CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

January 9, 2013

The Honorable President and Members
of the Baltimore City Council
Attn: Karen Randle, Executive Secretary
Room 409, City Hall, 100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 12-0159 Finance and Procurement – Local Hiring Supplemental Bill Report

Dear President and City Council Members:

The Law Department is supplementing its January 2, 2013 report for City Council Bill 12-0159.

The Law Department has been consistent in its advice on this subject as reflected in the attached reports on City Council Bill 10-0455 (Community Partnership Agreements) dated July 19, 2010, City Council Bill 11-0287R (Investigative Hearing–Local Hiring Preference Programs) dated June 22, 2011, and City Council Bill 12-0009R (Informational Hearing–Local, Small and Disadvantaged Business Purchasing Preferences for Baltimore) dated February 9, 2012. In addition, an article entitled "Local Preferences: Playing Politics with the Privileges and Immunities Clause," authored by a Law Department attorney, was published in the 2012 May/June issue of the International Municipal Lawyer magazine and is attached for reference.

The Law Department has advised the Council President's Office that there are ways to increase the hiring of City residents that may survive legal challenge. Those ways include:

- Creating job linkage and training programs
- Focusing the hiring preference on income level rather than residency in a way that satisfies the Equal Protection Clause of the United States Constitution
- Focusing the preference on those who are unemployed or who have graduated from job training programs in a way that satisfies the Equal Protection Clause of the United States Constitution
- Contractually modeling the Section 3 federal program so that when federal funding is involved and a preference would be consistent with the purpose of that federal funding, placing terms in a City contract with a company to employ low-income residents of the area where the federal funds are expended, just as is done now at Housing and Community Development and the Housing Authority of

Baltimore City through the Fair Housing & Equal Opportunity Office, which already has in place mechanisms for qualifying businesses as Section 3 businesses and for granting bidders Section 3 preferences

- Amending the Charter requirement that a competitively bid project be awarded to the lowest responsive and responsible bidder to allow the Board of Estimates to promulgate rules, consistent with constitutional law, for creating a bidding preference for contracts funded in part by federal funds in order to leverage the purpose of those funds

In a recent letter received by the Law Department, the Council President asked for assistance in amending City Council Bill 12-0159 to make it legally sufficient. Although the Law Department approves for form and legal sufficiency over ninety percent of the local legislation it reviews, and suggests amendments to all bills that can be amended, this bill cannot be amended to make it legal.

The case of *Utility Contractors Association v City of Worcester*, 236 F. Supp. 2d 133, 117 (D. Mass. 2002), cited by the Law Department in its first report on this bill, explains that where a law makes a distinction based on residency, courts will evaluate whether that distinction "strikes at the heart of an interest so 'fundamental' that its derogation would 'hinder the formation, the purpose, or the development of a single Union of [the] States.'" (citations omitted). Employment on government contracts is a fundamental interest. *See United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 221-22 (1984); *Lakeside Roofing Co. v. Nixon et. al.*, 2012 U.S. Dist. LEXIS 28442, *13 (E.D. Mo. March 5, 2012); *Hudson v. City of Jersey*, 960 F. Supp. 823, 831 (D. N.J. 1996). Therefore, the "analysis proceeds to a second stage, where the defendant can overcome the challenge by showing a 'substantial reason' for the difference in treatment." *Utility Contractors Ass'n.*, 236 F. Supp. 2d at 118 (citing *Camden*, 465 U.S. at 222; *Toomer v. Witsell*, 334 U.S. 385, 396, 398 (1948)).

Although the City may have many good reasons to prefer its residents for publicly funded employment, as part of the "substantial reason" analysis Courts require that the City "demonstrate that nonresidents are 'a peculiar source of evil'" before a law giving such a preference will be upheld under the Privileges and Immunities Clause. *Utility Contractors Ass'n.*, 236 F. Supp. 2d at 118 (citing *Sup. Ct. of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *Toomer*, 334 U.S. at 398-99). The recent case of *Merit Constr. Alliance v. City of Quincy*, 2012 U.S. Dist. LEXIS 54210, *7-8 (D. Mass. April 18, 2012), which was also cited in the Law Department's first report on this bill, struck down a local preference law in Quincy, Massachusetts because there was "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." Similarly, this bill does not provide the required fact finding or studies.

The Law Department does not recommend that a study be commissioned to support City Council Bill 12-0159 because courts have expressed doubt that such a study could identify

nonresidents as "source of unemployment and poverty within [the City's] borders." *Hudson County Building and Construction Trades Council, AFL-CIO v. City of Jersey City*, 960 F. Supp. 823, 831 (D. N.J. 1996). That study would have the herculean task of "clearly showing nonresident laborers . . . constitute a particular threat to the employment of [local] laborers." *Lakeside Roofing Co.*, 2012 U.S. Dist. LEXIS 28442 at *21. Even when the judiciary is "deeply moved" by the local economic plight, it is reluctant to "accept that nonresidents are the peculiar source of the evils" faced locally. *Utility Contractors Ass'n.*, 236 F. Supp. 2d at 120. "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." *Id.* "Though the [Privileges and Immunities] Clause admits the possibility that such discrimination may be justified, the level of scrutiny that the case law imposes is exacting." *Utility Contractors Ass'n.*, 236 F. Supp. 2d at 121.

Even if a study could provide the required causal nexus, the City must still demonstrate that a law discriminating against nonresidents "'bears a close relation' to the purposes of the classification" and "that there was no 'less restrictive means' to accomplish its lawful ends." *Utility Contractors Ass'n.*, 236 F. Supp. 2d at 118 (citing *Sup. Ct. of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *Toomer*, 334 U.S. 398-99). Given the work of the Mayor's Office of Employment Development as outlined in its report on this bill, and the ways listed above that local hiring can be spurred without enacting a law that discriminates against nonresidents, the City will have the impossible task of convincing Courts that this bill is narrow enough to meet the Constitutional requirement.

> **Courts** applying [Supreme Court cases] to determine the validity of laws requiring or giving preference to the employment of residents by contractors engaged in the construction of public works projects **have nearly uniformly ruled that such laws violate the Privileges and Immunities Clause**.
>
> *Lakeside Roofing Co.*, 2012 U.S. Dist. LEXIS 28442 at *17 (emphasis added).

Finally, in cities that have such laws on their books (usually enacted prior to the Supreme Court's seminal holding in *Camden*) because they have not yet been challenged on Privileges and Immunities grounds, Courts are finding that their effect "on citywide unemployment is minimal." *Utility Contractors Ass'n.*, 236 F. Supp. 2d at 120; *see also Merit Constr. Alliance*, 2012 U.S. Dist. LEXIS 54210 at *8 (recognizing that reliance on cases like *White v. Mass Council of Construction Employers*, 460 U.S. 204 (1983), which upheld a local preference law, is often misplaced because the case "was a challenge under the *commerce clause*, not, as here, the Privileges and Immunities Clause. *White* explicitly did not address potential invalidation of the ordinance under the latter because that issue had not been 'briefed or argued.'")(emphasis in original); *City of Cleveland v. Ohio*, 508 F. 3d. 827, 834-35 (2007)(upheld the Federal Highway Administration's decision to pull funding from Cleveland because its use of a local hiring law violated federal bidding requirements, without needing to address the question of whether that law also violated the Privileges and Immunities Clause). As one Federal Court observed, "eighteen years of the [local preference ordinance] have not resolved the economic and social conditions that, according to the City, required its enactment." *Utility Contractors Ass'n.*, 236 F.

Supp. 2d at 120. The fact that local preference laws that have remained on the books are proving ineffective in reducing local unemployment will make it much harder for the City to demonstrate that this bill is necessary to accomplish its goal.

As another Federal Court recognized less than a year ago, since "the Supreme Court has rejected the argument that employed nonresidents are automatically a source of high residential unemployment so as to enable protectionist legislation to pass scrutiny under the Privileges and Immunities Clause," it is "difficult to issue guidance to [a government] to enable the reformation" of the laws in question. *Lakeside Roofing Co.*, 2012 U.S. Dist. LEXIS 28442 at*21.

For all of the above reasons, the Law Department is unable to recommend amendments to the bill that will make it lawful. However, as stated above, the Law Department remains committed to helping the City implement lawful initiatives to spur local hiring.

Very truly yours,

George Nilson

George Nilson
City Solicitor

Ashlea H. Brown
Hilary B. Ruley
Assistant Solicitors

cc: Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor
Victor Tervala, Assistant Solicitor

CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

July 19, 2010

Honorable President and Members
of the City Council of Baltimore
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Attn: Karen Randle
Executive Secretary

JUL 22

Re: City Council Bill 10-0455
Community Partnership Agreements

Dear President and City Council Members:

You have requested the advice of the Law Department regarding City Council Bill 10-0455. City Council Bill 455 requires community partnership agreements for certain construction projects financed or funded by or through the City; defines certain terms; specifies the minimum contents of an agreement; provides for the creation of a model agreement; requires certain annual reports; provides for the automatic termination of the ordinance; and generally relates to community partnership agreements.

Bill 455 requires that the City include in all contracts for construction projects with a total cost of $5,000,000.00 or more in which the City has a certain financial role, a provision that requires contractors to enter into "Community Partnership Agreements" with the City and certain unions. The bill does not define "Community Partnership Agreement" but dictates its minimum contents. Each Community Partnership Agreement must require contractors to use the hiring halls of the signatory union as their first source of employees for 48 hours. The Agreement must also contain a no-strike clause and must require the signatory unions to "exert their best efforts" to recruit local workers for their hiring halls.

Local Hiring Preference:

The bill's requirement that signatory unions "exert their best efforts" to recruit local workers to their hiring halls combined with the requirement that contractors use those hiring halls exclusively

for 48 hours on covered projects, results in a hiring preference for local workers. The Law Department has consistently advised the City that a direct preference for hiring Baltimore residents for City funded work would run afoul of the Privileges and Immunities Clause of the Constitution and would interfere with the City's Charter-mandated procurement process.

The Supreme Court in *United Bldg. and Const. Trades Council v. Camden*, 465 U.S. 208, 220 (1984), a case addressing a law similar to this one, held "a city's efforts to bias employment decisions in favor of its residents on construction projects funded with public monies" "discriminates against a protected privilege." *Camden*, 465 U.S. at 221-2. The Court held "[t]he opportunity to seek employment with such private employers is 'sufficiently basic to the livelihood of the nation.'" *Id.* at 221 (quoting *Baldwin*, 436 U.S. 371, 388 (1978)).

The fact that the bill requires the unions to "exert their best efforts" to recruit local workers to their hiring halls, as opposed to using quotas, is of no legal consequence. The *Camden* law was changed from a quota to a "goal" with which developers and contractors must make 'every good faith effort' to comply." *Id.* at 214. Like the law in *Camden*, the purpose of Bill 455 is to give local (union) workers first dibs on City projects. The fact that nonresidents could potentially join those hiring pools is also of no consequence.

"[S]tatutes or ordinances mandating local hire in publicly funded projects are meeting a negative response based on both Commerce Clause and the Privileges and Immunity clause rationales." 3 Local Government Law §22:12. "Residence in the area has been rejected as a basis for an award of a public construction contract where the award is based solely on the reasoning that a local firm will use local contractors, local labor and will patronize local supply houses." 13 McQuillin Mun. Corp. §37:104. Although there is authority in some jurisdictions to the contrary, it is factually distinguishable and/or the challenge brought was not based on the Privileges and Immunities Clause.

Furthermore, a local hiring preference would not withstand a Commerce Clause challenge if the City did not have a "proprietary interest" sufficient to make it a "market participant" under the law. Bill 455 defines "covered construction project" as one that the "City finances, in whole or in part, through a [TIF] or a tax abatement program" or "...that is funded, in whole or in part, through state or federal grants or loans administered by the City." § 23-1 (D). The City must bear substantial economic risk on a project to be considered a "market participant" sufficient to survive a Commerce Clause challenge. Playing a minor financial part in a project is not enough. As written, Bill 455 would require the City to enter into these agreements, thereby participating in preferential hiring in situations where it would not be considered a "market participant." This could be challenged as a violation of the Commerce Clause.

Even if the bill were stripped of the local hiring preference, it still violates the Charter and would likely be struck down by courts as preempted by the National Labor Relations Act ("NLRA").

Charter:

The bill restricts the Board of Estimates' authority to award contracts and determine the fiscal policy of the City. Section 11(a) of Article VI of the Charter states that "The Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in the Charter." Bill 10-455 attempts to usurp the authority of the BoE by dictating which bidders are qualified to work on certain projects (only those willing or able to enter into these agreements). The City Council cannot by ordinance alter the authority granted in the Charter to the Board of Estimates. Furthermore, this law could have a negative impact on the ability of minority businesses to bid on City work, decreasing the effectiveness of the MWBE law. Bill 10-455, by requiring that all contractors on certain projects enter into what are essentially pre-hire collective bargaining agreements, restricting virtually all hiring, would impact the current bidding process significantly, thereby narrowing the Board's fiscal choices and potentially effecting the incentive to hire minority and women-run businesses for the same reasons.

Although there is an exception to the lowest responsible bidder standard in the Charter in Section11(g)(1)(vi), which states that "notwithstanding the competitive bid provisions of this Charter, the Board of Estimates may adopt rules and regulations that establish uniform procedures for providing, on a neighborhood service, neighborhood public work, or neighborhood public improvement contract, limited bid preferences to responsive and responsible bidders who are residents of, or have their principal places of business in, that neighborhood", this exception was provided by Charter amendment and lies within the discretion of the Board of Estimates.

NLRA Preemption:

The bill is preempted by the NLRA. The NLRA preempts any local ordinance that regulates (*inter alia*) an area of labor relations that Congress intended to "be controlled by the free play of economic forces." *Bldg. and Constr. Trades Dep't v. Allbaugh*, 295 F.3d 28, 34 (D.C. Cir. 2002) (quoting *Int'l Assoc. of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976)). "[T]he decisions of private employers and employees regarding whether or not, and with whom, to bargain" is an area of labor relations that Congress intended to be unregulated. *See Associated Builders & Contractors of Rhode Island, Inc. v. City of Providence*, 108 F. Supp. 2d 73, 81 (D.R.I. 2000).

The "Community Partnership Agreement" that is required by Bill 455 is essentially a project labor agreement, or a pre-hire collective bargaining contract. Local governments generally may not require by regulation that private parties negotiate collective bargaining agreements. *See Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277, 281 (7th Cir. 2005); *Associated Builders & Contractors of Rhode Island*, 108 F. Supp. 2d at 84 (holding that a city's policy requiring execution of a "project labor agreement" in exchange for favorable tax treatment was preempted). Bill 10-455 requires certain private parties to enter into project labor agreements. Therefore, it would regulate "the decisions of private employers and employees regarding whether or not, and with whom, to bargain." *Assoc. Bld. & Contractors of R.I.*, 108 F. Supp. 2d at 81. Consequently, the bill would be preempted by the NLRA, unless it fit within the "market participant" exception, which it does not. *See Allbaugh*, 295 F.3d at 34.

Bill 455, in addition to requiring that contractors working on certain City projects enter into labor agreements, also dictates the terms of those agreements. Unlike the master agreement addressed in *Building & Construction Trades Council v. Associated Builders & Contractors of Mass.*, 507 U.S. 218 (1993) (the "Boston Harbor" case often cited by union proponents as validating project labor agreements), in which the public entity was under a court order to complete a project by a certain deadline in which it had a tremendous financial stake, Bill 10-455 applies to all projects of a certain value meeting certain financial descriptions and it therefore is a regulatory, rather than an economic measure. As stated in *Metropolitan Milwaukee Association of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), a case involving a restrictive labor peace law, "**[the law] is a pretext to regulate the labor relations of companies that happen, perhaps quite incidentally, to do some county work.**" *Id.* at 282 (emphasis added).

Furthermore, Bill 455 arguably applies to situations in which the City's interest is taxation. This is simply "not sufficient participation in the marketplace to shield the action from federal preemption." *See Assoc. Blders & Contractors of R. I.*, 108 F. Supp. 2d at 83. In assessing taxes, a government is performing its "primeval governmental activity"; it is not "exhibiting behavior analogous to that of private parties in the marketplace." *Id.*

Union Preference:

"[U]nreasonable provisions limiting the contractor's right to select employees to perform the work under a municipal contract are contrary to public policy and invalid. Thus, a provision in a contract that none but union labor shall be employed by the contractor … is generally held void." 10A McQuillin Mun. Corp. § 29:94 (3rd ed.). Bill 455 mandates that contractors on covered projects use union hiring halls as their primary source of labor. This obviously greatly restricts a private employer's right to select employees.

For the reasons above, the Law Department does not approve the bill for form and legal sufficiency.

Sincerely yours,

Ashlea H. Brown
Assistant City Solicitor

cc: Angela Gibson, City Council Liaison, Mayor's Office
George Nilson, City Solicitor
Elena DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor
Terese Brown, Assistant Solicitor

CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

June 22, 2011

Honorable President and Members
of the City Council of Baltimore
c/o Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 11-0287R Investigative Hearing - Local Hiring Preference Programs

Dear President and City Council Members:

You requested that the Law Department review for form and legal sufficiency City Council Bill 11-0287R. The bill is for the purpose of investigating the efficacy of adopting a policy that would require resident preference hiring by certain entities contracting to supply goods and/or services to Baltimore City government; examining the impact to date of similar programs nationwide; forecasting the employment benefits for City residents; and analyzing the legal restrictions limiting local hiring programs and the likely impact on the economic development of baltimore City if a local hiring program put in place was crafted to successfully withstand a legal challenge.

Council Bill 11-0287R is an appropriate expression of the Council's decision to consider and determine issues related to local hiring preference programs. *See Inlet Assocs. v. Assateague House Condominium Assoc.*, 545 A.2d 1296, 1303 (Md. 1988) (explaining that a resolution is "'an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance....'") (quoting McQuillin Mun. Corp. § 15:2 (3rd Ed.)).

Although local hiring programs have been implemented in various forms in some cities and states, federal courts have made it clear that any government policy which directs or even merely encourages a preference based on residency for City funded work would violate the Privileges and Immunities Clause of the Constitution. *United Building and Const. Trades Council v. Camden*, 465 U.S. 208, 220 (1984). The opportunity to seek employment is "basic to the livelihood of the nation" and is therefore a protected privilege. A discrimination against workers based on residence would only survive scrutiny if a court found that nonresidents were the cause of the local unemployment rate that the law sought to rectify. Obviously, many factors contribute to the unemployment rate of local workers, making a hiring preference based on residence for public work legally indefensible. See, e.g. *Utility Contractors Ass'n v. City of Worcester*, 236 F. Supp. 2d 113 (D. Mass. 2002) (City of Worcester enacts a "Residency Requirement Ordinance" requiring all private contractors on public works projects to have at

least a 50% local work force. The court held that the ordinance violated the Privileges and Immunities Clause. "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....An injunction must issue." 236 F. Supp. 2d at 115 see also *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (The preference of the Virginia state bar for lawyers who are permanent Virginia residents was struck down. "'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.'" *Friedman*, 487 U.S. at 65) and see, e.g. *A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865 (3rd Cir. 1997) (Pennsylvania law requiring contractors to hire only Pennsylvania workers on public works projects struck down as violating Privileges and Immunities Clause).

The publication regarding "First Source Hiring Agreements" cited in the Resolution contains some legally defensible strategies designed to stimulate local employment. These include the creation of job linkage and training programs which are organized and run through a partnership with developers, community groups and the City. Another possible strategy would be focusing the hiring preference on income level rather than residence. While the Law Department could explore the legal parameters of these possibilities, many of "First Source Hiring" methods described in the publication would likely not pass constitutional muster. Any government policy directing preferences for private employment based on residence, even in the form of a "goal" is likely to be struck down by a federal court if challenged under the Privileges and Immunities Clause. See, e.g. *Hudson County Bld. and Constr. Trades Council v. City of Jersey City*, 960 F. Supp. 823 (D. N.J. 1996) (Jersey City First Source Hiring ordinance mandating that the recipients of certain public incentives including tax abatements, enter into First Source Hiring agreements which require them to make a "good faith effort" to hire 51% City residents for certain construction jobs struck down as violating the Privileges and Immunities Clause).

The Law Department approves Council Bill 11-0287R for form and legal sufficiency.

Very truly yours,

Ashlea H. Brown
Assistant Solicitor

cc: Angela Gibson, City Council Liaison, Mayor's Office
George Nilson , City Solicitor
Elena R. DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor
Victor Tervala, Assistant Solicitor

CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor

DEPARTMENT OF LAW
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February 9, 2012

Honorable President and Members
of the City Council of Baltimore
c/o Karen Randle, Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 12-0009R – Informational Hearing -
Local, Small and Disadvantaged Business Purchasing Preferences for Baltimore

Dear President and City Council Members:

You requested that the Law Department review for form and legal sufficiency City Council Bill 12-0009R. The bill is for the purpose of inviting representatives from City agencies concerned with purchasing and economic development to appear before the Council to discuss how the City can best leverage its purchasing expenditures to encourage the growth of local, small, and disadvantaged businesses.

Council Bill 12-0009R is an appropriate expression of the Council's decision to consider and determine issues related to the economic development of local, small and disadvantaged businesses. *See Inlet Assocs. v. Assateague House Condominium Assoc.*, 313 Md. 413, 428 (Md. 1988) (explaining that a resolution is "'an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance....'") (quoting McQuillin Mun. Corp. § 15:2 (3rd Ed.)).

Local Preferences

Any City policy that treats local residents differently than nonlocal residents is subject to scrutiny under the Privileges and Immunities, Equal Protection and Commerce clauses of the U.S. Constitution and Supreme Court precedent. Each clause involves subjecting the laws to 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 all over the country; some upholding local preference laws and some not. The result often depends on which clause (Equal Protection, Commerce or Privileges and Immunities) is asserted. Although local hiring programs have been implemented in various forms in some cities and states, federal courts have made it clear that any government policy which directs or even merely encourages a preference based on residency for City funded work would violate the Privileges and Immunities Clause of the Constitution. *United Building and Const. Trades Council v. Camden*, 465 U.S. 208, 220 (1984). The Supreme Court has held that

"'one of the privileges which the [Privileges and Immunities] 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.'" *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 65 (1988). This prohibition of discrimination based on residency extends to local governments as well. *Camden*, 465 U.S. at 214.

Many local preference laws in other jurisdictions have not been challenged under the Privileges and Immunities Clause, but this does not reflect their legal sufficiency; only that they have not been challenged. Any discrimination against workers based on residence would only survive scrutiny if a court found that nonresidents were the cause of the local unemployment rate that the law sought to rectify. Obviously, many factors contribute to the unemployment rate of local workers, making a hiring preference based on residence for public work virtually legally indefensible. *See, e.g., Utility Contractors Ass'n v. City of Worcester*, 236 F. Supp. 2d 113, 115 (D. Mass. 2002) (City of Worcester enacts a "Residency Requirement Ordinance" requiring all private contractors on public works projects to have at least a 50% local work force. The court held that the ordinance violated the Privileges and Immunities Clause. "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....An injunction must issue."); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *see, e.g., A.L. Blades & Sons, Inc. v. Yerusalim*, 121 F.3d 865 (3rd Cir. 1997) (Pennsylvania law requiring contractors to hire only Pennsylvania workers on public works projects struck down as violating Privileges and Immunities Clause).

Therefore, due to the expansive reading of the Privileges and Immunities Clause in *Camden*, any policy giving a preference for a business defined as "local" would likely violate the Privileges and Immunities clause, because it is arguably an "effort to bias employment decisions in favor of [City] residents."

Challenges to local preference laws based on the Privileges and Immunities Clause have been consistently successful, but courts often dismiss those claims on standing, leaving the Commerce Clause or Equal Protection claims, which are often defeated in this context by the market participant exception and a rational justification for the law. The result is that the local preference is upheld, despite the likelihood that it violates the Privileges and Immunities Clause. *See, e.g., Smith Setzer & Sons v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir. 1994) (upholding a legislatively enacted program which gave South Carolina vendors a slight preference in the bidding process for certain types of state procurement on the basis that the state was acting as a market participant and was therefore excepted from the Commerce Clause challenge and dismissing the Privileges and Immunities claim on standing); *J.F. Shea Co. v. City of Chicago*, 992 F.2d 745 (7th Cir 1993) (court dismisses Privileges and Immunities claim on standing and upholds Chicago's two percent bidding preference for local businesses on market participant exception to Commerce Clause); *Galesburg Construction v. Bd of Trustees*, 641 P.2d 745 (Wy. 1982)(Privileges and Immunities Clause dismissed for lack of standing, resident bidder preference upheld under Equal Protection analysis).

Obviously for a policy to be legally sufficient there must be a viable legal defense for all three of these types of challenges (Equal protection, Commerce Clause and Privileges and Immunities). While a local preference policy could be defended against the Commerce Clause

and Equal Protection challenges, the Privileges and Immunities challenge would likely prove insurmountable.

Some aspects of local preference programs have not been directly addressed by the Supreme Court, leaving many unanswered questions. These include: first, whether a direct preference for businesses rather than a requirement that businesses hired by the City use local workers is a legally significant difference under the Privileges and Immunities Clause, secondly, whether a slight preference versus a *requirement* of local hiring is a legally meaningful distinction and finally, whether the preference has to be in the form of an ordinance to be unconstitutional.

However, 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." *Camden*, 465 U.S. at 214. This made no difference to the Court which held that "a city's efforts" to discriminate against nonresidents violated the Clause. This expansive reading suggests that a preference based on residence, no matter how slight, would be unconstitutional.

Another legal restriction that could impede a local preference program is that many federal grants contain language forbidding local preferences. If the project involved federal funds, this could render the preference void and the federal agency could withhold the funding for the project. *See City of Cleveland v. Ohio*, 508 F.3d 827 (6th 2007).

Retaliatory actions by other jurisdictions are another downside to local preferences: for example, Maryland has a retaliatory law which penalizes bidders residing in states which have preference rules. Md. Ann. Code, Art. 24, § 8-102 (2011). Both Virginia and Pennsylvania have retaliatory laws which could penalize Baltimore businesses seeking work in those states if a local preference program was enacted.

"Small and Disadvantaged" Preferences

Creating a program which gives preferential treatment to small and/or "disadvantaged" businesses creates another classification that is subject to Constitutional challenge. The Equal Protection Clause prohibits governments from denying the "equal protection of the laws" to any group of people. Any statutory classification resulting from a vendor preference law must, therefore, satisfy at least a rational basis review to be legally sufficient. In other words, if the law is enacted in furtherance of a rational purpose, it will survive an Equal Protection challenge. *Smith Setzer & Sons, v. South Carolina Procurement Review Panel*, 20 F.3d 1311 (4th Cir 1994). Therefore, if a program was enacted to give a purchasing preference to a small or disadvantaged business, the program's purpose must be clearly articulated with supporting data that the program would benefit those businesses and the local economy. The scope of the law should also be clearly defined, with careful consideration given to which businesses qualify as "small" or "disadvantaged."

A program giving preference to local (and small) businesses restricts the Board of Estimates' authority to award contracts and determine the fiscal policy of the City. Section 11(a) of Article VI of the Charter states that "The Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in

the Charter." A program giving preferences to businesses based on factors like residence and size would interfere with the authority of the Board of Estimates by dictating which bidders are qualified to work on certain projects. The City Council cannot by ordinance alter the authority granted in the Charter to the Board of Estimates. Furthermore, such programs could have a negative impact on the ability of minority businesses to bid on City work, decreasing the effectiveness of the MWBE law.

A vendor preference program would also interfere with the Charter's requirement that contracts be awarded to the lowest responsible bidder. Although there is an exception to the lowest responsible bidder standard in the Charter in Section11(g)(1)(vi), which states that "notwithstanding the competitive bid provisions of this Charter, the Board of Estimates may adopt rules and regulations that establish uniform procedures for providing, on a neighborhood service, neighborhood public work, or neighborhood public improvement contract, limited bid preferences to responsive and responsible bidders who are residents of, or have their principal places of business in, that neighborhood," this exception was provided by Charter amendment and lies within the discretion of the Board of Estimates.

Conclusion

There are legally defensible strategies designed to boost the local economy and many of these have been explored and some implemented by the City. For example, the creation of job linkage and training programs which are organized and run through a partnership with developers, community groups and the City could be effective and legally sound.

In sum, although on the surface it appears that courts are inconsistent with regard to local preference laws, a closer look reveals that most courts have generally avoided the Privileges and Immunities analysis by denying those claims based on standing and upholding the laws on Equal protection or Commerce Clause grounds. Courts which address the Privileges and Immunities challenges consistently strike these laws down. In other words, while a local vendor preference would likely survive a Commerce Clause or Equal Protection challenge, if a challenger could obtain standing to assert a Privileges and Immunities claim, the policy would likely be struck down.

Other legal limitations and disadvantages to local vendor preferences include federal restrictions in federal grants and retaliatory laws in other jurisdictions.

Furthermore, even if a local business preference could withstand a constitutional challenge, giving preferences based on factors other than the lowest responsible bidder interferes with the Board of Estimates authority and the Charter mandated procurement process.

The Law Department approves Council Bill 12-0009R for form and legal sufficiency.

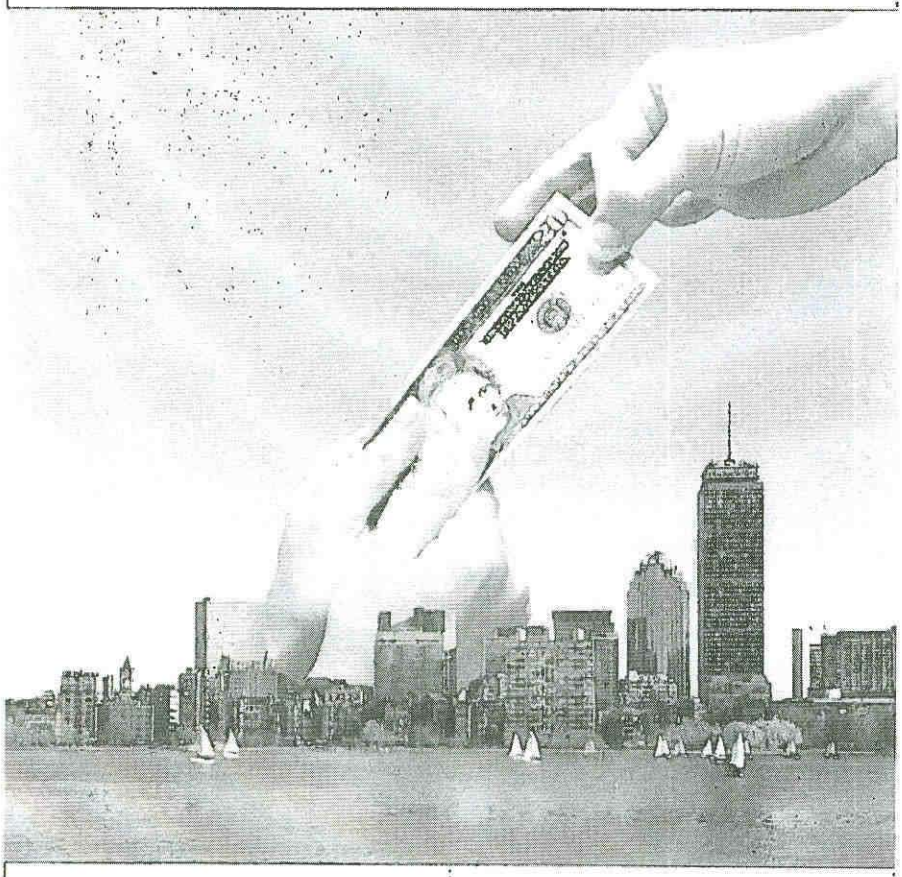
Very truly yours,

Ashlea H. Brown
Assistant Solicitor

cc: Angela Gibson, City Council Liaison, Mayor's Office
George Nilson, City Solicitor
Elena R. DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor
Victor Tervala, Assistant Solicitor

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

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Local Preferences

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). ML

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. ML

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.*