Targeted Hiring Measures and the Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV of the United States Constitution provides that "the Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[1] Targeted hiring measures, to the extent they result in a preference scheme adverse to out-of-state workers, might be said to interfere with those workers' ability to pursue private employment, which the U.S. Supreme Court has held is a fundamental right for purposes of the Privileges and Immunities Clause.[2] The Court has rejected the argument that discrimination based on municipal—as opposed to state—residency does not implicate the Clause.[3] The Privileges and Immunities Clause does not apply to direct public employment because there is no privilege or fundamental right to direct employment with a governmental institution.[4]

However, the Privileges and Immunities Clause only precludes discrimination against non-residents when the governmental action burdens one of the privileges and immunities protected under the clause, *and* the government does not have a "substantial reason" for the difference in treatment or the discrimination practiced against the nonresidents does not bear a "substantial relationship" to the government's objectives. In accordance with this deferential standard, local governments have adopted targeted hiring measures based on an explicitly stated desire to address poverty and unemployment. Wisely, these entities have made extensive findings about the poverty and unemployment they hope to address and the way in which targeted hiring measures accomplish that goal.

In *United Building & Construction Trades Council of Camden County v. Mayor & City of Camden*, the U.S. Supreme Court examined a Privileges and Immunities challenge[5] to an ordinance of the city of Camden, New Jersey that required at least 40% of the employees of contractors and subcontractors working on city-funded construction projects to be Camden residents.[6] During the course of litigation, the ordinance was amended to apply to any construction project "funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant."[7] Additionally, "the 40% resident-hiring requirement was changed from a strict 'quota' to a 'goal' with which developers

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[1] U.S. CONST. art. IV, § 2, cl. 1.

[2] *See United Bldg. & Construction Trades Council of Camden v. Mayor of Camden*, 465 U.S. 208, 219 (1984).

[3] *Id.* at 215–16.

[4] *See, e.g.*, *Polluck v. Duff*, 793 F.3d 34 (D.C. Cir. 2015) (Privileges and Immunities Clause does not apply to branches of the federal government).

[5] Initially, the appellant trade union raised Commerce Clause and Equal Protection arguments as well. *United Bldg. & Construction Trades Council of Camden County*, 465 U.S. 465 U.S. 208, 212 (1984). Appellant abandoned its Commerce Clause argument in light of the Supreme Court's decision in *White v. Mass. Council of Constr. Employers*, which held a mayor's executive order immune from scrutiny under a "market participation" exception to the Commerce Clause. 460 U.S. 204, 213 (1983) (relying upon the decision in 460 U.S. 204 (1983). Appellants abandoned their Equal Protection argument when the ordinance was amended to eliminate a one year residency requirement. *Id*.

[6] 465 U.S. at 210; The ordinance specifically applied, "[w]herever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $ 50,000.00, the provisions of this ordinance shall apply . . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or less." *Id*. at 211 n.3 (omission in original) (quoting the ordinance at issue).

[7] *Id*. at 214 (quoting the appellees' brief).

and contractors were to make 'every good faith effort'" to comply.[8] Having concluded that the ordinance burdened a fundamental right, the Court analyzed the ordinance's relationship to the government's objectives.[9] The City argued that "the ordinance [was] necessary to counteract grave economic and social ills [such as] unemployment, a sharp decline in population, and a reduction in the number of businesses located in the city, [each of which resulted in] eroded property values and a depleted. . .tax base."[10] The resident-hiring preference was designed, the city contended, to increase the number of employed persons living in Camden and to arrest the "middle-class flight" plaguing the city.[11] The City also argued that all non-Camden residents employed on city public works projects, whether they reside in New Jersey or Pennsylvania, constitute a "source of the evil at which the statute is aimed."[12] The Court reversed the New Jersey Supreme Court's decision to uphold the ordinance on the ground that the record contained insufficient facts to evaluate the City's justification because there had never been a trial or findings of fact.[13] The case ultimately settled on remand, without a determination of whether the ordinance would have violated the Privileges and Immunities Clause.

Entities of government wishing to put forth a "substantial reason" in defense of targeted hiring measures that discriminate against out-of-state residents have their work cut out for them. The Seventh Circuit has noted several kinds of evidence that a jurisdiction might use to justify discrimination against out-of-state workers in the construction sector, each relating principally to the specific cost and benefit to the jurisdiction.[14] This evidence includes: the unemployment rate in [the jurisdiction's] construction industry; what such unemployment cost the jurisdiction; whether it would be significantly increased by throwing open public construction projects to nonresidents; and whether the costs—if any—to the jurisdiction of allowing nonresident labor on such projects, costs in higher unemployment or welfare benefits paid unemployed construction workers or their families, were likely to exceed any cost savings in public construction from hiring nonresident workers.[15]

Other courts have focused specifically on a showing that out-of-state residents are a source of unemployment within the jurisdiction. In April, 2012, a district court in Massachusetts determined that the fact of local taxpayers' desire to see a return on their "investment" in public works construction in the form of local jobs did not provide a constitutionally adequate "substantial reason" for favoring local workers. [16] The court noted that the City had provided "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."

Jersey City, New Jersey defended its local hiring ordinance by pointing to poverty and unemployment rates there that were higher than those of surrounding municipalities.[17] The court, in

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[8] *Id.* (quoting the appellees' brief).
[9] *Id*. at 222.
[10] *Id*.
[11] *Id*.
[12] *Id*. at 223.
[13] *Id*.
[14] *See W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 498 (7th Cir. 1984).
[15] *Id.*
[16] *Merit Constr. Alliance v. City of Quincy*, 2012 U.S. Dist. LEXIS 54210, *7-8 (D. Mass April 18, 2012).
[17] *Hudson County Bldg. & Constr. Trades Council v. Jersey City*, 960 F. Supp. 823, 830–31 (D.N.J. 1996).

declining summary judgment against the City, noted that the City still needed to show that "out-of-state workers are a source of unemployment and poverty within its borders."[18]

Notably, the U.S. Supreme Court does accord deference to states and localities in analyzing "local evils" and prescribing "appropriate cures."[19] In particular, the Court has given deference to state and local governments that are "merely setting conditions on the expenditure of funds" that they control.[20] One district court has followed that doctrine to hold that a city-contract term requiring airport security contractors to hire Detroit residents did not run afoul of the Privileges and Immunities Clause because the city used only its own monies to purchase the services.[21] However, the *Camden* case, which involved projects "funded in whole or in part by the city" suggests there may be limits to this deference.[22]

States and localities seeking to adopt targeted hiring measures that may discriminate against out-of-state workers may wish to use such measures to remedy unemployment or poverty in areas where those "local evils" can be shown to be (a) higher than in other areas and (b) caused by out-of-state workers occupying employment positions in the targeted sector. However, as the cases above point out, the local government must be prepared to provide evidence of the "local evils" and evidence that the local hiring preference is a remedy that addresses those evils.

In *Metropolitan Washington Chapter v. District of Columbia*, the D.C. district court noted that courts in other cases had struck down virtually every local hiring preference policy challenged on Privileges and Immunities grounds.[23] However, the court found D.C.'s inability to impose taxes placed D.C. in a unique position in defending its First Source Act. That Act required all government-assisted projects or contracts in excess of a threshold amount to hire from a list of the D.C.'s residents and that the majority of employees hired be residents of D.C. unless the mayor waived the requirement. In defending its Act, D.C. argued that it could not impose a commuter tax, that 70% of the jobs were held by non-residents, and that the unemployment rate in D.C. exceeded the surrounding area, resulting in a structural imbalance in the budget.[24] While the court indicated the inability to impose a commuter tax could be a "unique evil," the court did not dismiss the case because D.C. had not provided sufficient substantive evidence to determine whether the hiring preference was narrowly tailored to address that evil.[25] Such a fact-intensive inquiry, the court determined, could not be resolved during the preliminary stage of the case.[26]

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[18] *Id*. at 831; *see also Util. Contrs. Ass'n of New Eng. v. City of Worcester*, 236 F. Supp. 2d 113, 115 (2002) (invalidating ordinance reserving work hours on public works projects for city residents, despite evidence of high city unemployment, because city had not shown that unemployment was caused by out-of-state residents).

[19] *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

[20] *United Bldg. & Construction Trades Council of Camden County*, 465 U.S. at 223.

[21] *Jones v. J.J. Sec., Inc.*, 767 F.Supp. 151 (E.D. Mich. 1991).

[22] *United Bldg. & Construction Trades Council of Camden County*, 465 U.S. at 221.

[23] *Metro. Wash. Chapter v. District of Columbia*, 57 F.Supp.3d 1, 23 (D.C. Dist. 2014).

[24] *Id.* at 25.

[25] *Id.* at 26.

[26] *See also Rack & Ballauer Excavating Co. v. City of Cincinnati*, 2013 U.S. Dist. LEXIS 17317, 2013 WL 503129 (S.D. Ohio 2013) (court found a challenge to Cincinnati's local hiring preference had a moderate likelihood of success on the merits because Cincinnati had not provided evidence that unemployment was occurring to a greater degree locally, that nonresidents were contributing to the unemployment or that the local preference policy would cure the problem. The court, however, denied plaintiff's request for a temporary restraining order because plaintiff had sought damages and, therefore, would not be irreparably harmed).

An approach that almost certainly creates a complete defense to a Privileges and Immunities challenge is to simply exempt out-of-state workers from targeted hiring calculations.[27] The Supreme Court has opined that in-state workers have no claim to challenge intra-state geographic preferences.[28] The cities of Akron,[29] Cleveland, Los Angeles, San Francisco and Seattle have all adopted targeted hiring policies that exempt out-of-state workers. The Cleveland "Resident Employment Law" requires that contracts related to construction projects under which the city provides more than $100,000 in assistance contain a provision ensuring that city residents will perform at least twenty percent of all "Construction Worker Hours." The law simply excludes hours worked by non-Ohio residents from the definition of "Construction Worker Hours." The Sixth Circuit has held that the Cleveland Resident Employment Law does not violate Title 23 C.F.R. § 635.117(b), which bars contract requirements that discriminate against labor from other states or territories.[30] Notably, the court looked to Privileges and Immunities jurisprudence to establish the vital distinction between interstate and intrastate discrimination based on residency.[31]

Given these options, policymakers should consider tracking hours worked by out-of-state residents in the sector that will be the subject of residency-based targeted hiring measures. Where the emerging data shows that few out-of-state workers are employed in the sector, policymakers may opt for the Cleveland approach, thereby creating a legal defense to a Privileges and Immunities challenge while causing minimal disruption to targeted hiring goals. Alternatively, where the emerging data shows a substantial number of out-of-state workers in the sector, a locality may use that data as a partial basis for showing a particular "source of evil" at which the targeted hiring measures are properly aimed.

[27] Seattle and a few other local jurisdictions have adopted policies that target subsets of local residents. Seattle's ordinance, for example, targets specific "economically distressed zip codes" in Seattle and King County. Wash. Mun. Code Section 20.37 *et seq.* Because the ordinance exempts out-of-state workers, the ordinance should be able to withstand a challenge under the Privileges and Immunities Clause.

[28] See *United Bldg. & Construction Trades Council of Camden County*, 465 U.S. at 217 ("And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause") *citing Slaughter-House Cases*, 16 Wall. 36, 77 (1873).

[29] *See Ohio Contrs. Ass'n v. City of Akron*, 2014 U.S. Dist. LEXIS 61313; 2014 WL 1761611 (N.D. Ohio 2014) (applying deferential rational basis standard and finding (1) "returning and reinvesting" to Akron tax payers financing public works project and (2) "reducing local unemployment and combating declining incomes" of the city residents were two legitimate government interests likely to pass constitutional muster where Akron's local preference policy exempted out-of-state residents).

[30] *City of Cleveland v. Ohio Dept. of Transport*., 508 F.3d 827, 847 (6th Cir. 2007) ("Cleveland's ordinance was drafted to avoid reaching contractors who hire only out-of-state workers, so it does not 'discriminate against the employment of labor from [another] state.'") (internal citation omitted).

[31] *Id.* at 847 (noting that in *Camden*, the Court held that the local hiring ordinance "could violate the Privileges and Immunities Clause because it disadvantaged both in-state and out-of-state residents alike").