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Local Hiring Preferences: Playing Politics With the Privileges and Immunities Clause

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Playing Politics With the Privileges And Immunities Clause

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Local Hiring Preferences:

Playing Politics with the Privileges and Immunities Clause[1]

By,
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I. Introduction

> "Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."
>
> (On the Privileges and Immunities Clause)
> *Paul v. Virginia,* 75 U.S. 168, 180 (1869).

As municipal lawyers know, the interplay between law and politics can be messy. When attorneys misrepresent precedent to serve political goals, they leave a trail of confusion, conflicting opinions, and bad law. The Supreme Court's decision in *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983), and its confusing aftermath, epitomizes this disarray. Despite the Supreme Court's attempt to clarify and limit the *White* opinion in its subsequent holding in *United Building and Construction Trades Council v. Camden*, 465 U.S. 208 (1984), lawyers and politicians nationwide have disagreed on local preferences for over thirty years. The politically charged debate over the legality of local preferences for government funded work continues, thanks to an abundance of inconsistent case law. Perhaps the worst consequence of this distortion of precedent is, of course, a disappointed and confused government client. One anchor for this runaway ship is the text and history of the U.S. Constitution, which is where the Supreme Court looked for guidance in *White* and *Camden*.

II. In the Beginning: *White v. Massachusetts Council of Construction Employers*

In 1979, the Mayor of Boston issued an executive order requiring that at least half of the work force for all Boston public works projects consist of "bona fide" Boston residents.[3] The Supreme Judicial Court of Massachusetts held that the Order violated the Commerce Clause of the U.S. Constitution because the impact of the Order on nonresident employers was too sweeping.[4] The Supreme Court reversed, finding that the city was acting in a proprietary, rather than regulatory fashion when it spent public funds, which saved it from a Commerce Clause

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[1] This paper is a modification of an article published in IMLA's Municipal Lawyer Magazine, May/June 2012.
[2] Special Assistant Solicitor, Baltimore City.
[3] *White*, 460 U.S. at 205-06.
[4] *Id.* at 209.

challenge.[5] Relying on *Hughes v. Alexandria Scrap*, 426 U.S. 794 (1976), a challenge to a Maryland law imposing more onerous documentation requirements on nonresident scrap dealers, the Court explained that "[nothing] in the purposes animating the Commerce Clause prohibits a state … from participating in the market and exercising the right to favor its own citizens over others."[6] The rationale behind this so-called "market participant" exception is based on the Clause's purpose, which is to protect free private trade from regulatory measures which impede it.[7] Since the government should participate in the market on a level playing field, the Court opined that "[t]he basic distinction …between States as market participants and States as market regulators makes good sense and sound law."[8] "There is no indication of a constitutional plan to limit the ability of the States themselves to operate freely in the free market."[9]

White seemed to be a clear win for local preference laws. However, the victory was short-lived. Soon the Privileges and Immunities Clause, which provides "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States" would prove to be a much greater foe for resident-based preferences. The Court addressed the Privileges and Immunities Clause in dicta in *White*, opining that the Executive Order was not as discriminatory as an Alaskan statute struck down by the Court in 1978.[10] In that case, Alaska unsuccessfully defended its "Alaska Hire" statute by arguing that discrimination against nonresidents was constitutional when the government owns the resource at issue.[11] The Court disagreed, holding that Alaska could not "bias [its] employment practices in favor of [its own] residents."[12] Ultimately, the Court in *White* avoided the issue, explaining that the Privileges and Immunities "question has not been, to any great extent, briefed or argued in this Court. We did not grant certiorari on the issue and remand without passing on its merits."[13]

III. *Camden*

A year after *White* was decided, in *United Building and Construction Trades Council v. Camden*, 465 U.S. 208 (1984), a Privileges and Immunities challenge, the more formidable opponent to resident preference laws, took center stage in the debate. At issue was a local Camden ordinance requiring that "[t]he developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the city of Camden, but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden."[14] The ordinance was later amended, changing the quota of resident workers to a "goal" with which contractors were required to make "every good faith effort" to comply.[15] The Court held that the law's preference for local workers violated the Privileges and Immunities Clause because "[t]he opportunity to

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[5] *Id.* at 214-15.
[6] *Id.* at 207 (quoting *Hughes*, 426 U.S. at 810).
[7] *Id.* at 207.
[8] *Id.* (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980)).
[9] *Id.*
[10] *Id.* at 211 (citing *Hicklin v. Orbeck*, 437 U.S. 518 (1978)).

[11] *Id.* at 210-11 (discussing *Hicklin*, 437 U.S. at 528).
[12] *Id.* at 211 (quoting *Hicklin*, 437 U.S. at 531).
[13] *White*, 460 U.S. at 215, n.12.
[14] *Camden*, 465 U.S. at 211.
[15] *Id.* at 214.

seek employment with such private employers is 'sufficiently basic to the livelihood of the nation'"[16] and is therefore a protected privilege.[17] Thus, "[a]s part of any justification offered for the discriminatory law, nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.'"[18] In reversing the Supreme Court of New Jersey, which limited the reach of the Clause to interstate discrimination, the Court notably held that municipal resident preferences are not impervious to its reach.[19] The Court explained that "Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged."[20]

Like its Commerce Clause analysis in *White*, the Court in *Camden* looked to the intent and purpose behind the Privileges and Immunities Clause to decide the constitutionality of the preference, but reached the opposite conclusion. Quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948), an earlier challenge to South Carolina's preference for resident shrimp fishermen, the Court explained that "The primary purpose of this clause, like the clauses between which it is located – those relating to full faith and credit and to interstate extradition of fugitives from justice – was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation."[21] Distinguishing its analysis in *White*, the Court explained that "The Commerce Clause acts as an implied restraint upon state regulatory powers" which must give way to federal regulation when interstate commerce is involved.[22] Therefore, "[w]hen the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise."[23] "The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony."[24] In other words, the Commerce Clause and Privileges and Immunities Clauses serve different purposes; one to eliminate burdensome regulation and the other to maintain the unity of the states. While a local preference might not constitute a regulatory restraint on trade, it does present a threat to interstate relations.

The City of Camden defended its law by claiming economic conditions all too familiar to cities today: population decline, "spiraling unemployment," and "eroded property values" which deplete the tax base.[25] In other words, Camden argued, nonresident employees of the city's public work projects "'live off' Camden without 'living in' Camden."[26] None of these conditions, however grim, proved that nonresidents were the "peculiar evil" that drove Camden into such an economic lapse, so the Court remanded.[27]

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[16] *Id.* At 221 (quoting *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 388 (1978)).
[17] *Id.*
[18] *Id.* at 222 (quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)).
[19] *Id.* at 217-18.
[20] *Id.* at 218.
[21] *Id.* at 217.
[22] *Id.* at 220.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 222.
[26] *Id.*
[27] *Id.* at 223. The case later settled, leaving future researchers wondering whether Camden (or any city) could satisfy the "peculiar evil" test.

IV. Before the Beginning … *Hicklin* and *Toomer*

Boston was not the first government to attempt to give preferential treatment to its residents seeking employment. As the Court mentioned in its avoidance of the Privileges and Immunities issue in *White*, in 1978 an Alaskan statute, "Alaska Hire" came under fire. Passed by the Alaskan legislature in 1972, the law, entitled "Local Hire Under State Leases" later dubbed "Alaska Hire" had as its central provision a requirement that "all oil and gas leases, easements or right-of-way permits for oil or gas pipeline purposes [require] the employment of qualified Alaska residents."[28] Those seeking employment on a pipeline were required to present a "resident card" as proof of residency as defined in the statute.[29] Three years after enactment, the Trans-Alaska pipeline was under construction and Alaska Hire was largely being ignored. In an attempt to enforce the statute, Alaska's Commissioner of Labor issued a cease-and-desist order enjoining unions supplying workers from dispatching nonresident workers if residents were available and qualified for the jobs.[30] Several nonresidents, unable to secure work on the pipeline due to the enforcement of the preference, filed a complaint with the Superior Court in Anchorage claiming that Alaska Hire violated both the Privileges and Immunities and Equal Protection clauses.[31] On appeal from the Alaskan court's 3 to 2 affirmation of the Act's general preference, the Supreme Court looked first to the purpose of the Privileges and Immunities Clause as discussed in *Paul v. Virginia*:

"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 is 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. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."[32]

The Court then went into an in-depth history of Privileges and Immunities clause challenges, the earliest of which involved a Maryland law regulating the sale of goods in this very City.[33] The law, passed in 1871, made it a criminal offense for nonresident merchants to sell any type of merchandise other than agricultural products or articles manufactured in Maryland without a license that cost twice the amount required for in-state merchants. Ward, a seller of horse harnesses and resident of New Jersey, sold his goods without a license in Baltimore City and as a result was indicted in a criminal court. His defense was that the law violated the Privileges and Immunities Clause.[34] The Court dismissed the indictment and

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[28] Alaska Stat. Ann. § 38.40.030 (a) (as quoted in *Hicklin*, 437 U.S. at 520).
[29] *Hicklin*, 437 U.S. at 520.
[30] *Id.* at 521.
[31] *Id.*
[32] *Id.* at 524 (quoting *Paul v Virginia*, 8 Wall. 168, 180 (1869)).
[33] *Id.* at 524-25 (discussing *Ward v.Maryland*, 12 Wall. 418 (1871)).
[34] *Id.*

invalidated the law, explaining that the Privileges and Immunities 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."[35]

Looking further to the history of the Clause, the Court wrote:

> Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.
>
> Evidence to show that the framers of the Constitution intended to remove those great evils in the government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear, or pay duties in another.
>
> Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each State possesses the power in levying taxes for the support of its own government to discriminate against the citizens of every other State of the Union.
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> *Ward* at 431.

Alaska's defense to the Privileges and immunities challenge to Alaska Hire in *Hicklin* was that the State's ownership of the resource at issue (in that case the oil pipeline) took the preference completely outside the scope of the Clause.[36] The Court admitted that this could be a dispositive factor in the analysis, but dismissed the defense because Alaska Hire covered activity well beyond Alaska's proprietary interests.[37]

The same defense also failed in 1948 when the South Carolina legislature imposed a licensing fee on nonresident shrimpers that was one hundred times greater than the fee imposed on resident fishermen in *Toomer v. Witsell*, 334 U.S. 385 (1948). The Court wrote "We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the severe discrimination practiced upon them."[38] The defendants urged that the State owned the shrimp and that this placed the law within an exception to the Clause. Appellees argued "Ever since Roman times, animals ferae naturae, not having been reduced to individual possession and ownership, have been considered as res nullius or part of the 'negative community of interests' and hence subject to control by the sovereign or other governmental authority. More recently this

[35] *Id.* at 525 (quoting *Ward*, 12 Wall. at 430).
[36] *Id*. at 528.
[37] *Id*. at 529.
[38] *Toomer*, 334 U.S. at 399.

thought has been expressed by saying that fish and game are the common property of all citizens of the governmental unit and that the government, as a sort of trustee, exercises this 'ownership' for the benefit of its citizens…Each government may, the argument continues, regulate the corpus of the trust in the way best suited to the interests of the beneficial owners, its citizens, and may discriminate as it sees fit against persons lacking any beneficial interest."[39] The migratory nature of shrimp, which made interstate fishing a necessity, was the very reason the exception could not save the law. The Court dismissed the ownership exception because no state possessed "free swimming fish."[40]

The Court wrote:

> "[b]ecause of the integral nature of the fishery, many commercial shrimpers, including the appellants, would like to start trawling off the Carolinas in the summer and then follow the shrimp down the coast to Florida. Each State has been desirous of securing for its residents the opportunity to shrimp in this way, but some have apparently been more concerned with channeling to their own residents the business derived from local waters. *Restrictions on non-resident fishing in the marginal sea, and even prohibitions against it, have now invited retaliation to the point that the fishery is effectively partitioned at the state lines; bilateral bargaining on an official level has come to be the only method whereby any one of the States can obtain for its citizens the right to shrimp in waters adjacent to the other States*."[41]

The *Toomer* case defined the test used years later in cases like *Hicklin* and *Camden* to determine the constitutionality of resident preferences.

The Supreme Court reasoned:

> "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute. It 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. But it does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principal that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures."[42] As justification for the statute, appellees urge that the State's obvious purpose was to conserve its shrimp supply, and they suggest that it was designed to head off an impending threat of excessive trawling. The record casts some doubt on these statements. But in any event, appellees' argument assumes that any means adopted to attain valid objectives necessarily squares with the privileges and immunities clause. It overlooks the purpose of that clause, which, as indicated above, *is to outlaw classifications based on the fact of non-citizenship unless there is something*

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[39] *Id*. at 399-400.
[40] *Id*. at 402.
[41] *Id*. at 388 (emphasis added).
[42] *Id*. at 396.

to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed."[43]

Proving that nonresidents are the "peculiar source of the evil" at which the law is aimed is the downfall of most, if not all, local hire preferences challenged under the Privileges and Immunities Clause. In *Hicklin*, the Court examined the record and found that no evidence supported the conclusion that nonresidents were the cause of Alaska's unemployment.[44] "What evidence the record does contain indicates that the major cause of Alaska's high unemployment was not the influx of nonresidents seeking employment, but rather the fact that a substantial number of Alaska's jobless residents especially the unemployed Eskimo and Indian residents were unable to secure employment either because of their lack of education and job training or because of their geographical remoteness from job opportunities."[45] Interestingly, a report submitted in that case claimed that seasonal and migrant workers tend to have a higher skill level than resident unemployed.[46]

Five years prior to *Camden*, the Court of Appeals of New York struck down Section 222 of the New York Labor Law, which mandated preferential treatment for New York workers on all public works projects.[47] Two Pennsylvania equipment handlers challenged the law when their company was awarded the contract for construction of a sewer line, only to find out thereafter that their employment was no longer needed due to enforcement of the law.[48] The Opinion begins with a detailed analysis of the history of the Privileges and Immunities Clause.[49] Citing various historical documents, including the Articles of Confederation, the New York Court noted that the Framers feared protectionist economic policies between the states to such a degree that protecting citizens against separatism was as highly revered as those "natural rights" that we hold so dearly today; the right to life, liberty, happiness.[50] In fact, in its historical review of the Clause, the Court discovered a quote from Alexander Hamilton, who described the Privileges and Immunities Clause as the "basis of the Union" in the Federalist papers.[51] Thus, the Court explained, "when the Constitution itself was penned, unlike those provisions whose detail reflects the controversy and compromise that preceded their adoption, the privileges and immunities clause was set out in broad, concise and unqualified terms…Ironically, it was this lack of specificity that later would make it possible for courts to be persuaded, on a seemingly *ad hoc* basis, to introduce exceptions to the clause's literal application."[52]

V. *Camden's* Confusing Aftermath

Despite the Clause's "unqualified terms," years after *Camden*, a slew of conflicting opinions on local preferences began to surface around the country. Under *Camden*, a

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[43] *Id*. at 397-98 (emphasis added).
[44] *Hicklin*, 437 U.S. at 526-27.
[45] *Id*. at 526.
[46] *Id*. at 527 fn 10.
[47] *Salla v. County of Monroe, New York*, 48 N.Y.2d 514, 525 (1979).
[48] *Id.* at 519.
[49] *Id.* at 520.
[50] *Id.* at 520-521.
[51] *Id*. at 521 (quoting Federalist No. 80).
[52] *Id.*

discrimination against workers based on residence will only survive scrutiny if a court finds that nonresidents are the "peculiar" cause of the local unemployment rate that the preference seeks to rectify. This is difficult (perhaps impossible) to prove, because, as was the case in Alaska in *Hicklin*, many factors contribute to the unemployment rate of local workers. To isolate nonresidents as the "peculiar" cause of unemployment among residents has yet to be done to the satisfaction of a court of law. This unproven hypothesis (that nonresidents are the cause of residents' unemployment), although at times passionately promoted by residential preference lobbyists, leaves local preference laws virtually indefensible.

Most courts adhere to *Camden* when faced directly with a Privileges and Immunities challenge to a resident-based preference. For example, in *Utility Contractors Ass'n v. City of Worcester*, 236 F. Supp. 2d 113 (D. Mass. 2002), the City of Worcester enacted a "Residency Requirement Ordinance" requiring all private contractors on public works projects to have at least a 50% local work force.[53] The court held that the ordinance violated the Privileges and Immunities Clause.[54] "While it is troubling to see this important project delayed, and to upset the expectations of Worcester residents, the law gives me no choice. The cases could not be clearer. The constitutional issues could not be more significant. In the absence of legally sufficient evidence from the town to justify the ordinance at this stage of the proceedings, an injunction must issue."[55]

Despite a slew of federal cases which clearly and blatantly reject local preferences as violating the Privileges and Immunities Clause under *Camden*, many cities and states have succumbed to the frustration of nonresidents "living off" of their city without "living in" it, enacting legally vulnerable local preference laws in various forms all over the country. Just as the Supreme Court predicted in *Toomer* half a century ago, these laws have resulted in acts of "official retaliation" embodied in the form of retaliatory laws, where governments penalize bidders from jurisdictions with preference laws.[56] In other words, despite *Camden*, which explained the danger the Privileges and Immunities Clause sought to avoid, many legislative bodies have enacted the very type of law that the Court and the framers of the Constitution warned against. As a result, local and state legislators are forced to either adhere to *Camden* or succumb to political pressure and enact legally vulnerable legislation. Proponents of the preference laws point to the jurisdictions enforcing them and misrepresent their "constitutionality" by citing cases upholding them on other Constitutional grounds. Some opinions rely on the fact that local preference laws exist all over the country, as if this somehow makes them Constitutional.[57] Perhaps the most surprising are the opinions that acknowledge federal precedent and then ignore it.[58]

A municipal lawyer must advise the client that resident preferences are subject to examination under the Privileges and Immunities, Equal Protection and Commerce clauses of the

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[53] *Utility Contractors Ass'n v. City of Worcester,* 236 F. Supp. 2d 113, 115 (D. Mass. 2002).
[54] *Id.*
[55] *Id*.

[56] *See, e.g.*, Md. Ann. Code, art. 24 § 8-102 (2011).
[57] *See, e.g., Bristol Steel and Iron Works, Inc. v. State of Louisiana*, 507 So.2d 1233, 1236 (La 1987).
[58] *See, e.g., APAC-Miss. V. Deep South Construction Co*., 288 Ark 277, 282 (1986).

U.S. Constitution. As reflected in the opposing results of *White* and *Camden*, each clause involves varying degrees of scrutiny embodied in different tests, serving different purposes which often produce different results. This, at least in part, explains the conflicting results of courts analyzing local preferences in various forms; some upholding them and others not. The result often depends on which clause (Equal Protection, Commerce or Privileges and Immunities) is asserted. Obviously, for any resident preference to be constitutional, there must be a viable legal defense for all three of these types of challenges. Since the only viable defense to a Privileges and Immunities challenge is to prove that nonresidents cause resident unemployment, and no government has yet mounted such a successful defense, it is unclear the degree to which this has to be proven. There is little case law explaining what "peculiar source of evil" actually means. Judging from the Court's analysis of Alaska Hire in *Hicklin*, it seems that data would have to support the assertion that nonresidents are taking jobs from similarly skilled residents. Would nonresidents have to constitute the *only* reason for residents' unemployment? This has yet to be clarified by the Supreme Court.

One thing that is clear, however, is that resident-based preferences are struck down consistently by courts and yet they exist in various forms all over the country. This can be explained in several ways. First, not everyone subject to a resident preference can bring a Privileges and Immunities claim. The Supreme Court in *Camden* admitted that a New Jersey resident who does not reside within Camden "will be affected by the ordinance as well as out-of-state citizens," but determined that "the disadvantaged [state] residents have no claim under the Privileges and Immunities Clause."[59] Furthermore, the Privileges and Immunities Clause "is inapplicable to corporations" which is an easy escape from the issue and many judges take it.[60]

Out-of-state residents who are not corporations consistently succeed against resident preferences,[61] but many Privileges and Immunities challenges are dismissed on standing, leaving Commerce Clause or Equal Protection claims, which are easily defeated in this context by the market participant exception to the Commerce Clause (as in *White*) or a rational justification for the law, which satisfies Equal Protection. The result: the local preference is upheld, despite the likelihood that it violates the Privileges and Immunities Clause. For example, in *Smith Setzer & Sons v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994), a South Carolina bidding preference was upheld on the market participant exception and withstood a rationality review under Equal Protection.[62] The Court dismissed the Privileges and Immunities claim on standing: "Finding no party to bring the Privileges and Immunities claim, it must fail."[63] Another example is *J.F. Shea Co. v. City of Chicago,* 992 F.2d 745 (7th Cir 1993), where the Seventh Circuit dismissed the Privileges and Immunities claim on standing, and upheld Chicago's two percent bidding preference for local businesses on the market participant exception. Yet another resident bidder preference survived in *Galesburg Construction v. Bd of Trustees*, 641 P.2d 745 (Wy 1982), because, once again, the Privileges and Immunities challenge

[59] *Camden*, 465 U.S. at 217 (citing The Slaughter-House Cases, 16 Wall. 36, 77 (1872).
[60] *Setzer & Sons v. South Carolina Procurement Review Panel*, 20 F.3d 1311, 1316 (4th Cir. 1994).
[61] See, e.g., *A.L. Blades & Sons v. Elliot*, 121 F.3d 865 (3rd Cir. 1997), *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486 (7th cir 1984), *Bernardi v. Leary Construction*, 102 Ill. 2d 295 (1984), *Neshaminy Const. v. Robinson*, 181 N.J. Sup. 376 (1981) and *Laborers Local Union v. Felton Constr.*, 98 Wn. 2d 121 (1982).
[62] *Setzer & Sons*, 20 F.3d at 1324.
[63] *Id*. at 1316, 1324.

was dismissed for lack of standing, and the preference was upheld under an Equal Protection analysis. Some judges acknowledge the varying results. For example, in *C.S. McCrossan Const. v. Rahn*, 96 F. Supp.2d 1238 (D.N.M. 2000), the court struck down a resident five percent bidding preference for highway construction projects, explaining that the law could pass Equal Protection scrutiny but not Privileges and Immunities.[64] Unfortunately, most judges are not so thorough, leaving ample case law upholding resident preferences as "constitutional," despite vulnerability to a Privileges and Immunities challenge.

Over the years local preference proponents have attempted to distinguish *Camden* on many grounds, trying to chip away at its threat. One theory is that a slight local preference is legal. Under *Camden*, however, any policy giving any point preference, however slight, to a worker or business defined as "local" is arguably an "effort to bias employment decisions in favor of [City] residents" and is unconstitutional, absent proof that nonresidents caused local workers to lose their jobs.[65] In fact, the Court in *Camden* notes in its opinion that the *Camden* law was changed from a quota to a "goal" with which developers and contractors must make 'every good faith effort' to comply."[66] The Court nonetheless mandated that the discrimination, however slight, be justified.[67]

Another slippery slope is the distinction between direct public employment (where the government gives a preference in its own hiring practice) and indirect public employment (where the government requires that those private employers it hires employ only residents) and whether this distinction matters under the Privileges and Immunities Clause. *Camden* acknowledged that it did matter for Equal Protection and Commerce Clause analysis, but this distinction has dubious ability to defend against Privileges and Immunities challenges.[68] In *Salem Blue Collar Workers Assoc v. City of Salem*, 33 F.3d 265 (3rd cir 1994), the Third Circuit held that "direct public employment" is not a fundamental right and is therefore outside the scope of the Privileges and Immunities Clause.[69] Admitting that the Supreme Court had not directly addressed the issue, the Court based its conclusion on the Supreme Court's Commerce Clause analysis in *White*, rejecting the argument that the public/private distinction was dead after *Camden*.[70] However, in *Camden*, the Supreme Court held that "[t]he distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. The two Clauses have different aims and set different standards for state conduct."[71] Thus, applying *White's* analysis to a Privileges and Immunities claim, as the Third Circuit did in *Salem*, ignores this distinction. The Third Circuit also based its holding on unsupported conclusions that the words "trade" and "commerce" used in older versions of the Clause in the Articles of Confederation were limited to private employment.[72] The reasoning in *Salem* is not only inconsistent with *Camden*, as the Chief Judge points out in his dissent, but the holding is factually limited to scenarios involving a City's hiring of its own employees.

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[64] *C.S. McCrossan Const. v. Rahn*, 96 F. Supp.2d 1238, 1244-1250 (D.N.M. 2000).
[65] *Camden*, 465 at 221.
[66] *Id.* at 214.
[67] *Id.* at 223.
[68] *Id.* at 219-20.
[69] *Salem*, 33 F.3d at 271.
[70] *Id.* at 269-70.
[71] *Camden*, 465 at 220.
[72] *Salem*, 33 F3d at 270.

The Chief Justice dissented:

"*Camden,* rather than providing the basis for a restrictive ruling, is a case that significantly expanded the scope of the Privileges and Immunities Clause... Therefore, the majority's conclusion does not follow from *Camden.*"[73] "Although the majority rationalizes its holding on the survival of a public/private distinction, in fact the Supreme Court has consistently rejected public ownership of assets as a sufficient justification in itself for discriminatory rules."[74] The Court made it clear in *Hicklin* that the fact that Alaska owned the resource at issue would not save Alaska's preference from a Privileges and Immunities challenge. In *Camden,* the Court said: "The 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 *but it does not remove the Camden ordinance completely from the purview of the Clause."*[75]

Therefore, policies giving a *direct* preference to local businesses or workers, rather than requiring private contractors to hire locally, are not immune from Privileges and Immunities challenges.

VI. Recent Cases: *Camden* Lives On

Although *Camden* remains the pivotal case for local preference laws, a close look at the reasoning of the case reveals that it was by no means the pioneer in this area of law. The opinion is well-grounded on the holdings of *Toomer*, and *Hicklin* which are founded on principles dating back to as early as 1871 in *Ward v. Maryland* and 1869 in *Paul v. Virginia*. So it should come as no surprise that the bedrock test: whether nonresidents constitute the "peculiar source of evil" at which the preference is aimed (unemployment of residents) remains viable today.

In spite of the longevity of these principles which date back almost 150 years in our history, resident-based preferences are still being passed all over the country. In April of 2010, in the City of Fall River, Massachusetts, a "Responsible Employer Ordinance" was passed mandating that contractors bidding on Fall River public works employ 50% resident workers and 100% resident apprentices.[76] Applying *Toomer*, the Court invalidated the residency requirement, finding that the City failed to submit adequate (or any) justification, and reasoned that the Privileges and Immunities Clause "is designed to prevent the discriminatory treatment of citizens from other states … [to avoid] economic Balkanization … [by keeping] states from adopting highly protectionist economic policies. The Constitution protects nonresidents from economic discrimination so that the nation may function as a single economic union."[77] Finding the law

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[73] *Id.* at 273.
[74] *Id.* at 274 (citing and quoting *Hicklin, infra*).
[75] *Camden*, 465 at 221 (as quoted in *Salem,* 33 F3d. at 275-6).

[76] *Utility Contractors Assoc. of New England v. City of Fall River*, 2011 U.S. Dist. LEXIS 114333 at *2.
[77] *Id*. at *11 (quoting *A.L. Blades*, 121 F.3d at 869-70)).

reflected precisely the type of protectionism that the Clause was designed to avoid, the preference was struck down.[78] In Quincy, another Massachusetts City, a similar residency bidding preference was passed.[79] The City urged the court that it, unlike its neighbor, Fall River, had substantial justification for the preference and that because its "Responsible Employer" ordinance had a "genuine and best effort" hardship clause it was narrowly tailored.[80] Interestingly, the City also argued that because the law only applied to City funded projects, it was "a lawful exercise of police power, narrowly tailored to address its activity in the public works marketplace."[81] This argument was most likely a hopeful nod to the marketplace exception which saved the preference in *White*. As *Camden* revealed, however, the marketplace exception will not save a residency preference from the Privileges and Immunities Clause. Quincy didn't give up easily, however, arguing that its taxpayers desired a return on their investment in their town which had committed to billions of dollars in projects.[82] Quincy explained to the court that Thomas P. Koch, the mayor, "was hearing from the citizenry on an almost daily basis that the blue collar sector of the city needs work [and that it is] axiomatic that every municipality would wish to see its citizens employed, and would do whatever it could to insure that to happen."[83] The court was not persuaded: "Quincy provides no evidence that the city engaged in any extensive fact finding, conducted or commissioned any studies, or made any determination based on evidence that non-residents were a particular source of the unemployment of Quincy's blue-collar workers. To the contrary, one may reasonably infer that non-residents shop, ride public transportation, frequent restaurants and taverns, and in many other ways contribute substantially to the Quincy economy, and that Quincy residents are gainfully employed well outside the confines of Quincy."[84] The court did not agree that the "best efforts" provision saved the law. "The mere fact that Quincy chose to include a clause that could potentially save a bidder from being subject to an unconstitutional residency mandate does not render that mandate constitutional, as the applicability of the Privileges and Immunities Clause does not depend on the level of hardship imposed on municipal residents."[85] This holding is consistent with the *Camden* court, which noted that the City had revised its 40% quota to a goal with which contractors must make an "effort" to comply but nonetheless held that the law was an "effort to bias private employment decisions in favor of its residents" and required adequate justification under *Toomer*.[86]

Although *Camden,* decided over 30 years ago, is the most recent Supreme Court analysis of a local hiring preference, Justice Alito writing for the Court *McBurney v. Young* just this past year, reinforced some these basic principles. In a challenge to Virginia's FOIA law, an out-of-state resident claimed that he was denied his fundamental right to pursue a common calling where his business was to access records and as a non-Virginian, he was denied access under the

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[78] *Id*. at *14 "Because the 2010 REO residency requirements impede a fundamental right under the Privileges and Immunities Clause and Fall River does not offer any justification, the *Toomer* test is satisfied and as a matter of law the residency requirement is invalid."
[79] *Merit Construction Alliance v. City of Quincy*, 2012 U.S. Dist. Lexis 54210 at *1.
[80] *Id*. at * 4.
[81] *Id*.
[82] *Id* at *6.
[83] *Id.*
[84] *Id*. at *7-8.
[85] *Id*. at *9.
[86] *Camden*, 465 U.S. at 221.

state's FOIA law. The Court, finding that Virginia's FOIA law had a "non-protectionist aim" and was therefore distinguishable from cases like *Camden*, *Hicklin* and *Toomer*, reiterated that "the [Privileges and Immunities] Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment."[87]

VII. Legally Viable Strategies for Combatting Resident Unemployment

The array of case law discussed above makes it clear that no municipal lawyer should go into court to defend a resident-based preference without some concrete evidence that the unemployment of residents is, in at least some way, caused by nonresidents. Without that data, the law has no chance in the face of a Privileges and Immunities challenge. Although the cases up to this point suggest that proving the theory that nonresidents are in fact the "peculiar" source of resident unemployment might be an impossible task, if your client has the resources to do so, and feels strongly about the preference, commissioning a study of the issue would be a good place to start. The complex aspect of such a study would be isolating the other obvious factors like lack of skills or education from the causes of unemployment. Most judges question whether this is a viable theory. As the judge in *Utility Contractors* put it when faced with a challenge to Worcester's local preference in 2002 "Even if I were to accept that poor economic conditions are a sufficiently substantial reason to defeat the challenge (and I have seen no case that has so held) I cannot accept that nonresidents are the peculiar source of the evils Worcester has described as the Camden case requires. It is more than a stretch to suggest that nonresident employment on public construction projects – or in the construction sector generally – is responsible for the far reaching economic problems the City describes."[88] In other words, as a New Jersey judge put it, "New Jersey, absent a special showing of specific dangers posed by out-of-state employees, may not attempt to resolve its problems on the backs of citizens of our neighboring states."[89]

Arguably, if data exists and supports the premise that similarly skilled nonresident workers are taking jobs from residents, you might have a chance at defending a resident employment preference. However, coming to court with files of data showing unemployment, rising property taxes, decrease in city population, or other descriptions of poor economic conditions in general will not suffice.

That's the bad news for local preferences. The good news is that there are viable legal strategies for achieving the same goal (of employing residents). One approach would be to base the preference on some other factor besides residency. For example, a "disadvantaged"[90] worker preference could be based on income level or years of unemployment. Creating opportunities for residents to hear of job openings is another strategy. Linking employers to residents through websites or community centers is another option. If resources are available, creating training programs that are both accessible and affordable to residents is another way to make residents more desirable to employers.

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[87] *McBurney v. Young*, 133 S. Ct. 1709, 1716 (2013).
[88] *Utility Contractors*, 236 F. Supp. 2d at 120.
[89] *Neshaminy Constructors v. Krause*, 437 A.2d 733, 738 (N.J. Super. Ct. Ch. Div. 1981).
[90] San Francisco's local preference uses this term

VIII. Conclusion

The legislative history of the Privileges and Immunities Clause, as well as Supreme Court precedent, leaves resident preference laws virtually indefensible. In addition, the efficacy of protectionist policies is questionable at best, as reflected in the many instances where a city failed to demonstrate that the discrimination actually achieved its economic purpose of boosting the local economy. Furthermore, there are legally defensible strategies designed to stimulate local businesses which might actually work; such as the creation of job linkage and training programs run through a partnership with developers, community groups and the government.

In today's society, where political figures and even Supreme Court Justices have been known to criticize the Constitution, describing it as antiquated and challenging its effectiveness to accommodate modern social issues, municipal lawyers should proceed with caution. We, as a people, certainly have the ability and the right to amend our own Constitution. We should reflect on, however, the potential ramifications of amending, or ignoring, the very "basis of the Union."

Author's note: The opinions expressed herein are the author's alone and are in no way official opinions of the Baltimore City Law Department.