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Are Residential Quotas Constitutional?

by Neal Devins

United Building and Construction Trades Council
v.
Mayor and Council of City of Camden, et al.
(Docket No. 81-2110)
Argued November 28, 1983

ISSUES

Employment quotas are being intensely debated nationwide, as shown by the recent controversy over the composition of the United States Commission on Civil Rights — a battle spurred by the Reagan administration's opposition to quotas. Although United Building through its emphasis on residential hiring preference — will not touch directly on whether and when minority hiring preferences are appropriate, the decision should shed some light on the present Supreme Court's attitudes toward such devices.

How can state and local governments deal with the problems of urban unemployment and minority underrepresentation in the workforce? If no intentional racial discrimination is found, can governments still set up goals, quotas or timetables? Do these governmental units have greater authority when government employment is at issue? And if so, what authority does government have in imposing such requirements on private employers working under contract to state or local governments?

Some (and perhaps all) of these important questions of social policy will be resolved by the Supreme Court in its forthcoming decision in this case. United Building primarily questions whether local governments can demand that private employers working on projects receiving local government support give preference to local residents. At the Supreme Court level, this question will be presented as whether such local hiring preferences improperly interfere with out-of-state workers' rights to seek employment in an open marketplace. This right is protected by the Privileges and Immunities Clause of the United States Constitution. United Building might also raise the issue of whether local governments can impose a time of residency requirement on such hiring preferences without violating the Fourteenth Amendment's Equal Protection Clause.

FACTS

In United Building, an association of contractors appealed a decision by the New Jersey Supreme Court. That decision upheld an ordinance by the city of Camden mandating affirmative action by private construction companies which receive public works contracts from the city government. This ordinance required that: a) 25% of all employees be members of minority groups, and b) 40% of all employees be Camden residents of at least one year. (In 1983, prior to hearing oral arguments by the United States Supreme Court, Camden nullified the one-year aspect of the residency requirement. However, the residence requirement itself remains and is under review in this case.)

This litigation derives from the 1975 amendments to New Jersey's Law Against Discrimination. The amendments mandated affirmative action in public works contracting. In 1977, under statutory authority granted through those amendments, the state treasurer established an "employment goal" of 20% minority hiring in Camden public works contracting. In 1980, the Camden City Council sought to modify this requirement under a statutory provision permitting the state treasurer to approve local affirmative action programs which satisfy state requirements. The Camden ordinance provided that every public works contractor: 1) "shall make every effort to employ not less than 25% minority workers ... in performance of his/her contract," and 2) "shall make every effort to employ persons residing within the city of Camden, but in no event shall less than 40% of the entire labor force be residents for at least one year of the city of Camden." The state treasurer, who is now a party to this suit on Camden's side, validated this ordinance.

United Building, an association of area contractors, unsuccessfully challenged both portions of the ordinance before the New Jersey Supreme Court. The minority hiring goal was upheld under the Equal Protection Clause doctrine established by the United States Supreme Court in its 1980 Fullilove v. Klutznick decision. (448 U.S. 448 (1980)) Fullilove involved a "10 percent set-aside of federal funds" requirement for minority businesses in state and local public works projects. In upholding this requirement, the Court held that the remedy of affirmative action quotas need not be limited to cases of discrimination by a particular employer. Instead, the Court suggested that racial quotas may be

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appropriate as a remedy for past societal discrimination. Analogizing action of the New Jersey legislature in United Building to that of the federal government in Fullilove, the state court ruled that the legislature had authority to enact its affirmative action program. United Building did not challenge this portion of the New Jersey Supreme Court ruling.

In challenging the other portion of the ordinance, United Building argued that the residency requirement violated three constitutional provisions: the Commerce Clause, the Equal Protection Clause, and the Privileges and Immunities Clause. The Commerce Clause challenge sought to limit the Supreme Court's principle that the state as market participant has freedom to favor its own citizens and choose the parties with whom it will deal. (See, e.g., Reeves, Inc. v. Stakes, 447 U.S. 429 (1980).) The New Jersey Supreme Court rejected this proposition. United Building did not challenge this ruling since it was effectively mooted by last term's Supreme Court decision in White v. Massachusetts Council of Construction Employers, Inc. (103 S.Ct. 1042 (1983)). White validated the "market participant" principle by upholding Boston Mayor Kevin White's executive order requiring all construction projects using city funds to be performed by at least 50% bona fide city residents.

United Building's equal protection challenge focused on the ordinance's one-year residency requirement. This challenge was grounded in Supreme Court decisions which invalidated durational residency requirements as violating the fundamental right of travel. These decisions concerned voting rights, the right to nonemergency medical care and the right to receive state welfare payments. Analogizing these cases to the situation faced by prospective Camden residents, United Building alleged that: "[t]he effect of the Camden resident preference is to deny new residents the essential means of economic survival." The New Jersey Supreme Court rejected this claim. It felt that employees working under public works contracts should be viewed as municipal employees since residency requirements for municipal employees are frequently upheld as a rational means of furthering a city's public welfare. The state court concluded that this hiring preference was constitutional since it was rationally related to Camden's interest in alleviating local unemployment. Although this issue is raised on appeal, it is likely that the Supreme Court will not address it since Camden has recently lifted the durational residency requirement.

The privileges and immunities challenge raised by United Building, which it has argued before both the New Jersey Supreme Court and the United States Supreme Court, is the most significant of the constitutional challenges made against Camden's affirmative action plan. The thrust of this argument is that Camden's residential preference runs counter to the two central purposes of the Privileges and Immunities Clause —

national unification and the preservation of an open economic marketplace. United Building argues that the sole concern of the Privileges and Immunities Clause is that the police power of one state (exercised in this case through state authority vested in a municipality) not be used to diminish the rights and privileges of residents of another state. The fact that New Jersey residents who live outside of Camden are also adversely affected by the residential preference is considered inconsequential by United Building. Instead, United Building emphasizes that only residents of New Jersey (albeit a limited class of such residents) can benefit from the state approved ordinance.

The New Jersey Supreme Court was not swayed by this Privileges and Immunities Clause challenge. It found controlling the fact that the residency requirement does not aim primarily at out-of-state residents, rather: "[t]he fact that New Jersey residents not living in Camden than it does out-of-state residents." The New Jersey Department of the Treasury elaborated upon this line of reasoning to argue that the Privileges and Immunities Clause does not apply to classifications drawn on the basis of municipal as opposed to state residency. In other words, the state's position is that "noncitizens must constitute a peculiar source of the evil at which the statute is aimed." The state also suggests that even if the Privileges and Immunities Clause was triggered, municipalities should be accorded great authority in their efforts to solve municipal problems with public funds.

BACKGROUND AND SIGNIFICANCE

United Building will help determine how municipalities can respond to area-wide economic problems. Camden faces severe unemployment and a concomitant exodus of many residents in need of job opportunities. As stated in an amicus brief, filed by the New Jersey Department of Public Advocates, "[the constitutionality of] a municipal ordinance which establishes a resident hiring quota for public works construction contracts ... will aid cities in their efforts to solve local problems for the alleviation of the social and economic hardships imposed on their residents by the severe unemployment problems endemic to the nation's cities."

Cities must be able to effectively address the problem of local unemployment. Yet there is reason to question using residential quotas to alleviate local unemployment. As suggested by amicus New England Legal Foundation: "[E]quality of economic opportunity is a right fundamental to achieving the unity of purpose and freedom of enterprise which are central to our democratic form of government ... . The denial of employment opportunity based solely upon the circumstance of residence
violates these vital constitutional guarantees."

United Building is also significant because it will determine whether state-authorized municipal action is subject to the strictures of the Privileges and Immunities Clause. The resolution of this issue could extend well beyond the context of local efforts to address unemployment. In fact, United Building could subject many economic decisions of municipalities to constitutional review.

ARGUMENTS

For Mayor and Council of the City of Camden
1. The equal protection issue raised by the one-year residency requirement is moot because that requirement was lifted in a recent modification of the ordinance.

2. Camden's job preference is constitutional under the Privileges and Immunities Clause since it is a reasonable local effort to secure jobs for city residents on city-funded projects, while allowing non-city residents to obtain over one-half the jobs on these projects.

For the Department of Treasury of the State of New Jersey (additional arguments)
1. The Privileges and Immunities Clause does not apply to classifications drawn on the basis of municipal as opposed to state residency.

For United Building and Construction Trades Council
1. The one-year residency requirement imposed by the Camden ordinance penalizes the fundamental right of interstate travel and thus violates the Equal Protection Clause. (Note: Appellant's brief was filed prior to when the one-year residency requirement was lifted.)

2. Municipal action which discriminates against out-of-state residents is subject to the Privileges and Immunities Clause.

3. The Camden ordinance is invalid under the Privileges and Immunities Clause because there is no proof that: 1) nonresidents constitute a "peculiar source of the evil" of unemployment at which the ordinance is aimed, and 2) the discrimination practiced bears a substantial relationship to the particular "evil" of unemployment that the nonresidents are said to present.

AMICUS ARGUMENTS

The New Jersey Department of the Public Advocate filed an amicus brief in support of Camden and the State Treasurer. This brief was concerned solely with the Privileges and Immunities Clause issue and made arguments identical to both appellees.

The New England Legal Foundation filed an amicus brief containing arguments identical to those made by United Building.