

Labor Law § 222: Held Violative of Privileges and Immunities Clause

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therefore, that the Court will take the earliest opportunity to clarify the extent to which statutory tenure rights may be waived in an initial employment agreement.

Thomas A. Leghorn

LABOR LAW

Labor Law § 222: Held violative of privileges and immunities clause

The privileges and immunities clause of the United States Constitution guarantees to "[t]he citizens of each State . . . all privileges and immunities of citizens in the several States."⁶⁴ Not-

could be used facily to avoid ever giving tenure. The tenure statutes are intended to protect the teacher and not become a trap to those not guileful to avoid it." *Baer v. Nyquist*, 34 N.Y.2d 291, 299, 313 N.E.2d 751, 755, 357 N.Y.S.2d 442, 448 (1974); *see, e.g., Board of Educ. v. Ambach*, 69 App. Div. 2d 949, 415 N.Y.S.2d 496 (3d Dep't 1979).

⁶⁴ U.S. CONST. art. IV, § 2. The purpose of the privileges and immunities clause was to unify a nation of independent sovereign states by eliminating destructive intrastate rivalry and competition. *Knox, Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution*, 43 Mo. L. REV. 1, 7 (1978); *see Toomer v. Witsell*, 334 U.S. 385, 395 (1948); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1868); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-32, at 404-05 (1978).

Although similar language appears in the fourteenth amendment, *see* U.S. CONST. amend. XIV, § 1, the provisions are not coextensive. The privileges and immunities clause of article IV precludes a state from denying to nonresidents certain rights accorded residents, while the fourteenth amendment clause protects from state encroachment rights arising from federal citizenship. For a general comparison of the two provisions, *see* L. TRIBE, *supra*, § 7-2 at 416-17.

Early cases construing the provision viewed the privileges and immunities clause as a source for affording federal protection to the natural or fundamental rights of state citizenship. *See, e.g., Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). It was not long, however, before the Court rejected this attempt to incorporate the natural rights doctrine into the Constitution, adopting instead the position that the clause was intended merely to prohibit discriminatory legislation aimed at nonresidents. *See Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872); L. TRIBE, *supra*, § 6-32, at 406. Accordingly, defining fundamental rights was relegated to a subordinate position and the initial inquiry became whether those fundamental rights which a state did grant its own citizens were granted or denied to citizens of another state. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 77 (1872). Under this view, a state could deny fundamental rights to citizens of different states if such rights were also denied to the state's own citizens. L. TRIBE, *supra*, § 6-32, at 407.

Much later, in *Toomer v. Witsell*, 334 U.S. 385 (1948), this comparative standard was supplanted by the substantial reason test. In *Toomer*, the Supreme Court determined that the protection afforded nonresidents by the privileges and immunities clause was not absolute and hence did not preclude discrimination in all cases, but only in those where the discrimination could not be reasonably and substantially justified. *Id.* at 396. Notably, however, the Supreme Court recently has held that the substantial reason test, enunciated in *Toomer*, does not alter the general rule that only *fundamental* rights accorded state citizens need be granted to nonresidents. *See Baldwin v. Montana Fish and Game Comm'n*, 436 U.S.

withstanding this broad language, where a state owned or had created a particular resource, disparate treatment of nonresidents with respect to that resource has frequently survived constitutional challenge under the privileges and immunities clause.⁶⁵ Recently, however, in *Salla v. County of Monroe*,⁶⁶ the Court of Appeals struck down section 222 of the Labor Law,⁶⁷ holding that the privileges and immunities clause prohibits New York from statutorily extracting contract terms which mandate the employment of its residents on public works projects.⁶⁸

Lisbon Contractors, Inc. (Lisbon) was a Pennsylvania corporation that contracted to build a sewer line for Monroe County, a

371, 387-88 (1978).

⁶⁵ See, e.g., *McCready v. Virginia*, 94 U.S. 391 (1876); *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230). Predicated upon the conception of a state's sovereignty over its natural resources, the ownership exception to the privileges and immunities clause was first promulgated in *Corfield*. In *Corfield*, the court, although acknowledging that the right to work in any state is fundamental, nevertheless concluded that access to the state's oyster beds could be restricted to citizens of the state. *Id.* at 552. In *McCready*, the Supreme Court affirmed the decision in *Corfield*, holding that a Virginia statute prohibiting noncitizens from planting oysters in the state's tidal waters did not violate the privileges and immunities clause. 94 U.S. at 396. The Court stated that a state citizen's right to plant oysters was a "property" right arising not as "a privilege or immunity of general citizenship but of special citizenship" and, consequently, was beyond the purview of the clause. *Id.* More recently, in *Doe v. Bolton*, 410 U.S. 179 (1973), wherein a state statute limiting abortions to state residents was struck down as violative of the privileges and immunities clause, the Court implied that its decision might have been different if the statute had been premised upon the narrow policy of preserving state-financed medical facilities for the benefit of its citizens. *Id.* at 200. See generally L. TRIBE, *supra* note 64, ch. 6, § 7, at 38-39 (Supp. 1979); Knox, *supra* note 64, at 21; see also *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *Geer v. Connecticut*, 161 U.S. 519 (1896).

Clearly, however, the ownership exception is not pervasive. See generally *Toomer v. Witsell*, 334 U.S. 385 (1948). The Supreme Court recently has noted that "the States' interest in regulating and controlling those things they claim to 'own' . . . is by no means absolute." *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 385 (1978); see *Hicklin v. Orbeck*, 437 U.S. 518, 529 (1978).

⁶⁶ 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *aff'g*, 64 App. Div. 2d 437, 409 N.Y.S.2d 903 (4th Dep't 1978), *cert. denied*, 100 S. Ct. 1836 (1980).

⁶⁷ Section 222 provides in pertinent part:

In construction of public works by the state, a municipal subdivision . . . or any agency entering into public works projects providing for the expenditure of public money or by persons contracting with the state, a municipal subdivision . . . or any agency entering into public works projects providing for the expenditure of public money, preference in employment shall be given to citizens of the state of New York who have been residents of the state for at least twelve consecutive months immediately prior to the commencement of their new employment.

N.Y. LABOR LAW § 222 (McKinney Supp. 1979-1980).

⁶⁸ 48 N.Y.2d at 525, 399 N.E.2d at 915, 423 N.Y.S.2d at 883-84.

project funded principally by the federal government.⁶⁹ David Salla and Robert Keppley, two of Lisbon's equipment operators, and Pennsylvania residents, were laid off pursuant to the county's demand that Lisbon comply with section 222, New York's resident-hire law.⁷⁰ Thereafter, the employer and interested employees joined in obtaining a declaration that section 222 was unconstitutional and an order enjoining Monroe County from enforcing the statute as incorporated in its contract with Lisbon.⁷¹ The trial court premised its finding that section 222 was unconstitutional on the commerce and privileges and immunities clauses as well as the fourteenth amendment's equal protection clause.⁷² A divided Appellate Division, Fourth Department, affirmed on the grounds that the privileges and immunities and commerce clauses had been violated.⁷³

On appeal, a divided Court of Appeals affirmed, but predicated its affirmance solely on the privileges and immunities clause.⁷⁴ Writing for the majority,⁷⁵ Judge Fuchsberg rejected the

⁶⁹ Although the project was 75 percent financed by federal funds allocated to the implementation of the Environmental Protection and Pure Water Acts of the United States, administration of the project was to be carried on by Monroe County and its Division of Pure Waters. *Id.* at 519, 399 N.E.2d at 911, 423 N.Y.S.2d at 880.

⁷⁰ *Id.* Section 222 of the Labor Law, mandating preferential employment of New York citizens, *see* note 67 *supra*, was incorporated into the contract between Lisbon and Monroe County by a provision requiring Lisbon to comply with all local and state laws. 64 App. Div. 2d at 440, 409 N.Y.S.2d at 905. As a result of the county's insistence on strict compliance with section 222, Salla and Keppley were released from their employment. They maintained that as a consequence of job scheduling conflicts, they would be unemployed for several months. 48 N.Y.2d at 519, 399 N.E.2d at 911, 423 N.Y.S.2d at 880.

⁷¹ *Id.* at 519-20, 399 N.E.2d at 911, 423 N.Y.S.2d at 880. Pursuant to CPLR 1012(b), Attorney General Robert Abrams intervened as a party defendant on behalf of the state in support of the statute's constitutionality. *Id.*

⁷² *Salla v. County of Monroe*, 90 Misc. 2d 427, 395 N.Y.S.2d 366 (Sup. Ct. Monroe County 1977), *aff'd*, 64 App. Div. 2d 437, 409 N.Y.S.2d 903 (4th Dep't 1978), *aff'd*, 48 N.Y.2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert. denied*, 100 S. Ct. 1836 (1980). Special term held that New York's attempt to exclude noncitizens constituted economic protectionism violative of the commerce clause. 90 Misc. 2d at 431, 395 N.Y.S.2d at 369, *see* U.S. CONST. art. I, § 8, cl. 3. Additionally, the court found section 222 to be an undue burden on the plaintiff's fundamental rights to interstate travel and to pursue a livelihood and, consequently, violative of equal protection principles. 90 Misc. 2d at 428, 395 N.Y.S.2d at 367; *see* U.S. CONST. amend. XIV, § 1.

⁷³ 64 App. Div. 2d at 445, 409 N.Y.S.2d at 908. The Fourth Department, finding that section 222 violated both the commerce clause and the privileges and immunities clauses, found it unnecessary to consider whether the statute violated the equal protection clause. *Id.* at 445, 409 N.Y.S.2d at 908.

⁷⁴ 48 N.Y.2d at 520, 399 N.E.2d at 911, 423 N.Y.S.2d at 880.

⁷⁵ Judge Fuchsberg was joined in his opinion by Judges Jasen, Wachtler, Jones and Meyer. Judge Gabrielli dissented in a separate opinion in which Chief Judge Cooke

defendants' contention that the state's "ownership" of the resource, the public works project, was sufficient in and of itself to justify the discriminatory hiring mandate,⁷⁶ noting that in light of developments in article IV jurisprudence that factor was no longer dispositive.⁷⁷ Rather, in passing upon the constitutionality of the statute, the Court applied a two-prong test formulated by the United States Supreme Court⁷⁸ to determine first whether "valid independent reasons" for discriminating against nonresidents existed and further whether the disparate treatment was justified by a "close relationship" to the reasons advanced.⁷⁹ Although apparently persuaded that the state's legitimate interest in reducing unemployment was sufficient to satisfy the threshold inquiry,⁸⁰ the majority determined that the defendant failed to establish the requisite nexus between the operation of the statute and the alleviation of unemployment.⁸¹ Indeed, the Court emphasized, there was no indication that the employment of nonresidents on public works projects had any appreciable effect on New York's unemployment rate.⁸² Consequently, the Court concluded that a nonresident's right to pursue his livelihood in New York outweighed any benefits accruing to the state from its statutorily mandated preferential hiring policies.⁸³

Employing commerce clause principles,⁸⁴ Judge Gabrielli dis-

concurring.

⁷⁶ 48 N.Y.2d at 524, 399 N.E.2d at 914, 423 N.Y.S.2d at 883. While acknowledging that the sewer line project could be viewed as a "local" concern, Judge Fuchsberg nevertheless concluded that "constitutional concerns for the right of a citizen of one State to pursue his vocation in another" outweighed any proprietary interest the state may have had. *Id.* at 525, 399 N.E.2d at 915, 423 N.Y.S.2d at 883.

⁷⁷ *Id.* at 524, 399 N.E.2d at 914, 423 N.Y.S.2d at 883.

⁷⁸ See *Toomer v. Witsell*, 334 U.S. 385 (1948); note 64 *supra*.

⁷⁹ 48 N.Y.2d at 522, 399 N.E.2d at 913, 423 N.Y.S.2d at 881-82.

⁸⁰ *Id.* at 523, 399 N.E.2d at 913-14, 423 N.Y.S.2d at 882. In applying the two-pronged test of *Toomer*, the *Salla* majority made the preliminary determination that the right to pursue a trade in a different state was "at the heart of the [privileges and immunities] clause's guarantees." *Id.* at 522, 399 N.E.2d at 913, 423 N.Y.S.2d at 882.

⁸¹ *Id.* at 523, 399 N.E.2d at 914, 423 N.Y.S.2d at 882.

⁸² The *Salla* majority pointed out that there was no guarantee that the statute would operate to reduce unemployment since qualified residents might be lured away from other jobs to work on the project in question. *Id.* Additionally, the court noted, since the additional costs of integrating new personnel might be so burdensome as to preclude out-of-state contractors from bidding on New York public work projects, the net effect of the statute might be to restrict commercial intercourse among the states, thus defeating the purpose of the privileges and immunities clause. *Id.* at 524, 399 N.E.2d at 914, 423 N.Y.S.2d at 883.

⁸³ *Id.* at 525, 399 N.E.2d at 915, 423 N.Y.S.2d at 884.

⁸⁴ Since the commerce and privileges and immunities clauses were designed to promote

sented, noting that while a state was constitutionally precluded from utilizing its regulatory powers to discriminate against the business interests of nonresidents, it was not prohibited from "using its spending powers to promote local industry or give its citizens a competitive edge."⁸⁵ Judge Gabrielli distinguished *Hicklin v. Orbeck*,⁸⁶ a recent Supreme Court case which had severely limited the states' ability to exploit their natural resources to obtain preferential hiring for residents.⁸⁷ Although the "Alaska Hire" statute in *Hicklin* extended to "all private employment generated by activities within the state" arising from and incident to oil and gas leases, the New York statute, the dissent noted, merely restricted hiring on construction contracts commissioned by the state.⁸⁸ Judge Gabrielli posited that, although Alaska had slight if any proprietary interest in the business transactions statutorily encompassed, New York evidenced precisely such interests by reason of the expenditure of its own funds on public works construction.⁸⁹ Hence, while acknowledging that a state may not "exploit its passive ownership of a resource by indirectly using it as a basis for requiring discrimination against nonresidents in private hiring," the dissent concluded that a state may exercise its contract bargaining power to limit to residents the employment opportunities created by public works spending.⁹⁰

It is submitted that in finding the public creation of a resource merely one factor to be considered in determining the validity of New York's resident-hire statute under the privileges and immunities clause, the Court unnecessarily restricted the state's power to contractually reserve to its citizens state-engendered employment opportunities. While a state's ownership of a resource has been adjudged insufficient to insulate discriminatory practices against non-

national unity by obviating protectionist policies and interstate rivalries, similar considerations come into play under both provisions. See *Knox*, *supra* note 64, at 18.

⁸⁵ 48 N.Y.2d at 526, 399 N.E.2d at 916, 423 N.Y.S.2d at 884-85 (Gabrielli, J., dissenting).

⁸⁶ 437 U.S. 518 (1978).

⁸⁷ In *Hicklin*, the Supreme Court held violative of the privileges and immunities clause an Alaska resident-hire statute that mandated the preferential hiring of qualified Alaskan residents by employers who had obtained oil and gas leases from the state. *Id.* at 526.

⁸⁸ 48 N.Y.2d at 528, 399 N.E.2d at 917, 423 N.Y.S.2d at 886 (Gabrielli, J., dissenting). Compare ALASKA STAT. § 38.40.030(a) (1977) with N.Y. LAB. LAW § 222 (McKinney Supp. 1979-1980).

⁸⁹ 48 N.Y.2d at 529, 399 N.E.2d at 917, 423 N.Y.S.2d at 886 (Gabrielli, J., dissenting); see note 94 *infra*.

⁹⁰ 48 N.Y.2d at 529, 399 N.E.2d at 917, 423 N.Y.S.2d at 886 (Gabrielli, J., dissenting).

residents from scrutiny under the privileges and immunities clause,⁹¹ it is clear that the presence of such a factor may dispositively establish that the disparate treatment is not violative of the constitutional mandate.⁹² Indeed, the Supreme Court has recently indicated in *Hicklin* that, notwithstanding the failure to satisfy the substantial reason test, a state's attempt to reserve for the benefit of its citizens employment opportunities arising from a state-owned resource will pass constitutional muster if the state additionally possesses a sufficient proprietary interest in the resource.⁹³ Hence, it would seem that where, as in *Salla*, a state *creates* employment opportunities in the form of public works projects, the requisite proprietary interest exists *prima facie* and, therefore, justifies the disparate treatment of nonresidents even though the discriminatory hiring practices are otherwise insufficiently related to a legitimate state interest so as to satisfy the substantial reason test.⁹⁴

By failing to appreciate the continued viability of the public

⁹¹ See *Hicklin v. Orbeck*, 437 U.S. 518, 528-29 (1978); *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 385 (1978). See generally *Toomer v. Witsell*, 334 U.S. 385 (1948).

⁹² See *Hicklin v. Orbeck*, 437 U.S. 518 (1978). In *Hicklin*, the Supreme Court, explaining the extent to which a state's ownership of a resource would validate disparate treatment of nonresidents, stated:

[A] State's ownership of the property with which the statute is concerned is a factor—*although often the crucial factor*—to be considered in evaluating whether the statute's discrimination against noncitizens violates the [privileges and immunities] clause. Dispositive though this factor may be in many cases in which a State discriminates against nonresidents, it is not dispositive here.

The reason is that Alaska has little or no proprietary interest in much of the activity swept within the ambit of Alaska Hire.

Id. at 529 (emphasis added).

⁹³ See note 95 *infra*.

⁹⁴ It is submitted that the *Salla* court failed to recognize the distinction between a state bargaining for contracts to benefit its citizens when the state is interested in the funds spent and the work accomplished on the one hand and a state dominating private contracts when it is only tangentially related to the business transacted on the other. Indeed, it is settled that where a resident-hire statute "extends to employers who have no connection whatsoever with the State's [resources], perform no work on state land, have no contractual relationship with the State, and receive no payment from the State," a state lacks the proprietary interest sufficient to justify disparate treatment of nonresidents. *Hicklin v. Orbeck*, 437 U.S. 518, 530 (1978). Such was not the situation in *Salla*, however, wherein Lisbon contracted with the state for work to be performed on state land and financed, at least in part, with state funds. See note 69 and accompanying text *supra*. It is precisely this "ongoing interest in and control over public works projects," which imbued the state with a "clear and direct proprietary interest" therein, and which placed the statute beyond the prohibitions of the privileges and immunities clause. 48 N.Y.2d at 529, 399 N.E.2d at 917, 423 N.Y.S.2d at 886 (Gabrielli, J., dissenting); see *Baldwin v. Fish & Game Comm'n*, 436 U.S. 371, 388 (1978).

ownership exception, it appears that the *Salla* Court has expanded the scope of the privileges and immunities clause beyond that envisioned by the Supreme Court.⁹⁵ In the wake of *Salla*, it seems that any attempt by the state to afford employment advantages to residents must unqualifiedly satisfy the substantial reason test. Therefore, even though the Court suggested that a narrowly drawn resident-hire statute might survive constitutional scrutiny,⁹⁶ its conclusion that nonresidents are not a peculiar source of New York's unemployment problem precludes the satisfaction of the substantial reason test and thus suggests that future resident-hire legislation similarly will be found violative of the privileges and immunities clause.⁹⁷

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PENAL LAW

Penal Law art. 140: Intent to commit specific object crime not element of burglary prosecution and hence disclosure of specific object crime not required in bill of particulars

To secure a conviction for burglary in New York, the prosecu-

⁹⁵ See *Hicklin v. Orbeck*, 437 U.S. 518, 529 (1978). Although the most vigorous attack on the proprietary interest exception was given in *Toomer* where it was referred to as a "fiction," 334 U.S. at 402, the Court nevertheless articulated the need for a continued viable predicate for state regulation in privileges and immunities cases: "The inquiry [in determining the validity of discrimination] must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.* at 396.

⁹⁶ 48 N.Y.2d at 523-24, 399 N.E.2d at 914, 423 N.Y.S.2d at 882-83.

⁹⁷ The net effect of the *Salla* holding, it appears, is to deter viable state action in alleviating its unemployment problems. Such a result was criticized in *C.D.R. Enterprises, Ltd. v. Board of Educ.*, 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd*, 429 U.S. 1031 (1977), wherein a three-judge court held section 222 unconstitutional on equal protection and due process grounds with respect to aliens. Taking issue with the majority's reasoning, Judge Platt stated:

[I]f the State of New York enacts legislation creating and funding additional jobs and makes them available to all comers at a time when unemployment is widespread (as it is today) there will be an influx of non-New Yorkers, both citizens and aliens, seeking such jobs and New York's desirable objective of eliminating unemployment within its borders will have been frustrated and defeated despite considerable taxpayer expense . . . [T]his course merely compounds, and in no way alleviates, the problem which New York is legitimately and properly attempting to correct, and that it can only discourage New York and other states from taking any action to reduce unemployment.

412 F. Supp. at 1174 (Platt, J., dissenting).