Wunnicke*, 104 S. Ct. 2237, 2242 (1984) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) ("The Commerce Clause was designed 'to avoid the tendencies toward economic Balkanization that had plagued relations among the colonies and later among the States under the Articles of Confederation.'")); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978) (quoting *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949) (the purpose of the clause embodies the "principle that our economic unit is the Nation, . . . the states are not separable economic units.")); *Polar Co. v. Andrews*, 375 U.S. 361, 374 (1964) (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935) (one of the "chief occasion[s] of the commerce clause was the mutual jealousies and aggressions of the States, taking form in custom barriers and other economic retaliation.")). See generally Anson and Schenkkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1980) (provides an overview regarding the states rights versus federalism dichotomy in the context of state preference laws); *Economic Sectionalism*, *supra* note 9, at 216-22 (provides a commerce clause analysis of state preference laws in the context of public contracting, and concludes that such laws are contrary to the spirit of national unity embodied in the clause).

39. Article IV of the ARTICLES OF CONFEDERATION provided:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each . . . state . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof. . . .

19 JOURNALS OF THE CONTINENTAL CONGRESS 214-15 (G. Hunt ed. 1912).

40. Comity is defined as: "Courtesy; . . . respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will. . . ." BLACK'S LAW DICTIONARY 242 (5th ed. 1979).

41. To balkanize is "to break up into small, mutually hostile political units. . . ." WEBSTER'S DELUXE UNABRIDGED DICTIONARY 142 (2d ed. 1979). Cf. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 113 (3d ed. 1967) ("to divide a country into small quarrelsome, ineffectual states").

42. See *supra* note 38 and sources cited therein.

43. See, e.g., *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 539 (1949) (the commerce clause embodies the "principle that our economic unit is the Nation, . . . [a] free trade unit. . . . Our system, fostered by the Commerce Clause, is that every . . . craftsman shall . . . have free access to every market in the Nation, and no foreign state will by customs, duties or regulation exclude them.").

out-of-state citizen's<sup>44</sup> right to participate in that market on an equal footing with citizens of the regulating state.<sup>45</sup>

The aim and effect of the Illinois Preference Act are in direct conflict with both the spirit and common purpose of these clauses. The Act promotes economic balkanization because it builds a protective regulatory wall around the state. This bulwark supports Illinois residents, but denies similar support to nonresidents. The Act, therefore, impedes the free flow of laborers in the interstate labor market and denies nonresidents the right to participate in that market on an equal footing with Illinois residents. Such discriminatory exclusion of nonresidents does not strengthen the Union and is contrary to the notion of comity. In short, the Act evinces blatant provincialism: life boat economic policy upon a sea of national unemployment.

### III. SCRUTINY OF THE ILLINOIS PREFERENCE ACT UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE

There has been a dramatic increase in the national unemployment rate since the early 1970's from a low of 3.5 percent in 1969 to a high of 9.7 percent in 1982.<sup>46</sup> This increase was accompanied by a spate of judicial decisions in which the courts declared that local employment preference acts are unconstitutional under the privi-

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44. In *United Building*, the Court observed that "[i]t is now established that the terms 'citizen' and 'resident' are 'essentially interchangeable' for purposes of analysis of most cases under the Privileges and Immunities Clause." 465 U.S. at 216 (citation omitted). See also *Hicklin*, 437 U.S. at 524 n.8 (same principle); *Austin v. New Hampshire*, 420 U.S. 656, 662 n.8 (1975) (same principle).

45. E.g., *Hicklin*, 437 U.S. at 524, which recently reaffirmed that the purpose of the privileges and immunities clause is

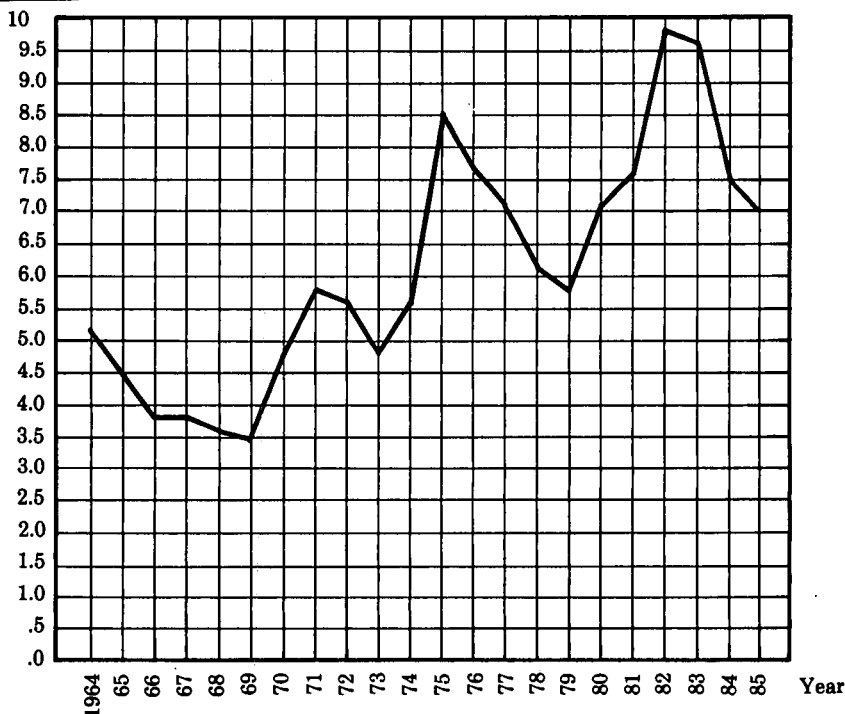
to place the citizens of each State upon the same footing with citizens of other states, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws.

*Id.* at 524 (quoting *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869)).

46. The following graphic description of the national unemployment rate depicts the yearly average for all civilian workers from 1964 through 1985:

leges and immunities clause.<sup>47</sup> These decisions indicate that a three-part analysis must be performed to determine whether the new Illinois Preference Act is constitutional under the privileges and immunities clause.<sup>48</sup> As a threshold matter, it must be determined

Rate (%)



BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 33 EMPLOYMENT AND EARNINGS, No. 2 (Feb., 1986) (Table A-3).

47. *E.g.*, *Hicklin*, 437 U.S. at 525-28 (held that Alaska's preference act was unconstitutional under the privileges and immunities clause); *W.C. M. Window Co.*, 730 F.2d at 496-98 (held that the original Illinois preference act was unconstitutional under the privileges and immunities clause); *Leary*, 102 Ill.2d at 299-300, 464 N.E.2d at 1021-22 (held that the original Illinois preference act was unconstitutional under the privileges and immunities clause); *Neshaminy Constructors, Inc. v. Krause*, 181 N.J. Super. 376, 437 A.2d 733 (1981) (held that New Jersey's preference act was unconstitutional under the privileges and immunities clause); *Salla v. County of Monroe*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979) (held that New York's preference act was unconstitutional under the privileges and immunities clause), *cert. denied sub nom. Abrams v. Salla*, 446 U.S. 909 (1980); *Laborers Local Union No. 374 v. Felton Constr. Co.*, 98 Wash. 2d 121, 654 P.2d 67 (1982) (held that Washington's preference act was unconstitutional under the privileges and immunities clause). *Cf. United Bldg.*, 465 U.S. at 217-18 (held that a Camden, New Jersey preference act was subject to the strictures of the privileges and immunities clause).

48. *See, e.g., United Bldg. & Constr.*, 465 U.S. at 218-19; *Hicklin*, 437 U.S. at 525-26; *W.C. M. Window Co.*, 730 F.2d at 497-98; *Leary*, 102 Ill. 2d at 299-300, 464 N.E.2d at 1021-22. *See also The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 75-86 (1978) (indicates that the three-part analysis under the privileges and immunities clause is composed of a two-step inquiry, with the second step composed of two

whether the Act burdens one of those privileges or immunities that the clause protects.<sup>49</sup> Then it must be determined whether nonresidents are a peculiar cause of the problem that the state seeks to eliminate.<sup>50</sup> Finally, it must be determined whether the degree of discrimination inflicted on nonresidents is closely related to the problem that the state seeks to cure.<sup>51</sup>

As an initial matter, then, it must be determined whether the Preference Act affects an interest or privilege that the privileges and immunities clause protects. More precisely, it must be determined whether a nonresident's interest in employment on public works projects in Illinois is "sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.'"<sup>52</sup> In *United Building & Construction Trades Council, Inc. v. Mayor of Camden*,<sup>53</sup> the United States Supreme Court held that a nonresident's interest in employment on another state's public works project is sufficiently fundamental to merit protection under the privileges and immunities clause.<sup>54</sup> This holding is consistent with the Court's prior decision in *Hicklin v. Orbeck*,<sup>55</sup> which held that state discrimination against nonresidents seeking to "ply their trade, practice their occupation, or pursue a common calling" in the state is *prima facie* unconstitutional under the privileges and immunities clause.<sup>56</sup> When the Illinois Supreme

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parts).

49. See *infra* text accompanying notes 52-60.

50. See *infra* text accompanying notes 61-81.

51. See *infra* text accompanying notes 82-89.

52. *United Bldg.*, 465 U.S. at 218 (quoting *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 388 (1978)).

53. 465 U.S. 208 (1984).

54. *Id.* at 222. See also *Hicklin*, 437 U.S. at 524-25; *W.C. M. Window Co.*, 730 F.2d at 497-98; *Leary*, 102 Ill. 2d at 299, 464 N.E.2d at 1021.

In *United Building*, the Court scrutinized the constitutionality of a municipal preference act similar to the Illinois Act, and stated: "Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the [privileges and immunities] Clause [of Article IV]." 465 U.S. at 219. Moreover, the Court concluded that the "exercise of [state] power to bias the employment decisions of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause." *Id.* at 221.

55. 437 U.S. 518 (1978). In *Hicklin*, the Court held unconstitutional, under the privileges and immunities clause, an Alaska statute which required that Alaska residents be hired in preference to nonresidents on all oil and gas exploration projects to which the state was a party. *Id.* at 523-31. For a comprehensive analysis of the *Hicklin* decision, see Schuman, *Domicile Preferences in Employment: The Case of Alaska Hire*, 1978 DUKE L.J. 1069. See generally J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 304 (2d ed. 1983) (discusses the *Hicklin* decision's significance in privileges and immunities clause jurisprudence).

56. *Hicklin*, 437 U.S. at 524. See also *Ward v. Maryland*, 79 U.S. (12 Wall.) 418, 430 (1871), quoted in *Hicklin*, 437 U.S. at 525 ("the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation.").

Court declared Illinois' original preference act unconstitutional in *Leary*, it followed *Hicklin*, and ruled that the "subject of one's livelihood invokes the protection of the clause."<sup>57</sup>

Indeed, there has never been any disagreement that "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State."<sup>58</sup> Striking at the central objective of the privileges and immunities clause—to protect the out-of-state resident's right to pursue his or her lawful trade in any state—the Illinois Preference Act expressly denies the right to employment of all out-of-state laborers who seek jobs in the Illinois public works market. In so doing, the Act contravenes the long line of United States Supreme Court decisions invalidating state laws that limit the commercial and employment opportunities of nonresidents.<sup>59</sup> The conclusion is inescapable that the Act's facial discrimination against nonresident laborers renders the Act subject to the strictures of the privileges and immunities clause and renders the Act *prima facie* unconstitutional.<sup>60</sup>

The conclusion that Illinois' Preference Act facially discriminates against the protected privilege of employment does not end the inquiry, however, because like other constitutional provisions, the mandate of the privileges and immunities clause is not absolute.<sup>61</sup> The clause does not preclude discrimination against citizens of other states where there is a "substantial reason" to justify the discrimination beyond the mere fact that they are citizens of another state.<sup>62</sup> Any justification offered for the discriminatory statute in question, however, must include a showing that nonresidents somehow "constitute a peculiar source of the evil at which the stat-

57. *Leary*, 102 Ill. 2d at 299, 302, 464 N.E.2d at 1021, 1023 (citing *Hicklin*, 437 U.S. at 524, and noting that *United Bldg.*, 465 U.S. at 208, was in accord).

58. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (a South Carolina statute that taxed out-of-state shrimp fisherpersons at a significantly higher rate than local fisherpersons was held unconstitutional under the privileges and immunities clause).

59. *E.g.*, *Hicklin v. Orbeck*, 437 U.S. 518 (1978); *Mullaney v. Anderson*, 342 U.S. 415 (1952); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870).

60. *See W.C. M. Window Co.*, 730 F.2d at 497 (citing as authority *United Bldg.*, 465 U.S. at 221-22; *Hicklin*, 437 U.S. at 526).

61. *Toomer*, 334 U.S. at 396, cited with approval in *United Bldg.*, 465 U.S. at 222.

62. *United Bldg.*, 465 U.S. at 222 (citing with approval *Toomer*, 334 U.S. at 396). *See also Hicklin*, wherein the Court observed that

although the Privileges and Immunities Clause 'does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it . . . , [i]t does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.'

437 U.S. at 525 (quoting with approval *Toomer*, 334 U.S. at 396). *Accord W.C. M. Window Co.*, 730 F.2d at 497; *Leary*, 102 Ill. 2d at 299, 464 N.E.2d at 1021.

ute is aimed."<sup>63</sup> Every inquiry under the privileges and immunities clause, therefore, must determine whether such reasons exist, and if so, whether the degree of discrimination bears a "close relation" to these reasons.<sup>64</sup>

Is there a "substantial reason" to justify the Preference Act's virtually absolute<sup>65</sup> prohibition against employing nonresident laborers on public works projects in Illinois? The ostensible reason why the Act was written is to relieve unemployment in Illinois.<sup>66</sup> Unemployment relief for Illinois residents is a legitimate and desirable goal, but it is not a "substantial reason" to justify inflicting unemployment on nonresidents. Yet, the Preference Act requires that if a nonresident is employed on a public works project, he or she must be replaced with an Illinois resident. This requirement is contrary to the spirit of national unity underlying the privileges and immunities clause.<sup>67</sup> It represents a shortsighted attempt to alleviate Illinois' unemployment problem because it simply shifts a portion of the national unemployment problem from Illinois to other states. The unemployment problem is a nationwide illness. Illinois' zero-sum solution may help cure Illinois' portion of the problem, but it unacceptably transfers the burden of Illinois' unemployment to other states of the Union.

Even if we accept the dubious assumption that local unemployment relief constitutes a valid justification for the Act's discrimination,<sup>68</sup> nonresident laborers must still be shown to be a "peculiar

63. *United Bldg.*, 465 U.S. at 222 (quoting *Toomer*, 334 U.S. at 398). See also *Hicklin*, 437 U.S. at 525-26 (quoting *Toomer*, 334 U.S. at 398) ("A 'substantial reason for the discrimination' would not exist . . . 'unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the [discriminatory] statute is aimed.'"). *Accord W.C.M. Window Co.*, 730 F.2d at 497; *Leary*, 102 Ill. 2d at 299, 464 N.E.2d at 1021.

64. *United Bldg.*, 465 U.S. at 222 (citing with approval *Toomer*, 334 U.S. at 396). Cf. *Hicklin*, 437 U.S. at 526 (quoting *Toomer*, 334 U.S. at 399) ("there must be a 'reasonable relationship between the danger represented by non-citizens as a class, and the . . . discrimination practiced upon them.'"); *Leary*, 102 Ill. 2d at 299, 464 N.E.2d at 1021 ("the discrimination must bear a substantial relationship to the evil that nonresidents present.").

65. The Preference Act's prohibition against nonresident laborers is not absolute, but its practical effect is absolute. The Act provides that nonresident laborers may be employed on public works projects in Illinois when Illinois laborers are either "not available, or are incapable of performing the particular type of work involved. . . ." ILL. REV. STAT. ch. 48, § 2203 (1985). Practically speaking, this provision will never be invoked because there are always people in Illinois who are available (and desire) to work as laborers. Moreover, because the Illinois labor force is highly skilled and educated, it will be capable of performing virtually any type of work involved in a public construction project.

66. See *supra* note 36 and accompanying text.

67. See *supra* text accompanying notes 38-45.

68. In *Hicklin*, the Court noted that its previous decisions "made at least dubious" the assumption "that a State may validly attempt to alleviate its unemployment problem by requiring private employers within the State to discriminate against non-



source" of unemployment in Illinois. This is because unemployment relief cannot be considered a "substantial reason" to justify the Act's discrimination unless nonresidents are proved to be a "peculiar source" of the unemployment that the Act seeks to alleviate.<sup>69</sup> In short, there must be a substantial justification for the discrimination that is independent of the fact that nonresident laborers are citizens of other states. Considering the myriad of causes for unemployment in Illinois, such as the state of the national economy, the state of Illinois' economy, and the influx of undocumented aliens,<sup>70</sup> it is impossible to prove that nonresident laborers are a "peculiar" cause of unemployment in Illinois.

Neither the Act nor its legislative record reveals any facts that prove or tend to prove that nonresidents are a "peculiar" cause of Illinois' unemployment problem.<sup>71</sup> This lack of legislative fact finding is significant given the fact that both the Seventh Circuit in *W.C. M. Window Co.*, and the Illinois Supreme Court in *Leary*, recently declared that the original preference act was unconstitutional under the privileges and immunities clause specifically because the state failed to offer any proof that nonresidents are a "peculiar" cause of Illinois' unemployment problem.<sup>72</sup> In *W.C. M. Window Co.*,

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residents." 437 U.S. at 526. The Court cited *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870), as one such previous decision. *Hicklin*, 437 U.S. at 526. The Court stated that *Ward* stood for the proposition "that a resident of one State is constitutionally entitled to travel to another State for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other State." *Hicklin*, 437 U.S. at 525. Moreover, the *Hicklin* Court indicated that *Edwards v. California*, 314 U.S. 160 (1941), also supported this proposition. 437 U.S. at 526 n.9. In *Edwards*, the Court invalidated, as an unconstitutional burden on interstate commerce, a statute prohibiting anyone from bringing a nonresident "indigent person" into California. 314 U.S. at 173-74. The state asserted that the statute was a valid exercise of its police power to regulate, *inter alia*, the finances of the state. *Id.* at 173. The Court rejected this assertion invoking the commerce clause "prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons . . . across its borders." *Id.* at 173.

It must be noted, however, that the current Burger Court appears willing to allow the states to attempt to justify employment preference acts as a means to deal with the state's unemployment problem. Judge Posner, speaking for the Seventh Circuit in *W.C. M. Window Co.*, stated that "the intimation in *Hicklin*, [437 U.S. at 526] . . . that unemployment may never be a valid ground for discriminating against nonresidents can no longer be considered authoritative" in light of the Supreme Court's holding in *United Building v. W.C.M. Window Co.*, 730 F.2d at 497. In *United Building*, the Court allowed the City of Camden to attempt to justify the discrimination its preference act inflicted on nonresidents, and quoted from *Toomer* that "the states should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *United Building*, 465 U.S. at 222-23 (citing *Toomer*, 334 U.S. at 396).

69. See *supra* notes 62 & 63 and accompanying text.

70. See *infra* note 88 and accompanying text.

71. See *supra* text accompanying note 35 and accompanying text.

72. In *W.C. M. Window Co.*, the court noted that the defendant, the Illinois Department of Labor, "presented no facts relating to actual or probable as opposed to purely conjectural harms from allowing nonresidents to work on public construction projects in Illinois. . . ." 730 F.2d at 496. The court also noted that *Hicklin*, and

the court noted that since the *Hicklin*<sup>73</sup> decision and the recent outpouring of state court cases invalidating preference laws much like Illinois',<sup>74</sup> "Illinois must have known" that it had to make a factual showing in order to justify the original preference act's discrimination against nonresidents.<sup>75</sup> Illinois, however, presented no facts even though the Director of the Illinois Department of Labor, who was the defendant in the case, had direct access to all employment/unemployment data.<sup>76</sup> If nonresidents are a "peculiar source" of unemployment in Illinois, then why did Illinois fail to produce the necessary factual proof in both *W.C. M. Window Co.*,<sup>77</sup> and *Leary*?<sup>78</sup>

Furthermore, if facts can be found proving that nonresident laborers are a "peculiar" cause of Illinois' unemployment problem, then why did the legislature not recite any such findings of fact when it drafted or debated the need for the new Act? Indeed, if it is possible to produce facts proving that nonresidents are a "peculiar" cause of unemployment in another state, then why was the state of New York unable to produce such facts in *Salla v. County of Monroe*,<sup>79</sup> why was the state of Washington unable to produce such facts in *Laborers Local Union No. 374 v. Felton Construction*,<sup>80</sup> and why was the state of Massachusetts unable to produce such facts in

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*United Bldg.*, "make clear that there must be some evidence of the benefits of a residents-preference law in dealing with a problem created by nonresidents, and Illinois has presented none." 730 F.2d at 497 (emphasis in original). In *Leary*, the court observed:

There is nothing in the record, including the complaint itself, to show that nonresident laborers are a cause of unemployment in Illinois. Because no relationship has been established between nonresident employment on public works projects and resident unemployment, the nonresident laborers cannot be considered a 'peculiar source' of the evil of unemployment.

102 Ill. 2d at 299-300, 464 N.E.2d at 1022.

73. *Hicklin*, 437 U.S. at 526-27.

74. In *W.C. M. Window Co.*, 730 F.2d at 498, the court cited a number of state court decisions that had followed *Hicklin* and declared unconstitutional preference laws much like Illinois'. See *Neshaminy Constructors, Inc. v. Krause*, 181 N.J. Super. 376, 437 A.2d 733 (1981); *Salla v. County of Monroe*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S. 878 (1979), *cert. denied sub nom.*, *Abrams v. Sala*, 446 U.S. 909 (1980); *Laborers Local Union No. 374 v. Felton Constr. Co.*, 98 Wash. 2d 121, 654 P.2d 67 (1982).

75. *W.C. M. Window Co.*, 730 F.2d at 498.

76. *Id.* Significantly, the Director of the Illinois Department of Labor was plaintiff in *Leary*, 102 Ill. 2d at 295, 464 N.E.2d at 1019.

77. *W.C. M. Window Co.*, 730 F.2d at 498.

78. *Leary*, 102 Ill. 2d at 299-300, 464 N.E.2d at 1022.

79. 48 N.Y.2d 514, 523, 399 N.E.2d 909, 914, 423 N.Y.S. 878, 882 (1979) ("far from any demonstration of a close relationship between nonresident employment on public works projects and unemployment rolls, there is nothing in this record to connect the two at all. . . . [N]othing to indicate that an influx of nonresidents for any reason is a major cause of our unemployment."), *cert. denied sub nom.*, *Abrams v. Sala*, 446 U.S. 909 (1980).

80. 98 Wash. 2d 121, 128-29, 654 P.2d 67, 70-71 (1982) ("Neither appellants nor the State provides any evidence that hiring out-of-state workers would constitute . . . a 'peculiar source' of evil at which the statute is aimed.").

*Massachusetts Council of Construction Employers, Inc. v. Mayor of Boston?*<sup>81</sup> The answer is that it is not possible to produce facts proving that nonresidents are a "peculiar source" of another state's unemployment problem because there are various other significant causes that contribute to the problem. The Preference Act, therefore, is unconstitutional under the privileges and immunities clause because there is no substantial reason for its discrimination against nonresident laborers beyond the fact that they are residents of other states.

Assuming, arguendo, that Illinois can produce facts proving that nonresidents are a "peculiar source" of unemployment in Illinois, the degree of the Preference Act's discrimination against nonresidents must still be shown to bear a "close relation" to the evil nonresidents present.<sup>82</sup> In other words, for the Act to be constitutional, it must be "closely tailored" to aid the unemployed it is intended to benefit without sweeping too broadly in its prohibition.<sup>83</sup> Nevertheless, this examination of the Illinois Preference Act, like every inquiry under the privileges and immunities clause, must proceed with due regard for the general rule that the states should be accorded "considerable leeway in analyzing local evils and in prescribing appropriate cures."<sup>84</sup> Notwithstanding this admonition, however, there are two reasons why the Act's substantively unqualified discrimination against nonresidents is not closely related to the evil they present.

First, the Act is not "closely tailored" to aid the unemployed it is intended to benefit. The Act requires that both employed and unemployed residents be hired in preference to nonresidents. There is no substantial reason to prefer employed residents over unemployed nonresidents. This is particularly true because the Act is intended to reduce unemployment, but unemployment will not be reduced through the use of a hiring preference that favors employed residents. In short, the Act sweeps more broadly than necessary to achieve its goal because unemployment can be reduced with an act

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81. 384 Mass. 466, 477, 425 N.E.2d 346, 353 (1981) (there must be "a clear demonstration that out-of-state residents are a peculiar source of high unemployment. [Citation omitted] Such a showing is not made on the record before us."), *rev'd on other grounds*, *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983).

82. See *supra* note 64 and accompanying text. See also *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57, 83-86 (1978) (discusses the "close relation" test under privileges and immunities clause analysis); *Residency Requirements*, *supra* note 9, at 469-70 (analyzes the *Toomer* "close relation" test and reviews its application in *Hicklin*).

83. *Hicklin*, 437 U.S. at 528, 529. See also Schuman, *supra* note 55, at 1079-85 (provides detailed analysis of the *Toomer/Hicklin* "close relation" test).

84. *Toomer*, 334 U.S. at 396, quoted with approval in *United Bldg.*, 465 U.S. at 222-23.

that is exclusively aimed at helping the unemployed in Illinois. In *Hicklin*, the Court declared Alaska's preference act unconstitutional because, *inter alia*, it preferred employed as well as unemployed Alaskans over nonresidents.<sup>85</sup> For this reason, therefore, the Preference Act fails to withstand scrutiny under the "close relation" test.

Second, the degree of the Act's discrimination against nonresidents is not closely related to the unemployment that nonresidents reputedly cause. This is because the application of the Act's 100 percent discriminatory mandate<sup>86</sup> is not directly related to the number of nonresidents employed on Illinois public works projects. That is, whether the Act applies at any particular time does not depend, as it should, on the number of nonresidents currently displacing Illinois laborers on public works projects. Rather, the Act applies whenever there is a "period of excessive unemployment in Illinois." These periods occur when Illinois' monthly unemployment rate was above five percent for two consecutive months immediately preceding the current month.<sup>87</sup>

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85. *Hicklin*, 437 U.S. at 527-28. *Accord* *Salla v. County of Monroe*, 48 N.Y.2d 514, 523, 399 N.E.2d 909, 914, 423 N.Y.S. 878, 882 (1979), *cert. denied sub nom.*, *Abrams v. Sala*, 446 U.S. 909 (1980). *See also* *Simon*, *supra* note 9, at 392-93, wherein it is insightfully observed that:

if the state wishes to ensure that its citizens are gainfully employed, a residence classification is no better than a plausible means of doing so. On the one hand, if the state hires any of its residents already employed in the private sector, it furthers its goal only to the uncertain extent that private employers hire unemployed residents to fill the openings created. On the other hand, the state can serve its objective at least as effectively by job-training programs and other less drastic means.

*Simon*, *supra* note 9, at 393.

86. The new Illinois Preference Act requires that all laborers on all public works projects be Illinois residents, but allows up to three nonresident technical experts to be employed on such projects. ILL. REV. STAT. ch. 48 ¶¶ 2202-04 (1985). *See also supra* note 2, at §§ 2-4. *Cf. supra* note 65. This total prohibition against nonresident laborers itself mitigates against the idea that the Act is closely tailored. Such a prohibition sweeps more broadly than necessary to achieve the Act's goals. In fact, decisions declaring other state preference laws unconstitutional under the privileges and immunities clause "close relation" test, were based on statutes with less than a total prohibition. *See Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston*, 384 Mass. 466, 468, 425 N.E.2d 346, 348 (1981) (preference law required that 50 percent local residents be hired), *rev'd on other grounds*, *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Laborers Local Union No. 374 v. Felton Constr. Co.*, 98 Wash. 2d 121, 123, 654 P.2d 67, 68 (1982) (preference law required that 90-95 percent local residents be hired).

87. ILL. REV. STAT. ch. 48, ¶¶ 2201, 2203 (1985). *See also supra* note 2, at §§ 1 & 3. Interestingly, it follows that any public works contracts consummated in the two month period after any month when the Illinois unemployment rate was under five percent will not be subject to the Preference Act's prohibition. If the Department of Labor tried to apply the Act to such contracts, the defendant contractor or nonresident could answer the complaint with the affirmative defense that the Act's requirements were simply not in effect when the contract was entered, and therefore, that the Act was not violated.

It should also be noted that the Act does not apply to any long-term contracts entered prior to September 20, 1984, which is when the Act became effective. Thus,

Whether Illinois' monthly unemployment rate rises or falls depends on various factors. Although the number of nonresident laborers employed on Illinois public works projects is an arguably related factor, there are various other causes contributing to the monthly unemployment rate that have no relation to nonresidents.<sup>88</sup> Illinois' unemployment rate would remain high even if citizens of Illinois' neighboring states were never employed on another public works project in Illinois. Yet, nonresidents are totally denied employment on Illinois public works projects because of their partial and unsubstantiated relation to Illinois' unemployment rate. The principles developed under the privileges and immunities clause demand a "close relation" in order to justify such discrimination. To withstand constitutional attack under the clause, the applicability of the Preference Act would have to vary as a function of the number of nonresidents actually displacing Illinois residents on public works projects in the state, because that number is directly/closely related to the unemployment that nonresidents cause. As written, however, the Act fails to withstand scrutiny under the "close relation" test because its discriminatory impact on nonresidents is tenuously related to the problem they present.<sup>89</sup>

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any contract entered prior to this date, which calls for the employment of nonresident laborers on public works projects in Illinois, will be immune from the Act's provisions. If the Labor Department tried to subject such contracts to the Act's requirements, the defendants could make a simple contract clause argument. Article I, section 10 of the United States Constitution provides: "No state shall . . . pass any . . . Law impairing the Obligations of Contracts. . . ." This provision, however, is not absolute. A public contract can be legitimately impaired by subsequent legislation that serves an important and legitimate public interest. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). Cf. *El Paso v. Simmons*, 379 U.S. 497 (1965). See generally *TRIBE, supra* note 10, at 465-83 (provides history, overview, and modern analysis of contract clause cases in public contracts area).

88. A close examination of Illinois' monthly unemployment rate, see *infra* note 89 (table No. 1), indicates that the rate changes seasonally. For example, note that the January rate is always higher than the preceding December rate. This fact is probably the result of high Christmas employment. Also, note that summer's employment rate is always higher than May and before, probably due to students entering the jobs market at the end of spring term. Other fluctuations in the rate result from the general health of the National economy, the general health of Illinois' economy, the number of undocumented aliens employed in place of Illinois residents, and the countless other technical and macro-economic factors recognized by economists as contributing to unemployment. For a discussion of background information and technical factors contributing to unemployment in America, see B. BLUESTONE & B. HARRISON, *THE DE-INDUSTRIALIZATION OF AMERICA* (1982); J. RAINES, L. BERSON & D. GRACIE, *COMMUNITY AND CAPITAL IN CONFLICT-PLANT CLOSINGS AND JOB LOSS* (1982); *THE BROOKINGS INSTITUTION, WORKERS, JOBS, AND INFLATION* (1982).

89. Moreover, the Illinois legislature's attempt to tailor the applicability of the Preference Act by "limiting" its applicability to periods of "excessive unemployment" in Illinois, was a complete failure in another sense too. In the last ten years, Illinois' monthly unemployment rate has been under five percent only three times. See *infra* this note (unemployment table No. 1). It was 4.9 percent in May of 1977, 4.7 percent in May of 1979, and 4.6 percent in August of 1979. *Id.* In America's contemporary

#### IV. SCRUTINY OF THE ILLINOIS PREFERENCE ACT UNDER THE COMMERCE CLAUSE

The United States Supreme Court has established beyond question that the interstate flow of persons is "commerce" within the meaning of the commerce clause.<sup>90</sup> It is immaterial whether a person's interstate travel is commercial in character.<sup>91</sup> The flow of em-

post-industrial economy, the unemployment rate is virtually always above five percent. The yearly national unemployment rate has only been below five percent once since 1970 when it was 4.9 percent in 1973. See *supra* note 46 (graphic display of national unemployment rate). Moreover, Illinois' yearly unemployment rate is consistently higher than the national average. Compare note 46 *supra* (National yearly unemployment rate) with table No. 1 *infra* this note (Illinois' unemployment rate). These unemployment statistics indicate that although the Preference Act is literally inapplicable when Illinois' unemployment rate is five percent or less, in effect, the Act's discriminatory mandate will always be applicable because Illinois' unemployment rate is greater than five percent 97 percent of the time (in the last 120 months, the rate was below five percent only three times). Thus, the legislature's attempt to "limit" the applicability of the Act is, in effect, no limit at all.

Table No. One:

Illinois Unemployment Rate						
Year	Jan	Feb	Mar	Apr	May	June
1976	6.8	7.3	6.8	5.9	5.8	7.9
1977	7.0	6.6	6.2	5.4	4.9	7.4
1978	7.5	7.1	6.7	5.5	6.1	6.2
1979	5.7	5.7	6.0	5.2	4.7	6.0
1980	7.9	7.6	7.3	7.1	7.4	9.3
1981	9.9	8.8	9.3	8.2	8.1	8.5
1982	10.1	10.1	10.2	10.1	10.6	11.7
1983	13.5	13.8	12.5	11.9	11.8	12.7
1984	10.7	10.1	10.6	9.5	8.8	8.8
1985	9.8	9.4	8.1	9.3	9.4	9.4

Year	July	Aug	Sept	Oct	Nov	Dec	Annual Average
1976		7.2	6.9	6.1	6.4	5.7	5.7
1977	6.5	6.3	5.8	6.0	6.3	5.6	6.2
1978	6.4	6.0	5.1	5.3	5.2	5.7	6.1
1979	5.1	4.6	5.7	5.5	5.5	6.2	5.5
1980	9.9	8.4	8.4	8.9	8.1	8.9	8.3
1981	7.7	8.1	8.0	8.2	8.5	8.8	8.5
1982	12.2	11.4	12.1	12.0	12.7	12.6	11.3
1983	11.7	11.3	9.8	9.4	9.3	9.4	11.4
1984	8.6	8.6	8.4	8.8	8.1	8.6	9.1
1985	8.9	8.8	8.9	9.2	9.0	8.3	9.0

BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LABSTAT SERIES REPORT (February 1986).

90. *Edwards v. California*, 314 U.S. 160, 172 (1941) (citing *Mitchell v. United States*, 313 U.S. 80 (1941); *United States v. Hill*, 248 U.S. 420, 423 (1919); *Caminetti v. United States*, 242 U.S. 470, 491 (1917); *Hoke v. United States*, 227 U.S. 308, 320 (1913); *Covington & Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204, 218 (1894); *Leisy v. Hardin*, 135 U.S. 100, 112 (1890); *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 203 (1885)).

91. *Edwards*, 314 U.S. at 172 n.1 (citing *Caminetti v. United States*, 242 U.S.

ployment-seeking laborers into Illinois, therefore, is "commerce" for purposes of commerce clause analysis.<sup>92</sup> Because the Preference Act affects the interstate flow of such laborers, it is subject to scrutiny under the commerce clause unless it is immune from such scrutiny under the "market participant" doctrine.<sup>93</sup>

Before analyzing the Preference Act under traditional commerce clause principles it is necessary to examine the "market participant" doctrine. A recent line of United States Supreme Court decisions,<sup>94</sup> culminating in *White v. Massachusetts Council of Con-*

470, 491-92 (1917)).

92. See, e.g., *W.C.M. Window Co.*, 730 F.2d at 493-96 (held that the original Illinois preference act's discrimination against nonresident laborers was "commerce" within the meaning of the commerce clause). See also *Massachusetts Council of Constr. Employers, Inc. v. Mayor of Boston*, 384 Mass. 466, 473, 478, 425 N.E.2d 346, 348 (1981) (interstate flow of laborers is "commerce" within the meaning of the commerce clause), *rev'd on other grounds*, *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983). See generally *Residency Requirements*, *supra* note 9, at 487-94 (provides overview of commerce clause analysis in area of state construction worker residency requirements).

93. See *W.C.M. Window Co.*, 730 F.2d at 493-96 (found that Illinois' original preference act was not protected by the market participant doctrine, and was subject to scrutiny under the commerce clause).

94. E.g., *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

In *Hughes*, the Court first faced the issue of whether traditional commerce clause restraints were applicable to state and local governments when such entities seek to effect commercial transactions not as regulators, but as market participants. 426 U.S. at 802-10. The Maryland legislature, in an effort to encourage the recycling of abandoned cars ("hulks"), offered a bounty for every Maryland-titled car that was converted into scrap metal. *Id.* at 796-97. There was a provision, however, that required the scrap processor to supply documentation of ownership for each hulk. *Id.* at 797-99. An amendment to the Maryland statute imposed a more exacting documentation requirement on out-of-state processors, who in turn demanded more exacting documentation from those who sold the junked cars for scrap. *Id.* at 800-01. The practical result of this amendment was that it became easier for persons in possession of hulks to sell them to in-state scrap processors in order to collect the Maryland bounty. *Id.* at 803, n.13.

In upholding the Maryland statute in the face of a commerce clause challenge, the *Hughes* Court stated: "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.* at 810 (footnotes omitted). In determining that Maryland was a market participant, the Court noted that Maryland had not attempted "to prohibit the [interstate] flow of hulks, or to regulate the conditions under which [such flow] may occur. Instead, [Maryland] . . . entered into the market itself [in order] to bid up their price . . .," *id.* at 806, "as a purchaser, in effect, of a potential article of interstate commerce. . . ." *Id.* at 808. Because Maryland was participating in the market, rather than acting as a market regulator, the Court concluded that the state's action need not be scrutinized, because the commerce clause was not "intended to require independent justification" in such situations. *Id.* at 809.

In *Reeves*, the Court once again applied the "market participant" exception when it was confronted with a challenge to a South Dakota policy that confined the sale of cement, which was produced in state-owned cement plants, to residents of the state. 447 U.S. at 440. A cement shortage caused the South Dakota Cement Commission to ban the sale of cement to nonresidents. A Wyoming cement distributor filed suit asserting that the state's action violated the commerce clause. *Id.* at 430-32. The

struction Employers, Inc.,<sup>95</sup> established this doctrine and defined its scope. In essence, the market participant doctrine provides that state legislation, which falls within the purview of the doctrine, is exempt from scrutiny under the commerce clause. This exemption applies to state legislation affecting interstate commerce when the effect of the legislation transforms the state into a participant in the relevant market rather than a regulator of that market.<sup>96</sup> In *White*, the Court rejected a commerce clause challenge to provisions of a city order which, like the Illinois Preference Act, required that contractors employ local residents on public construction projects.<sup>97</sup> The Court upheld the city's preference law because the public works contracts to which the law applied were either wholly or partially

Supreme Court disagreed, finding that "as a seller of cement, [the state] unquestionably fits the 'market participant' label. . . ." *Id.* at 440.

For a complete analysis and critique of the Court's decision in *Hughes*, see Note, *Constitutional Law—Commerce Clause—State Purchasing Activity Excluded From Commerce Clause Review—Hughes v. Alexandria Scrap Corp.*, 18 B.C. COM. & INDUS. L. REV. 893 (1977); *Residency Requirements*, *supra* note 9, at 488-91. For a discussion and critique of the Court's decision in *Reeves*, see Note, *Limiting Interstate Commerce Clause Scrutiny—Reeves, Inc. v. Stake*, 30 DEPAUL L. REV. 685 (1981); Comment, *Commerce Clause Immunity For State Proprietary Activities: Reeves, Inc. v. Stake*, 4 HARV. J.L. PUB. POL. 365 (1981); *Residency Requirements*, *supra* note 9, at 491-93. For a general critique and discussion of the "market participant" exception, see *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70 (1984).

95. 460 U.S. 204 (1983). In *White*, the mayor of Boston issued an executive order which required that all construction projects financed in whole or in part with city funds or with funds the city was authorized to administer, be built with a work force composed of no less than 50 percent Boston residents. 460 U.S. at 205-06. The Court ruled that the executive order did not violate the commerce clause. *Id.* at 214-15. In making this ruling the Court determined that the relevant inquiry was whether the city was a market participant or market regulator. *Id.* at 208. The Court found that the city was a market participant insofar as it spent only its own funds in entering into construction contracts for public projects. *Id.* at 214-15. As to projects financed in part with federal funds, the Court found that the federal programs specifically authorized "the type of parochial favoritism expressed" in the mayor's order, and therefore, affirmatively sanctioned the applicability of the order to the projects. *Id.* at 213, 215.

The significance of the *White* Court's finding that the city was a market participant was clearly stated when the Court noted that

[i]f the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as these which the city demands for its participation. Impact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it, for only in the former case need it be determined whether any burden on interstate commerce is permitted by the Commerce Clause.

*Id.* at 210. For a comprehensive analysis and critique of the market participant doctrine, see *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 70 (1984); Note, *White v. Massachusetts Council of Construction Employers, Inc.: State or Local Governments Acting as Market Participants Are Not Subject to Commerce Clause Restraints*, 10 J. CONTEMP. L. 217 (1984).

96. See *supra* notes 94 & 95. See also *W.C.M. Window Co.*, 730 F.2d at 494-96 (discusses the *White* decision and the market participant exception in the context of the original Illinois preference act).

97. *White*, 460 U.S. at 214-15.



financed with city funds.<sup>98</sup> The city, therefore, was seen as merely setting conditions for its participation in the market.<sup>99</sup> As a market participant, the city was free from commerce clause constraints and could condition public works employment on city residency.<sup>100</sup>

Superficially, it appears that the preference law considered in the *White* decision is sufficiently similar to Illinois' Preference Act to bring the Act within the market participant exception. Both are legislation requiring contractors to hire local residents as laborers for public works projects. However, the applicability of the preference law scrutinized in *White* was limited to construction projects financed at least in part with city funds,<sup>101</sup> whereas the Illinois Preference Act does not contain a similar limitation. As written, the Act applies to every public construction contract in Illinois whether financed with State funds or not.<sup>102</sup>

Because the *White* Court's finding that the city was a market participant was based on the fact that the city's preference law applied only to public works projects financed with city dollars,<sup>103</sup> it cannot be said that Illinois is a market participant as described in

98. *Id.* The *White* Court also addressed the issue of the propriety of applying the mayor's executive order to projects financed in part with federal funds. 405 U.S. at 212-13. The Court found that the federal programs involved were intended to encourage economic revitalization of the city's poor, minorities, and unemployed. *Id.* at 213. An examination of the corresponding federal regulations indicated that the mayor's order harmonized with the letter and spirit of Congress' goals. *Id.* at 213. The Court noted that "the federal regulations for each program affirmatively permit the type of parochial favoritism expressed in the order." *Id.* Thus, the Court held that it was proper to apply the mayor's order to projects financed in part with federal funds because the federal programs sanctioned the provincial economic favoritism expressed in the mayor's order. *Id.* at 215.

Interestingly, in reaching its conclusion that the mayor's order was in harmony with federal programs that Congress authorized, the *White* Court carefully observed that

[t]he Commerce Clause is a grant of authority to Congress, and not a restriction on the authority of that body. . . . Congress, unlike a state legislature authorizing similar expenditures, is not limited by any negative implications of the Commerce Clause in the exercise of its spending power. When state or local government action is specifically authorized by Congress, it is not subject to the Commerce Clause even if it interferes with interstate commerce. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945).

460 U.S. at 213. *Cf.* *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946) (held that Congress could consent to state regulation of commerce even though the dormant commerce clause would otherwise bar such regulation). See *generally* *TRIBE*, *supra* note 10, at § 6-31 (reviews historical development of the rule that Congress may authorize state regulation that burdens interstate commerce).

99. *White*, 460 U.S. at 210, 214-15.

100. *Id.* at 210.

101. See *supra* notes 95-99 and accompanying text.

102. As used in this comment, "State" funds or "State" dollars refers to funds that the Illinois legislature controls and distributes. See *supra* note 5. On its face, the Act is simply not limited to public works projects that are financed with State dollars. ILL. REV. STAT. ch. 48, ¶ 2203 (1985). See also *supra* note 2, at § 3.

103. *White*, 460 U.S. at 214-15. See also *supra* notes 95 & 98.

*White*. This is because Illinois' Preference Act applies to public works projects that are not financed with funds from the State. Government in Illinois is decentralized, and the substantially autonomous local municipalities have authority to levy taxes and issue revenue bonds in order to finance local public works projects.<sup>104</sup> The State of Illinois has no proprietary interest in such projects,<sup>105</sup> yet the Preference Act applies to them with as much force as it does to projects financed with State tax dollars. Illinois, through the Preference Act, is a regulator of the public works labor market, dictating to all levels of local government that they must not give construction contracts to employers of nonresidents. The market participant exception, therefore, is inapplicable to the present inquiry, and the Preference Act must be scrutinized under traditional commerce clause principles.<sup>106</sup>

The commerce clause implicitly prohibits state regulation that discriminates against or unduly burdens interstate commerce.<sup>107</sup> This dormant commerce clause proscription enjoins the states from

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104. *W.C. M. Window Co.*, 730 F.2d at 495. See also ILL. REV. STAT. ch. 122, §§ 17-11 to 17-13 (1983) (authority of local public school boards to levy taxes in order to supply and maintain schools); ILL. REV. STAT. ch. 85, §§ 861-81 (1985) (municipal authority to issue revenue bonds).

105. The market participant exception to commerce clause scrutiny evolved from the distinction drawn between a state's proprietary power and its governmental power. See Blumoff, *supra* note 18, at 74-76. A state uses its proprietary power to act for its private advantage as a state or for its citizens' advantage. A state uses its governmental power when it acts as a sovereign. *Id.* at 83-84. See also *American Yearbook Co. v. Askew*, 339 F. Supp. 719, 721 (M.D. Fla.), *aff'd mem.*, 409 U.S. 904 (1972) (held that a Florida statute, which required that all public printing for state universities be done within the state, did not violate the commerce clause. The court found that Florida was merely exercising its proprietary powers, and thus the statute was not subject to commerce clause restraints.). For a comprehensive analysis of the historical development and application of the proprietary/governmental distinction in commerce clause jurisprudence, see Blumoff, *supra* note 18 *passim*; *Economic Balkanization*, *supra* note 10, at 579-89.

106. It is significant that the Seventh Circuit in *W.C. M. Window Co.*, 730 F.2d at 494-95, similarly concluded that the market participant doctrine did not preclude commerce clause scrutiny of the original Illinois preference act. Because the original act applied to public works projects that were not State financed, the *W.C. M. Window Co.*, court found that the *White* Court's market participant doctrine was inapplicable. *W.C. M. Window Co.*, 730 F.2d at 495. Because the new Preference Act similarly applies to public works projects that are not financed with State funds, it also does not come under the market participant exception. If Illinois' legislators had read the *W.C. M. Window Co.* opinion, they would have realized that they had to limit the applicability of the new Act in order to immunize it from scrutiny under the commerce clause. For the new Act to be immune from commerce clause scrutiny under the market participant exception, the legislature need only have expressly defined "public works projects" to mean those projects financed, at least in part, with State funds. Because the legislature failed to change the original Act in this regard when it changed the original act into the new Act, the *W.C. M. Window Co.* decision continues to provide persuasive reasoning why the new Act suffers from the same constitutional infirmities as the original act.

107. See *supra* note 10 and sources cited therein. See also *infra* note 108 and cases cited therein.

erecting legislative walls in order to protect local interests from competition from other states merely to advance the economic welfare of local residents.<sup>108</sup> A "virtually per se rule of invalidity" is applied to state legislation that promotes economic isolation and protectionism without justification.<sup>109</sup> Although the opinions of the United States Supreme Court throughout the years have reflected an alertness to the evils of state-imposed economic isolation and protectionism,<sup>110</sup> they have recognized that incidental burdens on interstate commerce may be tolerated when states legislate to safeguard the health or safety of their citizens.<sup>111</sup>

A state may exercise its legislative police power in ways that burden the free flow of interstate commerce if it can justify the burden with proof that the legislation in question advances a legitimate state purpose.<sup>112</sup> Such burdens on commerce are justified if the burden is not excessive in relation to the benefit the state receives as a result of the legislation.<sup>113</sup> Nevertheless, because the evil of eco-

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108. *E.g.*, *South-Central Timber Dev., Inc.*, 104 S. Ct. at 2247 (state may not require in-state processing of lumber destined for export from state merely to promote employment of state residents or to help local industry compete); *City of Philadelphia*, 437 U.S. at 626-27 (state may not prevent waste, which originates in other states, from filling its waste dumps merely to protect environment); *Polar Co.*, 375 U.S. at 373-77 (state may not enact a milk regulation which forces in-state processors/distributors to purchase from in-state producers and thus virtually eliminate import of milk into state); *H. P. Hood & Sons, Inc.*, 336 U.S. at 537-38 (state may not enact license requirement for milk producers which gives economic advantage to in-state producers); *Baldwin*, 294 U.S. at 522-23 (state may not enact milk price regulation which discriminates against milk imported into state).

109. *E.g.*, *South-Central Timber Dev., Inc.*, 104 S. Ct. at 2247; *City of Philadelphia*, 437 U.S. at 624; *H. P. Hood & Sons, Inc.*, 336 U.S. at 525; *Baldwin*, 294 U.S. at 527.

110. *See supra* note 108 and cases cited therein.

111. *E.g.*, *Asbell v. Kansas*, 209 U.S. 251 (1908) (state may keep out diseased cattle). *Cf. City of Philadelphia*, 437 U.S. at 623-24 (New Jersey may not keep out Philadelphia's solid and liquid waste); *W.C. M. Window Co.*, 730 F.2d at 496 (Illinois may not keep out nonresident laborers).

112. *See infra* note 113 and cases cited therein.

113. In cases challenging state regulation of interstate trade under the commerce clause, the Supreme Court has traditionally applied a balancing test in order to determine the validity of the state's action. The state's justification for the burden on interstate commerce is weighed against the magnitude of the burden. If the Court finds that the benefit the state receives outweighs the burden imposed on interstate commerce, the statute will be upheld. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 459 (1981) (Minnesota environmental protection law that banned the retail sale of milk in plastic nonreturnable containers, weighed against the resulting burden on neighboring dairy producing states that were forced to change their packaging practices or not sell in Minnesota); *Great Atl. & Pac. Tea Co. v. Cottrel*, 424 U.S. 366 (1976) (Mississippi statute, enacted to protect health of Mississippi citizens, provided that milk from another state could be sold in Mississippi only if the other state accepted Mississippi milk on a reciprocal basis; benefit of statute was weighed against the resulting effect of cutting off markets to businesses that could more efficiently produce milk); *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1979) (Arizona statute, which required all cantaloupe offered for sale to be packaged in closed containers within the state, and which was enacted to protect reputation of Arizona cantaloupe

conomic protectionism can reside in both legislative means and legislative ends,<sup>114</sup> even if a legitimate purpose is credibly advanced, the state may not seek to further this purpose with legislation that discriminates against incoming commerce unless there is some reason apart from its origin to treat it differently.<sup>115</sup> Thus, even assuming that the state is pursuing a legitimate goal, it may not accomplish it via the enactment of illegitimate legislation that isolates the state from the national economy.<sup>116</sup>

The Illinois Preference Act causes precisely the kind of economic isolation that the commerce clause was designed to combat.<sup>117</sup> The Act seeks to protect resident laborers from the adverse economic effects of the national unemployment problem.<sup>118</sup> This goal is accomplished with an Act that, in effect, raises a wall at Illinois' border. This legislative impediment, like a protective tariff,<sup>119</sup> was designed to keep nonresident laborers from competing with resident laborers for jobs in the Illinois public works market. Thus, the Act expressly discriminates against the interstate laborer in order to promote the economic welfare of the resident laborer. In the absence of sufficient justification for such economically motivated discrimination, the "virtually per se rule of invalidity"<sup>120</sup> will be applied and the Preference Act declared unconstitutional.

growers, weighed against the resulting effect of forcing out-of-state packagers to relocate their packaging plants in Arizona). See generally *TRIBE*, *supra* note 10, at 328-35 (provides developmental analysis of the Supreme Court's commerce clause balancing test).

114. *City of Philadelphia*, 437 U.S. at 626.

115. *Id.* at 626-27. See also *Polar Co.*, 375 U.S. at 377; *Edwards*, 314 U.S. at 173-74; *Baldwin*, 294 U.S. at 511.

116. *City of Philadelphia*, 437 U.S. at 626-27. See also *Edwards*, 314 U.S. at 173-74 (the commerce clause prohibits "attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons . . . across its borders."); *Baldwin*, 294 U.S. at 527 (under the commerce clause, one state "may not place itself in a position of economic isolation. . . . [T]he police power may [not] be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.").

117. See *supra* notes 38-45 and accompanying text.

118. See *supra* notes 31, 36-37 and accompanying text. Ironically, the impact of such resident preference laws does not, in the long run, promote the resident laborer's economic well-being. This is because the higher costs of public construction resulting from this type of protectionist policy deny to the consumer and taxpayer his/her right to "look to the free competition from every producing area in the Nation to protect [him/her] from exploitation by any." *H. P. Hood & Sons, Inc.*, 336 U.S. at 539. See generally *Economic Sectionalism*, *supra* note 9, at 214 ("the [economic] theory of comparative advantage indicates that preference laws benefit in-state [interests] only at the expense of taxpayers and other businesses.").

119. A protective tariff is defined as: "A law imposing duties on imports, with the purpose and the effect of discouraging the importation of competitive products of foreign origin, and consequently of stimulating and protecting the home production of the same or equivalent articles." *BLACK'S LAW DICTIONARY* 1101 (5th ed. 1979).

120. See *supra* note 109 and accompanying text.

An inconsequential burden on the interstate labor market would be tolerated if Illinois could justify the burden with proof that it was seeking, through the Act, to safeguard the health and/or safety of its residents.<sup>121</sup> The Act, however, imposes a significant burden on interstate laborers because it prohibits them from securing employment on public works projects in Illinois. Moreover, preferring the economic welfare of resident laborers to the detriment of nonresident laborers is not a legitimate justification for such a burden.<sup>122</sup> Even if Illinois could prove that it was pursuing a legitimate goal, which is doubtful on any fair reading of the Act's legislative record,<sup>123</sup> it may not seek to accomplish it with protective legislation which, like the Act, isolates the state from the national unemployment problem.<sup>124</sup>

In *W.C. M. Window Co.*, the Seventh Circuit scrutinized the constitutionality of Illinois' original preference act under the commerce clause.<sup>125</sup> The original act, like the new Act, protectively sought to isolate the state and its laborers from the economic impact of the national unemployment problem. In its persuasively reasoned opinion, the Seventh Circuit concluded that the decision of the United States Supreme Court in *City of Philadelphia v. New Jersey*<sup>126</sup> was sufficiently analogous to its inquiry to support its decision that the original Act was unconstitutional.<sup>127</sup>

In *City of Philadelphia*, the Court held that New Jersey could

121. See *supra* notes 111 & 112 and accompanying text.

122. *W.C. M. Window Co.*, 730 F.2d at 496. The seventh circuit agreed with the state that reducing unemployment within the state is a legitimate purpose for such state regulation. *Id.* at 497 (citing *United Bldg.*, 465 U.S. at 222-23). However, the *W.C. M. Window Co.* court held that preferring the economic welfare of Illinois residents to that of nonresidents was not a valid justification for the original Illinois preference act's discriminatory burden on the interstate labor market. 730 F.2d at 496. See also *supra* note 108 and cases cited therein. Cf. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), wherein the Court stated:

In almost any commerce clause case it would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business. . . . Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition.

*Id.* at 43-44.

123. See *supra* notes 31, 36 & 37 and accompanying text.

124. See *supra* text accompanying notes 114-16.

125. *W.C. M. Window Co.*, 730 F.2d at 493-96.

126. 437 U.S. 617 (1978). In *City of Philadelphia*, the Court was asked to decide whether a New Jersey statute, which prohibited the importation of most solid or liquid waste that originated or was collected outside of New Jersey, violated the commerce clause. *Id.* at 618. The Court held that the statute, "both on its face and in its plain effect," unconstitutionally violated the principle of nondiscrimination inherent in the Court's previous commerce clause decisions. *Id.* at 627. For a discussion of the scope of the Court's decision in *City of Philadelphia*, see *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 57 (1978).

127. *W.C. M. Window Co.*, 730 F.2d at 496.

not, consistent with commerce clause principles, reserve its landfill waste dumps for its residents' exclusive use.<sup>128</sup> In *W.C. M. Window Co.*, the Court reasoned that "landfill waste dumps" are analogous to "public construction projects."<sup>129</sup> This reasoning is sound because New Jersey's attempt to prohibit the filling of its available waste disposal openings with out-of-state waste is substantively the same as Illinois' attempt to prohibit the filling of its available employment openings with out-of-state residents. Because the new Preference Act, like the original act, prohibits nonresident laborers from coming into Illinois in order to fill available employment openings, the holding in *City of Philadelphia* is applicable to the present inquiry.

The *City of Philadelphia* Court observed that the clearest example of state legislation that impermissibly promotes economic isolation and protectionism is a law that overtly blocks the free flow of interstate commerce at a state's border.<sup>130</sup> The Court emphasized that the crucial factor is the state's attempt to erect a barrier against the movement of interstate commerce in order to isolate itself from a problem common to many states.<sup>131</sup> The Court concluded that this type of legislation is subject to a "virtually per se rule of invalidity" under the commerce clause.<sup>132</sup> The Illinois Preference Act overtly blocks the free flow of nonresident laborers at Illinois'

128. *City of Philadelphia*, 437 U.S. at 627.

129. *W.C. M. Window Co.*, 730 F.2d at 496. The Seventh Circuit observed: "*City of Philadelphia* . . . held that a state could not confined the use of its landfill waste dumps to its residents. Change 'landfill waste dumps' to 'public construction projects' and you have this case." *Id.*

130. *City of Philadelphia*, 437 U.S. at 624. See also *Baldwin v. G.A.F. Seelig, Inc.*, wherein Justice Cardozo noted

What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce.

294 U.S. 511, 527 (1935)(emphasis added). Accord *Edwards v. California*, 314 U.S. 160 (1941) (invalidating, as an unconstitutional burden on interstate commerce, a statute prohibiting anyone from bringing a nonresident "indigent person" into the state). In *Edwards*, the Court observed:

There are [boundaries to the permissible area of state regulation of interstate commerce]. And none is more certain than the prohibition against attempts [by] any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events by the simple expedient of shutting its gates to the outside world. But, in the words of . . . Justice Cardozo: . . . 'the peoples of the several states must sink or swim together. . . .'

*Id.* at 173-74 (quoting *Baldwin*, 294 U.S. at 523).

131. *City of Philadelphia*, 437 U.S. at 628. See also *supra* note 130 (Justice Cardozo's observation).

132. *City of Philadelphia*, 437 U.S. at 624.

border, and is an attempt by the Illinois legislature to isolate the state and its laborers from the adverse economic effects of the nation-wide unemployment problem. The Act, therefore, is subject to the *per se* rule of invalidity and is, accordingly, unconstitutional under established commerce clause principles.

### CONCLUSION

The new Illinois Preference Act's express discrimination against nonresident laborers seeking to ply their trade in Illinois violates a privilege protected under the privileges and immunities clause. Such discrimination renders the Act *prima facie* unconstitutional under the privileges and immunities clause, but may be justified if there is a substantial reason for it. The putative justification for the Act's discrimination is that it is a means to alleviate unemployment in Illinois. Although unemployment relief is a desirable goal, it is not a substantial reason to justify the Act's discrimination because nonresidents are not a peculiar source of unemployment in Illinois. Furthermore, assuming there was a substantial justification for the Act's discrimination, the Act would nevertheless be unconstitutional under the privileges and immunities clause. This is because the Act is not closely tailored to aid the unemployed in Illinois, and because the blanket exclusion of nonresident laborers is not closely related to the unemployment that they cause.

The Preference Act is also unconstitutional under traditional commerce clause principles. The Act causes exactly the kind of state-imposed economic balkanization that the commerce clause was intended to eliminate. The purpose of this legislative impediment is to shield the Illinois laborer from the adverse economic impact of the national unemployment problem. The means employed to accomplish this goal—effectively blocking the free flow of laborers at the Illinois border—prevents nonresident laborers from competing with resident laborers for employment in the Illinois public works labor market. In the absence of sufficient justification for such economically motivated discrimination, the Act is unconstitutional under a virtually *per se* rule of invalidity. The Act's facial discrimination, however, is not justified because a state may not prefer the economic welfare of local residents to the detriment of nonresidents. Moreover, Illinois may not accomplish its goal with legislation which, like the Preference Act, isolates the state from the nation-wide unemployment problem.

The conclusion that Illinois' new Preference Act is unconstitutional does not mean there are no constitutionally permissible means to effectively deal with the nation's unemployment problem. It only means that the problem cannot be cured solely at the state

level. The federal government must more effectively address this problem because the national scope of the problem requires a national cure and because Congress alone possesses control over the resources necessary to effect an appropriate cure. Since the New Deal legislation of the 1930's, Congress has enacted a substantial number of anti-unemployment programs.<sup>133</sup> More programs are needed, however, and Congress must take the initiative to design and implement a national unemployment relief program.<sup>134</sup>

The United States Supreme Court recently overruled *National League of Cities v. Usery*<sup>135</sup> in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>136</sup> In doing so, the Court has set the stage for comprehensive federal unemployment relief legislation. The *Garcia* decision indicates that Congress' commerce power is virtually unlim-

133. For a comprehensive historical review and analysis of America's unemployment problem, and the federal government's programs to alleviate the problem, see ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *THE FEDERAL ROLE IN THE FEDERAL SYSTEM: THE DYNAMICS OF GROWTH—REDUCING UNEMPLOYMENT: INTERGOVERNMENTAL DIMENSIONS OF A NATIONAL PROBLEM* (1982).

134. An analysis of current federal unemployment relief legislation is beyond the scope of this comment. Moreover, a proposal for the type of national unemployment relief program that would be necessary to effectively cure the current unemployment problem is similarly beyond the scope of this comment. For a discussion of these topics, see report of ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, *supra* note 133, at 105-10.

135. 426 U.S. 833 (1976), *overruled in*, *Garcia v. San Antonio Metro. Transit Auth.*, 105 S. Ct. 1005 (1985). In *National League of Cities*, the Court held that the role of federalism embodied in the tenth amendment imposed a requirement that "Congress may not exercise [its commerce] power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." 426 U.S. at 843. According to the Court, Congress had exceeded its power under the commerce clause when it passed a statute imposing federal minimum wage requirements on state employees. *Id.* at 846-52. The Court reasoned that "traditional governmental functions" were core functions of state sovereignty, and thus beyond congressional control exerted via regulation enacted under the commerce power. *Id.* at 850-51. For an analytical discussion of *National League of Cities*, see Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

136. 105 S. Ct. 1005, 1007, 1021 (1985). In *Garcia*, the Court stated that Congress' authority under the commerce clause extends to intrastate economic activities that affect interstate commerce. *Id.* at 1010. The Court conceded that the states unquestionably retain "a significant measure of sovereign authority," *id.* at 1017, but noted that such authority is retained "only to the extent that the Constitution has not divested [the states] of their original powers and transferred those powers to the Federal Government." *Id.* In holding that Congress does have power under the commerce clause to require states to pay public employees according to the federal minimum wage standard, the *Garcia* Court noted:

[w]e continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.

*Id.* at 1020.



ited.<sup>137</sup> Congress may, therefore, use its commerce power to enact unemployment relief that affects both the private and public sectors. Such federal legislation should be enacted because it would preempt divisive state preference laws, and because it would be the best constitutionally permissible response to the national unemployment problem.

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137. After *Garcia*, only the national political process restrains Congress' commerce power. This process ensures that Congress will not enact laws that unduly burden the states. *Garcia*, 105 S. Ct. at 1020.