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Constitutional Law - Wyoming Upholds a Resident Laborer Preference Statute - State v. Antonich

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CASE NOTES

CONSTITUTIONAL LAW—Wyoming Upholds a Resident Laborer Preference Statute. *State v. Antonich,* 694 P.2d 60 (Wyo. 1985).

On September 22, 1983, the Converse County prosecuting attorney charged Roger Antonich with violating section 16-6-203 of the Wyoming Preference for State Laborers Act.[1] The Act requires private contractors working on a public works project to give hiring preference to qualified Wyoming laborers over nonresident laborers.[2] The prosecutor alleged that Antonich, as general superintendent of Westgate Construction Company, fired a Wyoming worker from a public school construction project in order to hire a nonresident worker.[3] The county court dismissed the charge on the ground that the Wyoming Preference Act violated the Privileges and Immunities Clause of the United States Constitution.[4] The court relied on recent cases from other jurisdictions striking down similar statutory preferences for resident laborers.[5] In those cases, the courts held such statutory preferences burdened one of the fundamental privileges pro-

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1. State v. Antonich, 694 P.2d 60, 61 (Wyo. 1985).
2. WYO. STAT. § 16-6-203 (1977) provides:
   Every person who is charged with the duty of construction, reconstructing, improving, enlarging, altering or repairing any public works project or improvement for the state or any political subdivision, municipal corporation, or other governmental unit, shall employ only Wyoming laborers on the project or improvement. Every contract let by any person shall contain a provision requiring that Wyoming labor be used except other laborers may be used when Wyoming laborers are not available for the employment from within the state or are not qualified to perform the work involved. The state employment office nearest the proposed contract or construction site shall maintain a list of laborers classified by skills, who are residents and are available for employment. When the nearest state employment office is unable to provide the requested number of laborers from its own list, it shall immediately contact other state employment offices and request the names of other available laborers. Every person required to employ Wyoming laborers shall inform the nearest state employment office of his employment needs. If the state employment office certifies that the person's needs for laborers cannot be filled from those listed as of the date the information is filed, then the person may employ other than Wyoming laborers.
3. Brief for Appellant at 2, State v. Antonich, 694 P.2d 60 (Wyo. 1985) [hereinafter State's Brief].
4. U.S. CONST., art. IV, § 2, cl. 1 provides: "The citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States."
5. *Antonich,* 694 P.2d at 62. Antonich, in a motion to dismiss, alleged that the Wyoming Preference Act also violated the equal protection clause of the fourteenth amendment. State's Brief, *supra* note 3, at 2. Section 202(a)(ii) of the Act is a durational residency requirement which defines resident as "any person who is a *citizen* of the United States and has resided in the State of Wyoming for at least one (1) year immediately preceeding his application for employment." (emphasis added). As a general rule, state statutes which either infringe upon a fundamental right or create a suspect classification rarely survive constitutional scrutiny under the equal protection clause. The Supreme Court has held that durational residency requirements burden the fundamental right to travel. Shapiro v. Thompson, 394 U.S. 618 (1969). The Court has also held that alienage is a suspect classification and statutes which deny legal aliens private employment opportunities are constitutionally impermissible. *In re* Griffiths, 413 U.S. 717 (1973). The Wyoming Preference Act thus presents an obvious challenge under the fourteenth admendment's equal protection clause because it burdens the fundamental right to travel and because it excludes legal aliens from private employment opportunities in that the Act only permits a U.S. citizen to become a Wyoming resident.

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tected by the privileges and immunities clause—the right to pursue a common calling.[6]

On appeal before the Wyoming Supreme Court, the state conceded that the Wyoming Preference Act burdened a fundamental privilege,[7] but argued that the Act survived constitutional scrutiny because it precisely addressed the goal of reduced unemployment by preferring the qualified, resident unemployed on Wyoming public works projects.[8] The Wyoming Supreme Court reversed the county court's decision and held that the Preference Act was "narrowly tailored to fit a particular problem identified by the State and therefore [did] not impermissibly infringe the privileges and immunities of the citizens of the United States."[9]

According to the court, the Act did not violate the privileges and immunities clause because the state showed that valid reasons existed for the Act's enactment. More specifically, the court found that the state properly identified the reason for the Act "as the reduction in unemployment among [Wyoming's] labor force."[10] The court also agreed with the state that the Act's discrimination against laborers was necessary because nonresidents could potentially take jobs away from resident laborers on public works projects.[11]

This ruling makes Wyoming the first jurisdiction in recent years to uphold a statutory preference for resident laborers employed by private construction firms.[12] The court's upholding of the Act appears to be inconsistent, however, with the constitutional standard established by the United States Supreme Court in *Toomer v. Witsell*[13] and recently reaffirmed in *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden.*[14] Before discussing the constitutionality of the Wyoming Preference Act, it will be useful to consider the standards by which the Supreme Court and other jurisdictions have decided the issue of whether such preference statutes violate the privileges and immunities clause.

BACKGROUND

The modern analysis under the privileges and immunities clause was articulated by the Supreme Court in *Toomer v. Witsell.*[15] Prior to *Toomer,*

6. The right to pursue a common calling generally refers to the right to seek private employment. *See* United Building & Construction Trades Council of Camden County and Vicinity v. Mayor and Council of Camden, 104 S.Ct. 1020 (1984).

7. State's Brief, *supra* note 3, at 8. The right to pursue a trade is a privilege protected under the privileges and immunities clause. *See* Corfield v. Coryell, 6 F. Cas. 546 (C.C. Wash. 1823) (No. 3,230).

8. State's Brief *supra* note 3, at 12.

9. *Antonich,* 694 P.2d at 60.

10. *Id.* at 62.

11. *Id.* at 63.

12. *See, e.g.,* Note, *Construction Workers Residency Requirements: A Constitutional Response,* 17 NEW ENGL. L. REV. 461, 465 (1982).

13. 334 U.S. 385 (1948).

14. 104 S.Ct. 1020 (1984).

15. 334 U.S. 385 (1948).

the Court's approach to challenges under the privileges and immunities clause involved a case-by-case analysis which focused primarily on whether the statute at issue burdened a fundamental privilege.[16] If a statute infringed on such a privilege, then, with few exceptions, the Court would invalidate it.[17]

In *Toomer,* the Court's analysis shifted away from classifying fundamental privileges to a determination of whether a state had a substantial reason for discriminating against nonresidents.[18] In *Toomer,* the Court examined a South Carolina statute which restricted the ability of nonresidents to catch shrimp commmercially within the state's three mile maritime belt.[19] The challenged statute required nonresidents to pay ten times more than the resident fee for a commerical shrimp license.[20] The court regarded commerical fishing as a privilege protected by the privileges and immunities clause because "it was long ago decided 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."[21] South Carolina argued that the statute was enacted to help conserve the state's shrimp supply and claimed that the statute's discrimination against nonresidents was necessary because nonresidents used larger fishing boats.[22] The state also urged that the higher fee for nonresidents was justified by the greater cost of enforcing the licensing law against them.[23] The Court, however, rejected the state's arguments and struck down the statute because nothing in the record indicated that nonresidents used larger fishing boats or that the state incurred a greater cost in enforcing the law against them.[24] In declaring the statute unconstitutional, the Court stated that it would be closing its eyes to reality if it "concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them."[25]

The Court will apply the *Toomer* test whenever a challenged statute abridges a fundamental privilege.[26] The test consists of two parts. First, the Court must determine whether the state can offer any substantial reason for the statute's discrimination against nonresidents. Second, the

16. Knox, *Prospective Applications of the Article IV Privileges and Immunities Clause of the United States Constitution,* 43 MO. L. REV. 1, 16 (1978).
17. *Id.*
18. Note, *supra* note 12, at 465.
19. *Toomer,* 334 U.S. at 389.
20. *Id.*
21. *Id.* at 396.
22. The statute's impact on nonresidents was swift and dramatic: "The parties stipulated that in 1946, the year before nonresidents had to pay higher fees than residents, 100 nonresident boats were licensed [in South Carolina] and that in 1947 only 15 such boats were licensed." *Id.* at 397. Thus, as a measure to prevent excessive trawling, the statute appeared to be very effective.
23. *Id.* at 398.
24. *Id.*
25. *Id.* at 399.
26. For a list of those privileges protected under the privileges and immunities clause, see *Corfield,* 6 F. Cas. at 551-52.

state must demonstrate "a reasonable relationship between the danger represented by non-citizens[27] as a class, and the severe discrimination practiced upon them."[28]

The United States Supreme Court reaffirmed the *Toomer* test in *Mullaney v. Anderson.*[29] In *Mullaney,* the Alaska Fishermen's Union challenged an Alaska statute under which nonresidents were charged ten times more than residents for a commercial fishing license. In response to the Unions's claim that the statute violated the privileges and immunities clause, Alaska argued that the higher fee was justified by the higher cost of enforcing the license law against nonresident fishermen.[30] Even though Alaska showed that ninety percent of its enforcement cost resulted from collecting fees from nonresidents, the Court invalidated the statute because the state failed to establish that the fee differential was closely related to the difference in enforcement costs.[31] The statute therefore failed the second part of the *Toomer* test which requires a reasonable relationship between the danger represented by nonresidents and the discrimination practiced against them.

In contrast to *Mullaney,* the Supreme Court in *Baldwin v. Fish & Game Commission of Montana*[32] upheld a statute which required nonresident hunters to pay as much as twenty-five times more than residents to hunt elk.[33] The nonresident hunters who brought the suit claimed that the statute's unequal treatment of them violated the privileges and immunities clause as well as the fourteenth amendment's equal protection clause. Montana responded that the higher licensing fee was justified by the higher cost of elk management which nonresident hunters imposed upon the state.[34] In examining the statute, the Court refused to apply the *Toomer* test because equal access by nonresidents to recreational big game hunting was not a fundamental privilege protected by the privileges and immunities clause.[35] Absent a showing to the contrary, the Court rejected the plaintiff's argument that Montana was required to apply its hunting laws equally to resident and nonresident alike. Because the *Toomer* analysis was inapplicable, the Court did not require the state to show that the higher nonresident fees were merely compensation for the cost of managing the state's elk program.[36]

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27. For purposes of analysis under the privileges and immunities clause, the terms citizen and resident are interchangeable. *See* Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920).

28. *Id. See also* Hicklin v. Orbeck, 437 U.S. 518, 526 (1978).

29. 342 U.S. 416 (1952).

30. *Id.* at 418.

31. *Id.*

32. 435 U.S. 371 (1978).

33. *Id.* at 373.

34. *Id.* at 403 (Brennan, J., dissenting).

35. Baldwin v. Fish and Game Commission of Montana, 435 U.S. 371, 388 (1978).

36. According to the Court, the Montana law was valid under the equal protection clause as well because the statute bore a rational relationship to a legitimate state objective. The "rational relation to a legitimate state objective" test is the most deferential level of scrutiny the Court will apply to a statute challenged under the equal protection clause. The Court has usually applied this standard of review to those statutes which neither burden a fundamental right nor create a suspect classification. *See, e.g.,* Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955).

Immediately following *Baldwin*, the Supreme Court decided *Hicklin v. Orbeck* in which it applied the *Toomer* test to strike down the 1972 "Alaska Hire" statute.[37] Alaska Hire required private employers to hire residents in preference to nonresidents for all work performed under contracts associated with state oil and gas leases.[38] This was the first time the Court squarely decided the constitutionality of such a preference statute under the privileges and immunities clause. Alaska argued that the statute was justified by the state's high rate of unemployment. The Court responded that even if a state could validly reduce its unemployment by discriminating against nonresidents,[39] Alaska Hire still would be unconstitutional because the state failed to show that nonresidents constituted a "peculiar source of the evil at which the statute was aimed."[40] Moreover, Alaska Hire's discrimination against nonresidents was not substantially related to the state's goal of reduced unemployment because the statutory preference applied to all Alaskans regardless of their employment status.[41]

More recently, the Supreme Court reviewed a much narrower statute in *United Building and Construction Trade Council of Camden County and Vicinity v. Mayor and Council of the City of Camden.*[42] In *United Building*, the Court decided the constitutionality of a Camden preference hiring ordinance which required that at least forty percent of the employees of contractors working on city works projects be Camden residents.[43] As a threshold matter, the Court determined that even those preference statutes which limit their discrimination to public works projects burden a fundamental privilege and thus would be subject to privileges and immunities scrutiny.[44] To justify the ordinance, Camden contended that it was enacted to help remedy Camden's economic and social decay. Camden argued that the ordinance's discriminatory effect on nonresidents was necessary because nonresident laborers were a peculiar source of the evil in that they "lived off Camden without living in Camden." The city implied that most of Camden's construction jobs were taken by laborers who commuted to Camden from Philadelphia and the surrounding areas. According to the city, the ordinance's disparate treatment of nonresidents was reasonably related to Camden's objective of solving its economic ills. By assuring a certain percentage of jobs to the city's unemployed, the ordinance would help revive Camden's stagnant economy.[45] Although the city appeared to satisfy both prongs of the

37. *Hicklin*, 437 U.S. 517 (1978). The full name of the statute was "Local Hire Under State Leases." ALASKA STAT. ANN. §§ 38.40.010 to .090 (1977).

38. *Hicklin*, 437 U.S. at 520.

39. According to the Court, the notion that a state could validly reduce its unemployment by requiring private employers to discriminate against nonresidents was an assumption made dubious by Ward v. Maryland, 79 U.S. (12 Wall.) 418 (1871).

40. *Hicklin*, 437 U.S. at 526 (citing Toomer v. Witsell 334 U.S. 385, 398 (1948)).

41. *Hicklin*, 437 U.S. at 527.

42. 104 S.Ct. 1020 (1984).

43. *Id.* at 1024.

44. *Id.* at 1028. The Court considered the pursuit of a common calling to be one of the most fundamental privileges protected by the clause.

45. *Id.* at 1030.

Toomer test, the Supreme Court refused to take judicial notice of Camden's unemployment related problems. Instead, the Court remanded the case to the New Jersey Supreme Court and ordered it to make the factual findings necessary to sustain Camden's contentions. The Court stated that without those findings, it would be impossible to evaluate Camden's assertion that nonresidents were a source of the evil at which the ordinance was aimed.[46]

State courts and lower federal courts which have addressed similar challenges under the privileges and immunities clause have consistently applied the *Toomer* test to strike down statutes giving a private employment preference to state residents. In *Salla v. County of Monroe,*[47] the New York Court of Appeals applied the *Toomer* test and struck down a New York statute which required private contractors working on public works projects to hire residents in preference to nonresidents.[48] The Washington Supreme Court struck down a similar preference statute in *Laborers Local Union No. 374 v. Felton Construction.*[49] In *W.C.M. Window Co. Inc., v. Bernardi,*[50] the seventh circuit upheld a district court's ruling that an Illinois preference statute violated the privileges and immunities clause.

The courts thus far have consistently applied the *Toomer* test to strike down state statutes which burdened a fundamental privilege. Wyoming is the first jurisdiction to have applied this test to uphold such a statute.

THE PRINCIPAL CASE

In *Antonich* the Wyoming Supreme Court upheld the Wyoming Preference Act against a privileges and immunities challenge because it

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46. *Id.*

47. 48 N.Y. 2d 514, 399 N.E.2d 909, 423 N.Y.S.2d 878 (1979), *cert. denied sub nom.* Abrams v. Salla, 446 U.S. 909 (1980).

48. *Id.* New York argued that the state's high unemployment rate justified the statute. The court held that New York's unemployment problem did not justify the statute's discriminatory treatment of nonresidents because there was no evidence indicating that nonresidents contributed to the state's unemployment problem. The court further explained that even if the state had produced such evidence the statute still was unconstitutional because, like Alaska Hire, it failed to prefer the unemployed over the employed. In other words, the statute was not reasonably related to the state's objective of reduced unemployment. The statute was therefore unconstitutional because it failed to satisfy both parts of the *Toomer* test.

49. 98 Wash. 2d 121, 654 P.2d 67 (1982). The State of Washington argued that the statute was enacted to strengthen the state's economic welfare and that the statutory preference for resident laborers would strengthen the state's economy by keeping wages from public works projects within the state. The hiring of nonresidents, the state asserted, would defeat this goal because they would divert wages out of the state. In applying the *Toomer* test, the court found the statute unconstitutional because the state failed to produce evidence demonstrating that nonresidents would in fact weaken the state's economy by diverting wages out of the state. The court never reached the second part of the *Toomer* test, stating that if the evil was not identified, the statute could "hardly be closely related to eliminating it." *Id.* at 129, 654 P.2d at 70-71.

50. 730 F.2d 486 (7th Cir. 1984). In affirming the district court's ruling, the court emphasized the State's failure to offer any evidence in support of the statute. *Id.* at 497-98.

found that the Act met the test outlined in *Toomer*.[51] In applying the test, the court considered the language of the statute,[52] certain assertions made by the state,[53] and judicial precedent.[54] The Act prohibited contractors working on public works projects from hiring nonresident laborers whenever qualified resident laborers were available for employment. It required the contractor to inform the nearest employment office of his employment needs. If that office certified that no employment office in the state was able to meet the contractor's employment needs, then he was free to hire nonresidents.

After determining that reduction in the state's unemployment was a legitimate objective for the statute's enactment,[55] the court concluded that the state had offered a substantial reason for the statute's discrimination against nonresidents. In other words, the state had shown that nonresidents were "the evil which the Wyoming Preference Act combats. . . ."[56] According to the court, the evil which the Act addressed was that of "a resident remaining unemployed while a nonresident takes a job on a public works project."[57] The court believed that this assertion satisfied the first part of the *Toomer* test.

Having accepted the state's identification of nonresidents as the "evil," the court then only had to find that the Act's discriminatory effect was reasonably related to the danger represented by nonresidents. For guidance, the court looked to *Hicklin*, where it easily distinguished the relatively narrow Wyoming Act from the Alaska Hire statute. Because the Wyoming Act only applied within the context of public works projects, the court concluded that the Act had a limited impact on nonresidents and, therefore, its discrimination was reasonably related to reducing the state's unemployment rate.[58]

Thomas' Concurring Opinion

Chief Justice Thomas recognized a basic flaw in the majority's opinion when he expressed doubt that the record adequately supported the state's assertion that nonresidents were in fact a peculiar source of the evil. He also recognized that even though the Act's purpose was to reduce

51. *Antonich*, 694 P.2d at 64.
52. WYO. STAT. § 16-6-203 (1977).
53. *Antonich*, 694 P.2d at 62.
54. The court relied on Hicklin v. Orbeck, 437 U.S. 518 (1978) and United Building and Trades Council of Camden County and Vicinity v. Mayor and Council of Camden, 104 S.Ct. 1020 (1984).
55. *Antonich*, 694 P.2d at 62. In *United Building* the Supreme Court intimated that unemployment could be a valid reason for discriminating against nonresidents. *United Building*, 104 S.Ct. at 1029.
56. *Antonich*, 694 P.2d at 62.
57. *Id.*
58. *Id.* at 64. The court's reasoning on this point was confused. The second prong of the *Toomer* test requires that there be a reasonable relationship between the statute's discriminatory treatment of nonresidents and the evil which they represent. The court, however, reasoned that the statute satisfied this part of the test merely because the statute confined its discriminatory impact to public works projects.

unemployment, the statutory language did not limit the list of qualified resident laborers to the unemployed.[59] This particular defect has been fatal to those preference statutes which have come before other courts.[60]

Notwithstanding these problems, Justice Thomas concluded that the Act should be upheld. He reasoned that because the state was acting as a "market participant" it was "inappropriate to invoke the privileges and immunities clause to inhibit the state in regards to the Act."[61] In the past, other states have used the market participant argument to defend a particular statute against a commerce clause, but not a privileges and immunities, challenge. This defense usually arises in connection with a state owned business which treats in-state customers more favorably than out of state customers. The United States Supreme Court ruled in *Reeves v. Stake*[62] that nothing in the commerce clause prohibits a state from favoring its own residents when it participates in the market as an independent proprietor. Justice Thomas, however, reasoned that the market participant argument was appropriate in *Antonich* because of the mutually reinforcing relationship between the commerce clause and the privileges and immunities clause.[63] Although he did not elaborate, Justice Thomas was apparently referring to the Fourth Article of the Articles of Confederation wherein both clauses have their common origin.[64] But his reasoning is inappropriate here in light of *United Building,* where Justice Rehnquist stated that the market participant defense was inapplicable to a challenge under the privileges and immunities clause.[65]

The Unidentified Evil

When Justice Vinson in *Toomer* said the state must show something indicating that nonresidents were a peculiar source of the evil at which the discriminatory statute was aimed, he implied that the state must establish a connection between the problem identified by the state and the activity of nonresidents.[66] This suggests that the state must present evidence to establish this connection.[67] Justice Frankfurter expressed this same thought in *Mullaney* when he stated that something more than bald assertion is required to establish this connection.[68]

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59. *Antonich,* 694 P.2d at 64 (Thomas, C.J., concurring).

60. *See Hicklin,* 437 U.S. at 527; *Salla,* 48 N.Y 2d at 523, 399 N.E.2d at 918, 423 N.Y.S.2d at 882.

61. *Antonich,* 694 P.2d at 64 (Thomas, C.J., concurring).

62. 447 U.S. 429 (1980).

63. *Antovich,* 694 P.2d at 65 (Thomas, C.J., concurring).

64. *See* Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 379 (1978).

65. *United Building,* 104 S.Ct. at 1028-29.

66. *Toomer,* 334 U.S. at 389.

67. In a recent decision, the United States Supreme Court invalidated under the privileges and immunities clause a New Hampshire court rule which limited bar admission to state residents. Although the state presented a number of cogent policy arguments to support the rule, the Court held the rule invalid because the state failed to produce any evidence in support of the arguments. Supreme Court of New Hampshire v. Piper, 105 S.Ct. 1272, 1279 (1985).

68. *Mullaney,* 342 U.S. 418.

The Wyoming court, however, unhesitatingly accepted the state's assertion that nonresidents were connected to the problem that the Wyoming Act attempted to remedy.[69] Although one can argue that every construction job taken by a nonresident is one less job for a Wyoming resident, the record before the court was inadequate to support any connection between Wyoming's unemployment problem and the activity of nonresidents. Read together, *Toomer, Hicklin* and *United Building* require the state to present evidence showing that "the presence or activity of nonresidents causes or exacerbates the problem the State seeks to remedy."[70] Absent this showing it is difficult to see how the Wyoming court ever reached the second part of the *Toomer* test.

The court's willingness to connect nonresidents to Wyoming's unemployment problem on the basis of a barren record might be explained by the importance the court attached to the fact that the Act "confines its discriminatory effects to projects constructed from public funds."[71] Because the Act confines its discrimination to state funded projects, the court may have reasoned that this factor was dispositive and that it was therefore unncessary to remand for the necessary factual findings. This reasoning finds support in *United Building,* where Justice Rehnquist stated: "[T]he fact that Camden is expending its own funds . . . is certainly a factor to be considered in evaluating whether the statute's discrimination violates the privileges and immunities clause."[72]

If this was the authority on which the court relied, then the holding makes sense. But this reasoning still presents a major problem because it sidesteps the dictates of *Toomer.* In *United Building,* the City of Camden implied that a nonresident's "living off Camden without living in Camden" was connected to Camden's economic and social decay. Despite the compelling force of this argument, the Supreme Court still found it impossible to evaluate the city's argument on the record because, as in *Antonich,* no trial had been held. In sum, nothing in the record substantiated Camden's assertion that nonresidents were in fact the evil at which the ordinance was aimed.[73] Thus, the Wyoming court upheld the Wyoming Preference Act by misapplying the *Toomer* test.

No Reasonable Relationship

Even if the state had shown that nonresidents exacerbated Wyoming's unemployment problem, it is still doubtful whether the Wyoming Preference Act would satisfy the second part of the *Toomer* test. This part requires that there be a reasonable relationship between the Act's

69. The Wyoming court stated that "the evil which the Wyoming Preference Act combats is . . . a resident remaining unemployed while a nonresident takes a job on a Wyoming public works project." *Antonich,* 694 P.2d at 62 (quoting State's Brief, *supra* note 3, at 16).

70. *Hicklin,* 437 U.S. at 526.

71. *Antonich,* 694 P.2d at 63.

72. *United Building,* 104 S.Ct. at 1029.

73. *Id.* at 1030.

discrimination against nonresidents and the particular evil they represent.[74] In *Hicklin*, Justice Brennan implied that one may determine this relationship by the degree to which the Act is tailored to aid the unemployed.[75] The Wyoming court apparently concluded that a reasonable relationship existed here when it said that "the Wyoming Preference Act specifically addresse[d] the problem of unemployment among Wyoming construction workers."[76] Chief Justice Thomas identified the weakness in this reasoning when he observed that the Act did not limit the list of available, qualified resident laborers to the unemployed.[77] Because the Act only requires the employment of laborers "who are available for employment,"[78] it can be argued that all Wyoming laborers who already have jobs "may be drawn away from [those jobs] in order to accept what they may regard as the more attractive opportunities thus created."[79]

The majority may have reasoned that the statute implicitly preferred the unemployed, since only the unemployed would be available for employment. But the failure of the statutory language to limit explicitly the list of available laborers to the unemployed is a potentially fatal defect in Wyoming's Preference Act. The Court in *Hicklin* stated that Alaska Hire's failure to limit its preference to the unemployed indicated that the statute was not closely tailored to remedy Alaska's unemployment. The statute's discrimination against nonresidents was therefore not substantially related to the evil they allegedly represented.[80] The New York Court of Appeals gave considerable attention to the same problem in *Salla v. Monroe*[81] when it invalidated the New York Preference Statute. The statute's failure to mandate an explicit hiring preference for the resident unemployed was one reason why the court concluded that the statute was not closely tailored to alleviate New York's unemployment problem.[82] Despite the majority's statement to the contrary, therefore, the Wyoming Act's failure to mandate an explicit preference for the resident unemployed is a strong indication that the statute's discrimination against nonresidents is not reasonably related to the evil they allegedly represent.

CONCLUSION

The Wyoming Supreme Court is the only court in recent years to sustain a resident laborers preference statute against a privileges and immunities clause challenge. In upholding the Act, the court found that the statute satisfied the standard of review demanded by *Toomer v. Witsell*. But given the scant record before the court, it is doubtful the court prop-

74. *See, e.g., Hicklin*, 437 U.S. at 527.
75. *Id.* at 528.
76. *Antonich*, 694 P.2d at 63.
77. *Id.* at 64 (Thomas C.J., concurring).
78. WYO. STAT. § 16-6-203 (Supp. 1985).
79. Salla v. County of Monroe, 48 N.Y.2d 514, 523, 399 N.E.2d 909, 914, 423 N.Y.S.2d 878, 882 (1979), *cert. denied. sub nom.*, Abrams v. Salla, 446 U.S. 909 (1980).
80. Hicklin v. Orbeck, 437 U.S. 517, 526-28 (1978).
81. 48 N.Y.2d at 514, 399 N.E.2d at 909, 423 N.Y.S.2d at 878.
82. *Id.* at 523, 399 N.E.2d at 914, 423 N.Y.S.2d at 882.

erly applied the *Toomer* test. In view of the record, the court erred in failing to remand the case for further factual development in the county court. This approach would not only have been consistent with *United Building,* but it would have also produced evidence necessary to evaluate the Act under both prongs of the *Toomer* test.

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