Local Preferences: Playing Politics with the Privileges and Immunities Clause

by Ashlea Howard Brown



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 United States Supreme Court's decision in *White v. Massachusetts Council of Construction Employers*,[1] and its confusing aftermath, epitomizes this disarray. Despite the Court's attempt to clarify and limit the *White* opinion in its subsequent holding in *United Building and Construction Trades Council v. Camden*,[2] lawyers and judges 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*.

The *White* Case

In 1979, the Mayor of Boston issued an executive order requiring that construction projects funded in whole or in part by City funds, or funds which the City had the authority to administer, were to be performed by a work force of which at least half was "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 challenge.[5] Relying on *Hughes v. Alexandria Scrap*, 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]

Privileges and Immunities Challenges

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, "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States,"[10] would prove to be a much greater foe. In *White*, the Court addressed the Privileges and Immunities Clause in dicta, opining that the order was not as discriminatory as an Alaskan statute previously struck down by the Court in 1978, in *Hicklin v. Orbeck*.[11] There, Alaska attempted to justify its local hiring preference law (a "Local Hire Under State Leases" statute) by arguing that discrimination against nonresidents

was constitutional when the government owned the resource at issue.[12] The Supreme Court disagreed, holding that the State could not "bias [its] employment practices in favor of [its own] residents."[13] However, the Court in *White* ultimately 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."[14]

A year later, in 1984, this more formidable opponent to resident preference laws took center stage in the debate, in *United Building and Construction Trades Council v. Camden*.[15] At issue was a Camden, N.J., ordinance requiring that a "developer/contractor, in hiring for jobs, ... 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."[16] The ordinance was later amended, changing the "quota" of resident workers to a "goal" that contractors were required to make "every good faith effort" to comply with.[17] The Supreme Court held that the law's preference for local workers violated the Privileges and Immunities Clause because "[t]he opportunity to seek employment with such private employers is 'sufficiently basic to the livelihood of the nation'"[18] and was, therefore, a protected privilege.[19] 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.'"[20] 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 were not impervious to its reach.[21] 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."[22]

Like its Commerce Clause analysis in *White*, the Court in *Camden* looked to the intent and purpose behind the Privileges and Immunities Clause, but reached the opposite conclusion. Quoting its 1948 decision in *Toomer v. Witsell*, 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.[23]

As municipal lawyers know, the interplay between law and politics can be messy.

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.[24] Therefore, "[w]hen the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise."[25] "The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony."[26]

Camden had defended its resident preference law by pointing to the kinds of local economic conditions that are all too familiar to cities today: population decline, "spiraling unemployment," and "eroded property values" which depleted its tax base.[27] In other words, Camden argued, nonresident employees of the City's public work projects "'lived off' Camden without 'living in' Camden."[28] 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.[29]

Five years prior to the *Camden* case, the Court of Appeals of New York struck down Section 222 of the New York Labor Law.[30] This law mandated preferential treatment for New York workers on all public works projects. Two Pennsylvania equipment handlers challenged the law when their company was awarded a contract for construction of a sewer line, only to find out later that their employment was being terminated due to the strict enforcement of the law.[31] The opinion in the case, *Salla v. County of Monroe, New York*, begins with a detailed analysis of the history of the Privileges and Immunities Clause.[32] Citing various historical documents, including the Articles of Confederation, the court noted that the Constitution's 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, and happiness.[33] 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.[34] 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

continued on page 12



Ashlea Howard Brown currently works as a Special Assistant Solicitor in the General Counsel Division of the Baltimore City Law Department. She specializes in legislative review, with a particular interest in constitutional issues. Prior to her current position, Ashlea was an associate with DLA Piper, where she worked in the Public Law group. She earned her J.D. from University of Maryland School of Law. She lives in north Baltimore with her husband, Alex, and two children, Hugh and Kolby. Ashlea is expecting her third child in June.

continued from page 11

> 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.[35]

Addressing the merits of the case, the court referred to the law's "blunderbuss overbreadth."[36] While combating unemployment was a legitimate State concern, the relevant criteria for privileges and immunities analysis remained whether nonresidents were a "peculiar source" of the evil of joblessness in New York, and whether the statute was "fashioned with sufficient precision to meet the problem without unduly impinging on the rights of those who [did] not contribute to it. ... Far from any demonstration of a close relationship between nonresident employment on public works projects and unemployment rolls, there [was] nothing in this record to connect the two at all."[37]

Later Rulings

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*, 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 local preference law seeks to rectify. Not only is this difficult to prove, but many factors contribute to the unemployment rate of local workers, making a hiring preference based on residence virtually legally indefensible. Some opinions adhere to *Camden*. For example, in *Utility Contractors Ass'n v. City of Worcester*, 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.[38] The court held that the ordinance violated the Privileges and Immunities Clause,[39] concluding:

> 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.[40]

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 U. S. Constitution.

On the other hand, many cities and states have succumbed to the frustration of having nonresidents "living off" of their city without "living in" it by enacting legally vulnerable local preference laws in various forms. 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.[41] 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 Supreme 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.[42] Perhaps the most surprising are the opinions that acknowledge federal precedent, and then ignore it.[43]

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 U. S. Constitution. As reflected in the opposing results of *White* and *Camden*, each Clause involves varying degrees of scrutiny embodied in different tests, 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. For any resident preference to be constitutional, however, there must be a viable legal defense for all three of these types of challenges.

In brief, though, Privileges and Immunities challenges consistently succeed against resident preferences,[44] but courts often dismiss them on standing grounds, leaving Commerce Clause or Equal Protection claims, which are easily defeated in this context by the "market participant" exception to the Commerce Clause (as was the case in *White*) or on the basis of 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. S.C. Procurement Review Panel*, a South Carolina bidding preference was upheld based on the "market participant" exception and withstood rationality review under Equal Protection.[45] The court dismissed the Privileges and Immunities claim on standing: "Finding no party to bring the Privileges and Immunities claim, it must fail."[46] Another example is the case of *J.F. Shea Co. v. City of Chicago*,[47] where the U.S. Court of Appeals for the Seventh Circuit dismissed a 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 sur-

continued on page 13

vived challenge in *Galesburg Construction v. Bd. of Trustees*,[48] because, once again, the Privileges and Immunities challenge was dismissed for lack of standing, and the preference was upheld under an Equal Protection analysis. The Privileges and Immunities Clause "is inapplicable to corporations," which is an easy escape from the issue, and many judges take it.[49]

Some judges acknowledge these varying results. For example, in *C.S. McCrossan Construction, Inc. v. Rahn*,[50] the court struck down a resident five percent bidding preference for highway construction projects, explaining that the law could pass Equal Protection scrutiny, but could not be upheld on Privileges and Immunities analysis.[51] 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, proponents have attempted to distinguish *Camden* on many grounds, trying to chip away at its threat to local preferences. 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.[52] In fact, as the Supreme Court in *Camden* noted in its opinion, the *Camden* law was changed from a strict quota to a more flexible "goal" that developers and contractors were to make "'every good faith effort' to comply" with.[53] The Court, nonetheless, mandated that the discrimination, however slight, be justified.[54]

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 gives dubious grounds on which to defend against Privileges and Immunities challenges.[55]

In *Salem Blue Collar Workers Ass'n v. City of Salem*,[56] the U.S. Court of Appeals for 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.[57] 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*.[58] 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."[59] 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.[60]

The dissent in the *Salem* case, by Chief Judge Sloviter, points out that the reasoning of the majority in *Salem* is not only inconsistent with *Camden,* but the holding was factually limited to scenarios involving a city's hiring of its own employees: "*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.*"[61] He adds that "[a]lthough 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."[62] In *Camden,* he said, the Supreme Court indicated that the fact that Camden was expending its own funds was 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.*"[63]

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.

Conclusion

The legislative history of the Privileges and Immunities Clause, as well as existing Supreme Court precedent, leave resident preference laws virtually indefensible. In addition, the efficacy of such 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. Further, there are other, legally defensible strategies designed to stimulate local businesses which might actually work; the creation of job linkage and training programs run through a partnership with developers, community groups, and the government.

Recently, the President and a Supreme Court Justice openly criticized the Constitution, describing it as antiquated and challenging its effectiveness to accommodate modern social issues. 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 the very "basis of the nation."

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

Notes

1. 460 U.S. 204 (1983).
2. 465 U.S. 208 (1984).
3. 460 U.S. at 205-06.
4. *Id.* at 209.
5. *Id*. at 214-15.
6. *Id.* at 207 (quoting *Hughes v. Alexandria Scrap*, 426 U.S. 794, 810 (1976)).
7. *Id.* at 207.
8. *Id.* (quoting *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980)).
9. *Id.*
10. U. S. Const., Art. IV, § 2.
11. 460 U.S. 204, 211 (1983) (citing *Hicklin v. Orbeck*, 437 U.S. 518 (1978)).
12. 437 U.S. 518, 528 (1978).
13. *Id.* at 531.

continued on page 36

Local Preferences

cont'd from page 13

14. *White*, 460 U.S. at 215, n.12.
15. 465 U.S. 208 (1984).
16. *Id.* at 211.
17. *Id.* at 214.
18. *Id.* (quoting *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371, 388 (1978)).
19. *Id.* at 221.
20. *Id.* at 222 (quoting *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)).
21. *Id.* at 217-18.
22. *Id.* at 218.
23. *Id.* at 216 (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)).
24. *Id.* at 220.
25. *Id.* (emphasis in original).
26. *Id.*
27. *Id.* at 222.
28. *Id.*
29. *Id.* at 223. The case later settled, leaving future researchers wondering whether Camden (or any city) could satisfy the "peculiar evil" test.
30. Salla v. County of Monroe, New York, 48 N.Y.2d 514, 525 (1979).
31. *Id.* at 519.
32. *Id.* at 520.
33. *Id.* at 520-21.
34. *Id.* at 521 (quoting Federalist No. 80).
35. *Id.*
36. *Id.* at 523.
37. *Id.*
38. Utility Contractors Ass'n v. City of Worcester, 236 F. Supp. 2d 113, 115 (D. Mass. 2002).
39. *Id.*
40. *Id.*
41. *See, e.g.*, MD. ANN. CODE, art. 24 § 8-102 (2011).
42. *See, e.g.*, Bristol Steel and Iron Works, Inc. v. State of Louisiana, 507 So. 2d 1233, 1236 (La 1987).
43. *See, e.g.*, APAC-Miss. v. Deep South Constr. Co., 288 Ark. 277, 282 (Ark. 1986).
44. *See, e.g.*, A. L. Blades & Sons v. Yerusalim, 121 F.3d 865 (3d Cir. 1997), W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984), People ex rel. Bernardi v. Leary Constr. Co., 464 N.E.2d 1019 (Ill. 1984), Neshaminy Constructors, Inc. v. Krause, 181 N.J. Sup. 376 (N.J. Super. Ct. Ch. Div. 1981); Laborers Local Union v. Felton Constr., 654 P.2d 67 (Wash. 1982).
45. Smith Setzer & Sons v. S.C. Procurement Review Panel, 20 F.3d 1311, 1324 (4th Cir. 1994).
46. *Id.* at 1316, 1324.
47. 992 F.2d 745 (7th Cir 1993).
48. 641 P.2d 745 (Wy. 1982).
49. *Smith Setzer & Sons*, 20 F.3d 1311, 1316.
50. 96 F. Supp. 2d 1238 (D.N.M. 2000).
51. *Id.* at 1244-50.
52. United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 221 (1984).
53. *Id.* at 214.
54. *Id.* at 223.
55. *Id.* at 219-20.
56. 33 F. 3d 265 (3rd Cir. 1994).
57. *Id.* at 271.
58. *Id.* at 269-70.
59. *Camden*, 465 at 220.
60. *Salem*, 33 F. 3d at 270.
61. *Id.* at 273.
62. *Id.* at 274 (citing *Hicklin v. Orbeck*, 437 U.S. 518 (1978)).
63. *Id.* at 275-6 (citing *Camden*, 465 U.S. 208, 221 (1984)) (emphasis in original). **M**

Tasers

cont'd from page 9

ted and no threat; subject stepped away from officer and was tased the first time, and subject on the ground and unable to resist when tased the second time).
36. 635 F.3d 354 (8th Cir. 2011).
37. *Id.* at 360.
38. Hoyt v. Cooks, 672 F.3d 972 (11th Cir. 2012).
39. *Id.* at 979.
40. *See* Sanders v. City of Dotham, 409 Fed. Appx. 285 (11th Cir. 2011) (law was not clearly established).
41. *See* Floyd v. Corder, 426 Fed. Appx. 790 (11th Cir. 2011) (law was not clearly established).
42. *See* Buckley v. Haddock, 292 Fed. Appx. 791 (11th Cir. 2008) (no Fourth Amendment violation).
43. *See* Chaney v. City of Orlando, 291 Fed. Appx. 238 (11th Cir. 2008) (no violation of clearly established law).
44. *See* Draper v. Reynolds, 369 F.3d 1270, 1277-78 (11th Cir. 2004) (taser analysis includes the need for application of force, relationship between need and amount of force used, and extent of injury inflicted).
45. *See* Moretta v. Abbott, 280 Fed. Appx. 823 (11th Cir. 2008).
46. *See* Oliver v. Fiorino, 586 F.3d 898, 903 (11th Cir. 2009).
47. *See, e.g.*, Bryan v. Macpherson, 630 F.3d 805, 826 (9th Cir. 2010).
48. Hoyt v. Cooks, 672 F.3d 972, 979 (11th Cir. 2012).
49. *Id.* at 980. *See also Draper*, 369 F.3d at 1278 ("Although being struck by a taser gun is an unpleasant experience, the amount of force Reynolds used—a single use of the taser gun causing a one-time shocking—was reasonably proportionate to the need for force and did not inflict any serious injury. ...The single use of the taser gun may well have prevented a physical struggle and serious harm to either Draper or Reynolds.").
50. 652 F.3d 524 (4th Cir. 2011).
51. *Id.* at 532.
52. The U. S. Supreme Court has denied *certiorari*. *See* Purnell v. Henry, 132 S. Ct. 781 (U.S. Nov. 28, 2011). Similarly, in *Torres v. City of Madera*, 648 F.3d 1119 (9th Cir. 2011), *cert. denied*, *Noriega v. Torres*, 132 S. Ct. 1032 (U.S. Jan. 09, 2012), an officer mistakenly used a Glock semiautomatic pistol instead of her taser, resulting in the death of a handcuffed arrestee in a police cruiser. The Ninth Circuit held that the district court improperly granted summary judgment, as there was a question of fact as to whether the mistake was objectively reasonable. **M**

Brownfield Redevelopment

cont'd from page 27

CONTROLS, 5 (2000).
11. Edwards, *supra* note 9, at 5.
12. John Pendergrass, *Sustainable Redevelopment of Brownfields: Using Institutional Controls to Protect Public Health*, 29 ENVTL. L. REP. 10243, 10244 (2000).
13. 723 F. Supp. 2d 1123 (D. Minn. 2010).
14. *Id.* at 1130.
15. *Presumptive Remedies: Policies and Procedures*, U.S. Environmental Protection Agency, http://www.epa.gov/superfund/policy/remedy/presump/pol.htm (last updated Dec. 12, 2011).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*