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ENFORCEABILITY OF LOCAL HIRE PREFERENCE PROGRAMS

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Jennifer D. Cantrell, Esq., and Suparna Jain, Esq., Atkinson, Andelson, Loya, Ruud & Romo. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

Some public agencies are requiring contractors that work on public construction projects to hire local residents or use local businesses to perform the work. Local hire programs are generally defined as programs that require contractors and developers using public funds to hire local residents. These local hire requirements can be statutory, regulatory, or a function of agency policy. Numerous jurisdictions have enacted local hire preference laws and policies, usually to reduce local unemployment. Another strategy public agencies use is to require contractors to establish a jobs training program or to hire participants of existing jobs training programs. Such programs are often characterized by a few common characteristics, namely a percent of jobs set aside or reserved for local labor, designation of a target area, thresholds, a definition of compliance, and provisions governing monitoring and enforcement protocols. These programs are potentially subject to legal challenge or federal funding restrictions.

Local hire programs have been written about from either a legal perspective or as a tool of economic development. Previous literature has analyzed the constitutionality of local hire programs as well as the shift from traditional statutes and ordinances to the use of contract-based tools as a means of improving the employment opportunities of local residents. This digest is designed to build on the previous research and serve as a comprehensive and practical guide to legal practitioners, community groups, and individuals interested in utilizing and implementing local hire programs.

This digest includes discussions of: 1) the Constitutional issues; 2) case law and other legal authority associated with such programs; 3) representative examples of entities that have implemented such programs and have included information regarding program challenges; 4) steps that would be advisable for an agency to take to ensure that its program will pass judicial scrutiny; 5) issues associated with federal funding; and 6) remedies available to an agency if the contractor fails to comply with the requirements. Given the issues confronting the enforceability of local hire programs, this digest provides considerations that public agencies and community groups ought to take into account when contemplating what may be the best course of action when deciding whether to implement local hire programs. It should be useful to attorneys, administrators, board members, legislatures, planning officials, human resources personnel, and contracting officials.

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I. INTRODUCTION

Years after the start of the recession that began in December 2007, the national unemployment rates remained at historically high levels and more than 12.5 million Americans remained unemployed.[1] Certain industries, such as construction, suffered greatly, with unemployment rates remaining as high as 14.5 percent.[2] In an effort to address high unemployment and spur local economic growth and opportunity, a growing number of public agencies expressed interest or sought the implementation of local hire programs, which require contractors that work on public construction projects to hire local residents or use local businesses to perform work.

A. What Are Local Hire Programs?

Local hire programs are generally defined as programs that require contractors and developers benefiting from the use of public funds to utilize the labor of local residents.[3] These local hire requirements can be statutory, regulatory, or a function of agency policy. States, counties, and municipalities throughout the United States have enacted local hire preference laws and policies, usually with the general intent of alleviating local unemployment by channeling job opportunities to local residents and funneling local resources back to the constituents of the enacting governmental entity.[4] Community groups and organizations focused on economic development have also been able to implement local hire policies and programs by utilizing contract-based tools such as first source hiring agreements, project labor agreements (PLAs), development agreements (DAs), and community benefits agreements (CBAs).[5]

Local hire programs require or encourage the hiring of residents or the use of businesses of a particular geographic location to perform work or provide services.[6] Such programs are often characterized by a few common characteristics, namely a percentage of jobs set aside or reserved for local labor, designation of a target area, thresholds, a definition of compliance, and provisions governing monitoring and enforcement protocols. Percent set-asides are the percentage of total hours worked or total employees hired that must be residents of the target area.[7] Local hire programs usually designate a target area, which is defined as the area whose residents qualify as local hires to fulfill the set-aside. This area is usually the city or local municipality, but could also be defined differently under a contract-based agreement that focuses on a particular development project. Thresholds are criteria used to determine which public works projects will be required to participate in a local hiring program. For example, the size of a project or the amount of a public works contract can trigger participation in a local hire program.

Compliance provisions in local hire programs can range from mandatory set-asides—meaning that those who do not meet the mandated percent set-aside may lose their contract or subsidy from the public agency—to percent set-asides that are designated as goals and where compliance includes only making a "good faith effort." Failure to comply with percent set-asides that are goals may subject a contractor or business to scrutiny but will not necessarily cause the contractor to lose its contract. Businesses and contractors can still be found in compliance if they demonstrate that they have complied with other requirements and maintained good faith efforts to comply with the suggested percent set-aside. Enforcement provisions generally encompass a plan for monitoring and compliance, such as requiring

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[1] U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS: DATABASES, TABLES & CALCULATORS BY SUBJECT (May 2012), http://data.bls.gov/timeseries/lns14000000 (last accessed Oct. 15, 2012); U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS: ECONOMIC NEWS RELEASE (2012), http://www.bls.gov/news.release/empsit.nr0.htm (last accessed Oct. 15, 2012).

[2] U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS: INDUSTRIES AT A GLANCE, http://www.bls.gov/iag/tgs/iag23.htm (May 2012) (last accessed Oct. 15, 2012).

[3] *See* United Bldg. & Constr. Trades v. Mayor of Camden, 465 U.S. 208, 210, 104 S. Ct. 1020, 1023 (1984); Thomas H. Day, *Hiring Preference Acts: Has the Supreme Court Rendered them Violations of the Privileges and Immunities Clause?*, 54 FORDHAM L. REV. 271, 272 (1985); The Partnership for Working Families, http://www.forworkingfamilies.org/, Community Benefits Legal Dictionary, http://www.forworkingfamilies.org/cblc/dictionary (last accessed Feb. 5, 2013) (hereinafter cited as "Community Benefits Legal Dictionary").

[4] Werner Z. Hirsch, *The Constitutionality of State Preference (Residency) Laws Under the Privileges and Immunity Clause*, 22 SW. U. L. REV. 1, 1–2 (1992).

[5] Community Benefits Legal Dictionary, *supra* note 3; Julian Gross, Greg LeRoy & Madeline Janis-Aparicio, *Community Benefits Agreements: Making Development Projects Accountable* 9 (2005), http://www.goodjobsfirst.org/sites/default/files/docs/pdf/cba2005final.pdf.

[6] Community Benefits Legal Dictionary, *supra* note 3; Day, *supra* note 3.

[7] Policylink.org, *Local Hiring Strategies—How to Use It?*, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137627/k.8819/How_to_Use_it.htm (last accessed Oct. 15, 2012), hereinafter cited as "Policylink.org, *Local Hiring Strategies*."

the monthly submittal of reports of job hires and payroll records of resident employees hired or periodic job site visits. Local hire programs may vary in the type of enforcement mechanisms they utilize.[8]

The application of local hire programs can also be limited by express exemptions or exceptions. For example, some local hire ordinances and statutes only apply when the contract is a particular amount or more.[9] Thus, absent meeting the designated threshold amount, certain public work contracts or development projects may not be subjected to or required to comply with local hire requirements.[10] Also, some states and municipalities will only apply local hire or preference laws to workers or businesses from other states or cities that have resident preference laws that would restrict the right of their local residents.[11] To avoid potential conflict with federal laws or constitutional provisions, many states and municipalities limit the application of their local hire laws.[12] One way of limiting the application of local hire preference laws is to exempt projects that are either wholly- or partially-funded by federal funds.[13] Another way is to clearly articulate in the ordinance or statute that the local hire law is not to be applied where it would be prohibited by federal law.[14]

B. What Is the Appeal of Local Hire Programs?

Local hire programs become politically popular especially during times of economic slowdowns, increased unemployment, and declining incomes.[15] When local unemployment is high or communities are divested, local hire programs serve as a mechanism for directing local resources back to members of the local community.[16] Many recession battered states and communities view local hire programs as a means of counteracting "grave economic and social ills" brought on by high unemployment.[17] Such programs are often utilized with regard to permanent and/or construction jobs arising from public works projects.[18]

By ensuring that projects involving the use of public funds go to local laborers or businesses in the form of jobs, local hire programs aim to increase local employment and help enhance local economic development.[19] However, by directly benefiting local labor, local hire programs indirectly disadvantage nonresidents. As a result of this discrimination toward nonresidents, local hire programs have been subject to legal challenges and have been held by courts to violate certain constitutional provisions. Civic groups from excluded surrounding communities or those who would be directly impacted by such local hire programs have also resisted the implementation of local hire programs.[20] Local hire programs are also often disfavored by organized labor that may already have agreements with cities or developers for building contracts and thus are resistant to mandates requiring the use of nonunion residential laborers on such contracts.[21]

Given the legal hurdles that have confronted local hire programs, there has been a shift from the use of traditional local hire ordinances and statutes to contract-based tools—such as first source hiring policies and agreements, PLAs, DAs, and CBAs—to increase local hiring.[22] The shift to and use of CBAs has particularly gained momentum.[23] A CBA is a legally binding contract between one or more community-based organizations and a developer relating to a development project and including commitments regarding a range of community benefits.[24] Coalitions of community-based organizations usually work together and agree to support the development project and release claims against the project in exchange for the developer's community benefits commitments.[25] Of the many benefits negotiated and included in CBAs, targeted hiring policies, which benefit those in the communities affected by a development, are among the most prominent.[26]

C. Purpose of This Digest

Local hire programs have been written about from a legal perspective or as a tool of economic development. Previous literature has analyzed the constitutionality of local hire programs, as well as the shift from traditional statutes and ordinances to the use of contract-based tools as a means of improving the employment opportunities of local residents. This digest is designed to build on this previous research and serve as a comprehensive and practical guide to legal practitioners, community groups, and individuals interested in utilizing and implementing local hire programs.

This digest highlights the legal issues related to local hire mandates and requirements and how the presence of federal funding may impact the enforceability of a local hire program. It sets forth the current practices that have been utilized to increase the use and em-

[8] *Id.*

[9] Hirsch, *supra* note 4, at 1, 9.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 10.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1–2. n.1.

[16] Patrick Sullivan, *In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges and Immunities Clause,* 86 CAL. L. REV. 1335, 1336 (1998).

[17] *Camden*, 465 U.S. at 222.

[18] Community Benefits Legal Dictionary, *supra* note 3.

[19] *Id.* at 1.

[20] Sara Edel, *First Source Hiring Agreements: An Overview* 10 (Fresno Works for Better Health) (2005), http://www.fwced.com/resources/FWBHfirstsourcehiringreport.pdf, hereinafter cited as "Edel."

[21] *Id.*

[22] Gross, LeRoy & Janis-Aparicio, *supra* note 5.

[23] *Id.* at 5.

[24] *Id.* at 9; Community Benefits Legal Dictionary, *supra* note 3.

[25] *Id.* at 9.

[26] *Id.* at 43.

ployment of local businesses and residents and case studies of such tools in practice. Lastly, given the issues confronting the enforceability of local hire programs, this digest provides considerations that public agencies and community groups should take into account when contemplating whether to implement local hire programs.

The major legal challenges confronting local hire statutes and ordinances are discussed in Section II. Section III addresses the impact federal funding may have on the enforceability and viability of local hire programs. Section IV highlights the diverse tools that have been utilized to increase the employment opportunities of local residents and provides examples of each of them in practice. Given the legal issues and federal funding issues confronting local hire preference programs, Section V identifies and recommends steps public agencies and community groups should consider when contemplating the implementation of local hire programs.

II. LEGAL ISSUES ASSOCIATED WITH LOCAL HIRE PREFERENCE PROGRAMS

Local hire programs have been subjected to various constitutional challenges. Specifically, they have been challenged under the Privileges and Immunities Clause, the Commerce Clause, and the Equal Protection Clause. The enforceability and viability of a local hire program can be threatened on the basis of any one of these constitutional challenges, meaning that even if it survives a legal challenge on one basis, it can still be deemed unconstitutional on another.

A. Privileges and Immunities Clause

The Privileges and Immunities Clause has been used to successfully challenge the constitutionality of some local hire statutes and municipal ordinances. The Privileges and Immunities Clause of Article IV, Section 2, of the United States Constitution provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[27] The primary purpose of the Privileges and Immunities Clause is to prevent states from enacting measures that discriminate against nonresidents for reasons of economic protection.[28] It "place[s] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[29] In particular, the framers of the Constitution were concerned with avoiding "the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[30] The Constitution sought to protect nonresidents from economic discrimination so that the nation may function as a single economic union.[31]

Local hire programs, to the extent that they discriminate on the basis of residency, trigger scrutiny under the Privileges and Immunities Clause. This is true even if the policy is adopted at the municipal rather than state level. The terms "resident" and "citizen" have been deemed essentially interchangeable for the purposes of Privileges and Immunities challenges because an out-of-state citizen who seeks employment in a city would not enjoy the same privileges as a state citizen residing in the city.[32] Whether the exercise of a privilege is conditioned on state residency or municipal residency, an individual would still be excluded.[33] Local hire preferences, even if adopted solely by a local municipality to regulate expenditure of local public funds, must still withstand scrutiny under the Privileges and Immunities Clause.[34]

1. Basis of a Privileges and Immunities Clause Challenge

The Privileges and Immunities Clause is triggered by discrimination against nonresidents on matters of "fundamental concern." In *Baldwin v. Fish & Game Commission of Montana*, the United States Supreme Court specifically addressed the issue of "fundamental rights."[35] There, the Court upheld against a Privileges and Immunities Clause challenge of a Montana elk hunting licensing scheme that required greater fees for nonresidents than Montana residents.[36] The court held that elk hunting is not a fundamental right.[37] The *Baldwin* Court relied on Justice Washington's opinion in *Corfield v. Coryell*, an 1823 federal circuit case.[38] While upholding a New Jersey law restricting access to the state's oyster beds, the *Corfield* opinion grounded the Privileges and Immunities Clause in the natural

[27] U.S. CONST. art. IV, § 2, cl. 1.

[28] Supreme Court v. Piper, 470 U.S. 274, 285, 105 S. Ct. 1272, 1279, 84 L. Ed. 2d 205, 214 n.18 (1985).

[29] Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180, 19 L. Ed. 357, 360 (1869).

[30] Hughes v. Oklahoma, 441 U.S. 322, 325–26, 99 S. Ct. 1727, 1731, 60 L. Ed. 2d 250, 255 (1979); *see also* Laborers Local Union No. 374 v. Felton Constr. Co., 98 Wash. 2d 121, 123, 654 P.2d 67, 68 (1982) ("The history of the [Privileges and Immunities] clause reflects a concern by the framers for keeping the newly independent states from adopting highly protectionist economic policies.")

[31] *Hughes*, 441 U.S. at 325–36; s*ee also* A.L. Blades & Sons, Inc. v. Yerusalim, 121 F.3d. 865, 870 (3d Cir. 1997).

[32] *Camden*, 465 U.S. at 216.

[33] *Id.* at 216–17; *see also* Austin v. New Hampshire, 420 U.S. 656, 662, 95 S. Ct. 1191, 1195, 43 L. Ed. 2d 530, 535, n.8 (1975).

[34] *Camden*, 465 U.S. 216, 217, 98 S. Ct. 1852, 56 L. Ed. 2d 354 (1978).

[35] *Baldwin*, 436 U.S. 371.

[36] *Id.* at 393–94.

[37] *Id.* at 372–74.

[38] 6. F. Case. 546 (C.C.E.D. Pa. 1823) (Case No. 3230).

rights belonging "of right" to citizens "of all free governments."[39] In his opinion, Justice Washington stated:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal…may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental….

From this premise, the *Baldwin* Court concluded that recreational elk hunting was not essential or fundamental to the nation's livelihood.[40]

In *International Organization of Masters, Mates & Pilots v. Andrews*, the Ninth Circuit Court of Appeals upheld the constitutionality of a wage differential between state resident and nonresident employees, finding that receiving an equal wage did not amount to a fundamental right protected by the Privileges and Immunities Clause.[41] However, in *O'Reilly v. Board of Appeals*, the Fourth Circuit Court of Appeals found driving a taxi to be a fundamental privilege and held the county's denial of plaintiff's license application because he was resident of a neighboring Virginia county and not a resident of Montgomery County to be unconstitutional under the Privileges and Immunities Clause.[42] While the outer contours of what constitutes a "fundamental right" have not been delineated, it is taken to mean core economic interests and civil liberties.

Fundamental Right to Pursue a "Common Calling." Despite the lack of clarity as to what constitutes a "fundamental right," the Supreme Court has consistently held that the pursuit of a "common calling" is fundamental and therefore within the Privileges and Immunities Clause protection.[43] A common calling is defined as the right of a "citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation."[44] In *United Building & Construction Trades Council v. Mayor of Camden* (*Camden*), the Court stated "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause."[45] For example, in *Supreme Court of New Hampshire v. Piper*, the Court struck down a residency requirement for admission to the New Hampshire State Bar.[46] The Court held that the practice of law is sufficiently important to the national economy to deserve protection as a fundamental privilege.[47]

Moreover, in *Supreme Court of Virginia v. Friedman*,[48] the Court seemed to broaden the concept of "fundamental right" to encompass actual equality between residents and nonresidents. The Court held the State of Virginia could not permissibly deny nonresidents the privilege of admission to the State Bar "on motion" or without taking the bar examination.[49] Although the inability of nonresidents to take advantage of Virginia's special discretionary procedure did not amount to a total bar on their pursuit of a common calling, the Court held that the Privileges and Immunities Clause guarantees citizens the right of practicing law "[o]n terms of substantial equality with those enjoyed by residents."[50]

What has been deemed a common calling goes beyond the right to practice law. In *Tangier Sound Waterman's Association v. Pruitt*, the Fourth Circuit held that a Virginia licensing scheme that charged much greater fees to nonresident commercial fisherman than to Virginians violated the Privileges and Immunities Clause because the court reasoned that commercial fishing constituted a right to earn a living.[51]

Direct Public Employment Versus Employment on Publicly Funded Contracts. Within the area of employment, the Court has distinguished between the right to work for the government and the right to work at all.[52] The Constitution does not guarantee a right to a government job.[53] Thus local residency can be a condition of direct employment by a state or local municipality without violating the Privileges and Immunities Clause.[54] However, courts have treated those employed

[39] *Id.* at 551–52.

[40] *Baldwin*, 436 U.S. at 388.

[41] 831 F.2d 843, 846 (9th Cir. 1987).

[42] 942 F.2d 281, 284 (4th Cir. 1991).

[43] *See Camden*, 465 U.S. at 219; Hicklin v. Orbeck, 437 U.S. 518, 524, 98 S. Ct. 2482, 2487, 57 L. Ed. 2d 397, 403 (1978) (discrimination against nonresidents seeking to pursue common callings violative of Privileges and Immunities Clause); *Baldwin*, 436 U.S. at 387 (linking "essential activities" to "common callings"); Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430, 20 L. Ed. 449, 452 (1870); Salem Blue Collar Workers Ass'n v. City of Salem, 33 F.3d 265, 268–69, 20 L. Ed. 449, 452 (3d Cir. 1994) (holding that "common callings" are within protection of Privileges and Immunities Clause).

[44] *Ward*, 79 U.S. at 430.

[45] 465 U.S. at 219.

[46] 470 U.S. at 288.

[47] *Id.* at 281–82.

[48] 487 U.S. 59, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1989); Sullivan, *supra* note 16, at 1335, 1348.

[49] *Friedman*, 487 U.S. at 61.

[50] *Id.* at 70.

[51] *Id.* at 266 (referring to Toomer v. Witsell, 334 U.S. 385, 403 (1948)).

[52] Day, *supra* note 3, at 271, 278.

[53] *Camden*, 465 U.S. at 219.

[54] *See* McCarthy v. Philadelphia Civil Comm'n, 424 U.S. 645, 646–47, 96 S. Ct. 1154, 1155, 47 L. Ed. 2d 366, 368 (1976) (upholding residency requirement for firemen under Equal Protection Clause); Detroit Police Officers Assn' v. Detroit, 385 Mich. 519, 522–23, 190 N.W.2d 97, 98 (1971) (residency requirement for police officers upheld under Equal Protection Clause). In Salem Blue Collar Workers Ass'n v. City of Salem 33 F.3d 265, 269–70 (3d. Cir. 1994), the Third Circuit Court of Appeals held that direct public hiring is not protected by the Privileges and Immunities Clause. Determining that there was no fundamental right to direct public employment, the Court upheld the validity of an ordinance that required all Salem city

by government contractors on publicly funded contracts differently. A state's restrictions on nonresidents who are employed by, or seek employment from, any party other than the state or local government itself, even if the restrictions pertain to state-funded projects, constitute a *prima facie* violation of the Privileges and Immunities Clause.[55]

The United States Supreme Court has stated that "public employment is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling."[56] The Supreme Court has explicitly protected private employers contracting with government entities.[57] In *Hicklin v. Orbeck*, the Court held that the "Alaska Hire" statute violated the Privileges and Immunities Clause because the statute's mandate reached all "employment which is a result of oil and gas" agreements with Alaska.[58] Because the "Alaska Hire" statute reached employers with no direct relation to the state, the broadness of Alaska's statute was deemed unconstitutional.[59]

However, in *Camden*, the Court stated that whether a privilege is "fundamental" for purposes of the Privileges and Immunities Clause is not dependent on if the employees of private contractors and subcontractors engaged in public works projects can or cannot be said to be "working for the city."[60] *Camden* concerned the constitutionality of a municipal ordinance requiring that at least 40 percent of the labor force of the contractors and subcontractors working on city construction projects be local residents.[61] The Court's decision focused on the initial opportunity to seek employment with private employers, which was found to be "sufficiently basic to the livelihood of the Nation" as to fall within the purview of the Privileges and Immunities Clause even if those same private employers were engaged in construction projects funded in whole or in part by the city.[62] This suggests that the opportunity of individuals to be hired by private contractors for projects funded by the city is enough to be considered fundamental under the Privileges and Immunities Clause.

The Supreme Court's jurisprudence suggests that public employment is different from employment by a government contractor. While the distinction between direct employment by public entities and government contractors might be significant, most local hire acts are generally utilized and designed to affect contractors' dealings with employees outside the public agency's direct participation. Thus a local hire program that seeks to restrict an individual's employment opportunity with a private employer working with a state or local government would be found to implicate a fundamental right under the Privileges and Immunities Clause.[63]

2. Modern Test When Fundamental Right Implicated

Once it is determined that a fundamental right has been implicated, the court engages in a two-prong test that was enunciated in *Toomer v. Witsell*.[64] *Toomer* involved a South Carolina statute that discriminated against nonresident commercial shrimp fishermen by imposing a license fee 100 times greater than that charged to residents.[65] In declaring that statute invalid and emphasizing that each state had to accord substantial equality of treatment to the citizens of the other, the Court set forth what has become the modern Privileges and Immunities doctrine.[66]

Pursuant to the two-prong test, a state may not discriminate against nonresidents unless 1) there is substantial reason for the difference in treatment and 2) the discriminatory remedy bears a close relation to the state's objective.[67] Each prong is discussed in turn.

Substantial Reason for the Difference in Treatment. Once a challenger establishes that an ordinance, statute, or policy implicates a fundamental privilege or immunity, the burden shifts to the governmental entity to show that there is a "substantial reason" for the difference in treatment between residents and nonresidents "beyond the fact that they are citizens of other States."[68] This required showing highlights that local hire programs are not per se invalid under the Privileges and Immunities Clause.[69] A state or local government may only discriminate against nonresidents if it makes a clear showing that noncitizens constitute a "peculiar source of evil" at which the discriminatory statute is aimed.[70]

In *Camden*, the Court found that a city resident hiring preference imposed on public works contractors violated the plaintiff's fundamental right to pursue a common calling. It remanded the case for further findings as to what motivations, if any, lay behind the Camden ordinance, leaving open the possibility that a city or state can defend a local hire program, however difficult it may be to do so.[71] While the City of Camden

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employees to be residents of the City. The Court distinguished *Camden* on the ground that the Salem ordinance dealt with direct city employment, while *Camden* addressed only indirect city employment, workers seeking employment with private employers contracting with the City.

[55] *Camden*, 465 U.S. at 221–22.

[56] *Id.*

[57] *Id.* at 219, 221–22.

[58] *Hicklin*, 437 U.S. at 529.

[59] *Id.* at 527–28, 530.

[60] *Camden*, 465 U.S. at 221.

[61] *Id.* at 210.

[62] *Id.* at 221–22.

[63] *See Camden*, 465 U.S. at 219, 221–22.

[64] 334 U.S. 385, 396, 68 S. Ct. 1156, 1162, 92 L. Ed. 1460, 1471 (1948).

[65] *Id.* at 389.

[66] *Id.* at 396.

[67] *Id.*

[68] *Camden*, 465 U.S. at 222; *Toomer*, 334 U.S. at 396.

[69] *Camden*, 465 U.S. at 222; *see also* Sullivan, *supra* note 16, at 1335, 1345.

[70] *Camden*, 465 U.S. at 222.

[71] *Id.*

argued that the ordinance was "necessary to counteract…social ills" and would prevent nonresidents from "liv[ing] off" Camden without "living in" Camden, the Court ultimately found it was impossible to evaluate these proffered justifications because the City did not present any findings of fact.[72] Nonetheless, many cities have patterned themselves after *Camden* by incorporating similar language into their local preference programs. Like Camden, these cities justify their programs using the same boilerplate language that nonresidents constitute a "particular source of evil." However, as discussed below, absent sufficient evidentiary proof, such blanket statements—that nonresidents are a source of "peculiar evil" or that preference for residents is required to counteract "grave economic and social ills and spiraling unemployment"—are insufficient to withstand a Privileges and Immunities challenge.

Post-Camden Case Law Emphasizes High Evidentiary Burden. After *Camden*, governmental entities have a very high evidentiary burden to satisfy when it comes to showing that nonresidents are a "peculiar source of the evil" at which the discriminatory local hire preference is aimed at remedying. Commentator Werner Z. Hirsch has explained that

> [I]n applying the substantial reason test, the State courts have interpreted the phrase "peculiar source of evil" to require a showing that nonresidents were a cause of the unemployment the hiring preference acts were designed to alleviate…. Providing that nonresidents are the cause of unemployment in a State would be a difficult, if not impossible, evidentiary task, given the large number of variables contributing to unemployment.[73]

Because the showing needed to overcome a violation of the Privileges and Immunities Clause is so difficult to make, nearly all state courts that have adjudicated Privileges and Immunities Clause challenges to local hire laws have found such resident preferences to be unconstitutional.[74]

With regard to remedying unemployment, post-*Camden* case law implies that a state or local municipality must establish that its unemployment problem is directly caused by the influx of nonresident labor and is not of the state's own doing.[75] Thus, without substantially more justification and evidence showing that nonresidents are the cause of unemployment, challenged local hire programs and policies are unlikely to meet the burden of establishing a substantial reason to discriminate against nonresidents. Accordingly, they most likely will be held unconstitutional.

Type of Evidence Needed. Presently, the courts have not yet clearly delineated just how much evidence is sufficient or exactly what type of evidence a state or city must produce to justify local hire preference laws.[76] In the remand of *Camden*, the Supreme Court hinted as to what type of evidence might be required to justify a local hire preference.[77] There, the record contained comparative statistics on the difference between Camden's high level of unemployment and unemployment levels in the state and in the county.[78] But without more, the Court was not persuaded by the presentation of comparative statistics. The Court also refused to take judicial notice of "Camden's decay," and implied that the city would have to conduct an investigation more thorough than "the brief administrative proceeding that led to approval of the ordinance by the State Treasurer."[79]

At least one lower court has called for a more quantitative "cost-benefit" analysis in which the evidence of increased employment among state residents is weighed against the costs associated with barring nonresident workers and contractors.[80] In *W.C.M. Window Company v. Bernardi*, the Seventh Circuit did not find it obvious that preventing nonresidents from working would benefit the state, and therefore required the state to provide some sort of financial or employment data to justify its resident hiring preference.[81] Judge Posner specifically described evidence he believed was necessary to uphold a state local hiring law, such as information concerning the benefits of the preference law, the unemployment rate in the construction industry, the costs of local residential unemployment to the state, and whether there were any costs to the state for nonresident laborers on such projects.[82]

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[72] *Id.* at 222–23.

[73] Hirsch, *supra* note 4, at 16–17.

[74] *See, e.g.*, Salla v. County of Monroe, 48 N.Y.2d 514, 522–525, 399 N.E.2d 909, 913–915 (N.Y. 1979) (While "the counteracting of unemployment is a legitimate State concern…there is nothing to indicate that an influx of nonresidents…is a major cause of our unemployment."); Neshaminy Constructors, Inc. v. Krause, 181 N.J. Super. 376, 385, 437 A.2d 733, 738 (N.J. Ch. 1981) ("Absent a showing of specific dangers posed by out-of-state employees, [New Jersey] may not attempt to resolve its problems on the backs of citizens of [its] neighboring States."); Laborers Local Union No. 374, 98 Wash. 2d 121, 129, 654 P.2d 67, 71 (1982) ("Neither appellants nor amicus have demonstrated that nonresidents are a peculiar evil, nor has either shown how the statute is 'closely tailored' to achieving a legitimate State purpose."); People *ex rel.* Beranardi v. Leary Const. Co., 102 Ill. 2d 295, 299, 464 N.E. 2d 1019, 1022 (1984) ("There is nothing in the record, including the complaint itself, to show that nonresident laborers are a cause of unemployment in Illinois."); Robinson v. Francis, 713 P.2d 259, 266 (Alaska 1986) ("What is lacking is a showing that non-residents are a 'peculiar source of the evil' of unemployment.").

[75] *See supra* note 74.

[76] George T. Reynolds, *Constitutional Law—Constitutional Assessment of State and Municipal Residential Hiring Preference Laws*, 40 VILL. L. REV. 803, 832 (1995).

[77] *Camden*, 465 U.S. at 223.

[78] United Bldg. & Constr. Trades Council v. Mayor of Camden, 88 N.J. 317, 323, 443 A.2d 148, 151 (1982) (Camden: 11.5 percent; New Jersey: 8.1 percent; county: 7.6 percent).

[79] *Camden*, 465 U.S. at 223.

[80] W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 498 (7th Cir. 1984).

[81] *Id.* at 497–98.

[82] *Id.* at 498.

However, in *State v. Antonich*, the Supreme Court of Wyoming reached the opposite conclusion on nearly identical facts.[83] While Judge Posner identified specific evidence that could be used to justify discrimination against nonresidents, the Wyoming Supreme Court upheld a state local hire program without citing to any facts or findings indicating that nonresidents were actually keeping residents from working.[84] The Wyoming statute required contractors to contact a local employment office to determine whether qualified resident workers were available, and if so, to hire them first.[85] In holding that the Wyoming preference statute satisfied the requirements of the *Toomer* substantial reason test, the Wyoming Supreme Court's Privileges and Immunities analysis stressed that *Toomer* required states be given "considerable leeway" as to their analysis of perceived "local evils" and "appropriate cures."[86]

The Wyoming Supreme Court accepted the State's justification that the purpose of the Wyoming Preference Act was not to eradicate general unemployment but rather to "prevent a qualified Wyoming worker's remaining unemployed while a nonresident goes to work on a government-funded construction project."[87] The Wyoming Supreme Court's decision in *Antonich* and its deference to the State's proffered justification has been sharply criticized because it represents a lack of evidence that was fatal in other cases.[88] For example, Hirsch has stated that in contrast to *Antonich*, the Seventh Circuit's decision in "[*W.C.M. Window*][89] represents a move to a more analytically sound and practical test for justifying [state preference laws] under the substantial reason test."[90] Given the emphasis on the high evidentiary burden, *Antonich* may be viewed as an outlier.

Discrimination Practiced Against Nonresidents Must Bear a Close Relation to the State's Objectives. The second prong of the *Toomer* test requires that the governmental actor's discriminatory remedy bear a "close relation" to the State's objective.[91] Thus, even when the presence of nonresidents causes or exacerbates the problem the State seeks to remedy, there must be a "reasonable relationship between the danger presented by noncitizens, as a class, and the severe discrimination practiced upon them."[92]

In *Hicklin v. Orbeck*, the first case in which the Supreme Court reviewed a public works local hire preference law, the State of Alaska had required that all contractors involved in oil and gas related work where the State was a party give preference to state residents.[93] The Court decided that the Alaska Hire Act was overly broad in that it gave a preference to all Alaskans "regardless of their employment status, education or training."[94] The Court stated that "if Alaska is to attempt to ease its unemployment problem by forcing employers within the State to discriminate against nonresidents…the means by which it does so must be more closely tailored to aid the unemployed the Act is intended to benefit."[95] The Court determined that Alaska's blanket preference for state residents did not bear a close relation to combating the peculiar evil of nonresidents taking local jobs, as the State had not shown nonresidents actually caused local unemployment.[96]

In *Camden*, the Court noted the city's ordinance, which was "limited in scope to employees working directly on city public works projects," was not as broad as the act in which the court found excessive in *Hicklin*.[97] But because the record contained insufficient evidence to determine whether the city had substantial reasons, it could not consider whether the City of Camden's methods were "closely related" to solving its residents' unemployment problem.[98]

In *Supreme Court of New Hampshire v. Piper*, the Court failed to mention the "peculiar source of evil" element.[99] Instead the Court held that to pass Privileges and Immunities scrutiny, a state need only show that it has a substantial reason for discriminating against nonresidents, and that its method of discrimination bears a close relationship to that objective.[100] Under this variation, the Court judges the "close relation" of a preference statute to the city's substantial reason in light of the other policy options that the city or state had available.[101] Thus, to pass constitutional muster under the Privileges and Immunities Clause, the resident preference would have to be "less restrictive" of the rights of nonresidents than other policy options.[102] In his dissent in *Piper*, Justice Rehnquist asserted that this increased level of judicial scrutiny amounted to an unwarranted intrusion into State decisionmaking and argued that the Court should defer to

[83] 694 P.2d 60 (Wyo. 1985).

[84] *Id.* at 64.

[85] *Id.* at 63.

[86] *Id.* at 61–62 (quoting *Toomer*, 334 U.S. at 396).

[87] *Id.* at 63.

[88] Hirsch, *supra* note 4, at 1, 17 (stating that this decision "seems flawed by the court's easy acceptance of Wyoming's justification…in the face of a lack of evidence.").

[89] 730 F.2d at 498.

[90] Hirsch, *supra* note 4, at 1, 17.

[91] *Toomer*, 334 U.S. at 396.

[92] *Hicklin*, 437 U.S. at 526 (quoting *Toomer*, 334 U.S. at 399).

[93] *Id.* at 520.

[94] *Id.* at 527–28.

[95] *Id.* at 528.

[96] *Id.* at 526–28.

[97] *Camden*, 465 U.S. at 223.

[98] *Id.*

[99] *Piper*, 470 U.S. at 285–87; *see also* Sullivan, *supra* note 16, at 1335, 1346.

[100] *Piper*, 470 U.S. at 285–87.

[101] Sullivan, *supra* note 16, at 1335, 1346; *see also* Day, *supra* note 3, at 294–96.

[102] Sullivan, *supra* note 16, at 1335, 1346.

states and cities under the Privileges and Immunities Clause when they have a rational basis for their statutes.[103] He noted that with respect to the less restrictive means rationale, "such an analysis, when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another 'less restrictive' way to write it."[104]

At the other end of the spectrum, the Wyoming Supreme Court's decision in *Antonich* highlights the possibility of meeting the close relation test simply by defining the State's reason very narrowly.[105] As discussed above, the court found the statute's definition bore a close relation to the State's goal, since anyone listed on the employment office's list would be in some way looking for work.

Despite the *Piper* and *Antonich* decisions, courts have subsequently continued to apply the "peculiar source of evil" element of the "close relation" prong enunciated in *Toomer*. As such, whether a local hire measure is found to bear a close relation to remedying unemployment is strongly dependent on whether the court believes sufficient evidence has been provided to show discrimination against nonresidents is justified.

Summary Regarding Privileges and Immunities Challenges to Local Hire Programs. The Privileges and Immunities Clause prevents states from enacting measures against nonresidents for reasons of economic protection.[106] The Clause is triggered by discrimination against nonresidents on matters of "fundamental concern."[107] The right to seek employment with a private employer has been deemed fundamental under the Privileges and Immunities Clause.[108] Consequently, local hire programs that require contractors receiving public funds to hire local residents are subject to a Privileges and Immunities Clause challenge.[109]

Local hire programs have a small chance of surviving a Privileges and Immunities Clause challenge because governmental entities must establish that nonresidents are a "peculiar source of the evil" that the local hire preference is aimed at remedying.[110] Given that local unemployment can be attributed to a number of different variables besides the influx or presence of nonresidents, this has been a difficult evidentiary burden to meet. In addition to showing that it has a substantial reason to discriminate against nonresidents, governmental entities have to show that the local hire preference is directed at remedying unemployment.[111] The local hire preference must bear a close relation to the state's objective. Given the case law in this area, the biggest hurdle to the enforceability of a local hire preference is a Privileges and Immunities Clause challenge.

B. Commerce Clause

Local hire programs may also be challenged under the Commerce Clause. The Commerce Clause, contained in Article I, Section 8 of the Constitution, gives Congress the exclusive authority to "regulate Commerce…among the several states."[112] The Commerce Clause also includes a negative or "dormant" aspect, which restricts states and municipalities from imposing burdens on interstate commerce.[113] The doctrine is driven by concern about "economic protectionism, that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[114] "The Court gives life to the 'dormant' side of the Commerce Clause by striking down state or local laws of facial economic protectionism, as well as laws that place an undue burden on interstate commerce."[115]

1. Basis of a Commerce Clause Challenge

While both the Privileges and Immunities and the Commerce Clauses find common origin in Article IV of the Articles of Confederation and evolved together, their policies differ.[116] Whereas the Privileges and Immunities Clause precludes discrimination against out-of-state residents, the Commerce Clause is triggered by regulation affecting interstate commerce.[117] Thus, a court's analysis under the Privileges and Immunities Clause and the Commerce Clause are not identical. In order to determine whether a state or municipal law violates the "dormant" aspect of the Commerce Clause, a court asks whether it discriminates on its face against interstate commerce.[118] In this context, "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually *per se* rule of invalidity,"[119] which can only be

[103] *Piper*, 470 U.S. at 295 (Rehnquist, J., dissenting) (arguing that Privileges and Immunities challenges "should be overcome if merely a legitimate reason exists for not pursuing" a proffered less discriminatory path); *see also* Sullivan, *supra* note 16, at 1335, 1346.

[104] *Piper*, 470 U.S. at 294–95; Sullivan, *supra* note 16, at 1335, 1346.

[105] Sullivan, *supra* note 16, at 1335, 1346.

[106] *Piper*, 470 U.S. at 285 n.18.

[107] *Camden*, 465 U.S. at 220.

[108] *Id.* at 219, 221–22.

[109] *Id.*

[110] *Toomer*, 334 U.S. at 398; Camden, 465 U.S. at 222.

[111] *Toomer*, 334 U.S. at 396.

[112] U.S. CONST. art. 1, § 8, cl. 3.

[113] New Energy Co. v. Limbach, 486 U.S. 269, 273, 108 S. Ct. 1803, 1807, 100 L. Ed. 2d 302, 308 (1988).

[114] *Id.* at 273–74.

[115] Sullivan, *supra* note 16, at 1335, 1349; s*ee also* Dan T. Cohen, *Untangling the Market-Participant-Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 398–400 (1989).

[116] *Piper*, 470 U.S. at 284 & n.17; Day, *supra* note 3, at 271, 272.

[117] *Camden*, 465 U.S. at 220; Day, *supra* note 3, at 271, 273–74.

[118] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 412 (2d ed., Aspen Publishers 2002).

[119] City of Philadelphia v. New Jersey, 437 U.S. 617, 98 S. Ct. 2731, 57 L. Ed. 2d 475 (1978); Dean Milk Co. v. City of

overcome by a showing that the State has no other means to advance a legitimate local purpose.[120]

However, where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach.[121] If the law is not outright or intentionally discriminatory or protectionist, but still has some impact on interstate commerce, the Court will evaluate the law using a balancing test. The Court determines whether the interstate burden imposed by a law outweighs the local benefits. If such is the case, the law is usually deemed unconstitutional.[122] In *Pike v. Bruce Church*, the Court explained that a state regulation having only "incidental" effects on interstate commerce "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[123] In *Pike*, the Court stated when weighing burdens against benefits, both "the nature of the local interest involved, and...whether it could be promoted as well with a lesser impact on interstate activities" should be considered.[124]

2. Market Participant Exception

While local hire programs may be subject to a Commerce Clause challenge, the judicially created market participant exception to the Dormant Commerce Clause "enables cities and states to enact hiring preference programs and to take other actions when such behavior does not constitute 'regulating commerce.'"[125] Despite a state or municipality's protectionist motives in enacting and instituting local hire programs and its effects, "the market participant exception considers such 'non-regulatory' action as nonthreatening to Congress' power to regulate commerce."[126]

The Commerce Clause as "an affirmative grant of power to Congress to regulate [trade between the states and foreign nations, and] has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce."[127] However, in *Hughes v. Alexandria Scrap Corporation*, the United States Supreme Court has held that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[128] Thus, the Commerce Clause does not constrain a state when it acts as a "market participant" or proprietor, that is, when it purchases goods or services with its own money. When acting as a proprietor, a government shares the same freedom under the Commerce Clause that private parties enjoy.[129] The justification underlying the distinction between market regulator and market participant arises from the fact that the Dormant Commerce Clause "is animated by a desire to prevent states from erecting barriers that 'imped[e] free private trade in the national marketplace.'"[130]

In *White v. Massachusetts Council of Construction Employers, Inc.,*[131] the Supreme Court upheld a local executive order that required all construction projects funded by the City of Boston be performed by a workforce at least half of whom were Boston residents.[132] The Court held that "[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of *Hughes*…."[133] As such, the Court held that Boston's local hire ordinance did not implicate or violate the Commerce Clause because the City had simply placed restrictions on the use of its own funds and the funds it administered.[134] The Court agreed that there are "some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business."[135] However, the Commerce Clause does not require the city "to stop at the boundary of formal privity of contract."[136] In the case of *White*, the majority considered the mayor's executive order to cover a "discrete, identifiable class of economic activity in which the city is a major participant."[137] Everyone affected by the order is, "in a substantial if informal sense, 'working for the city.'"[138] By invoking and

Madison, Wisconsin, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951); Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977).

[120] Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 174, 179 (1986).

[121] Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 847, 25 L. Ed. 2d 174, 178 (1970); *City of Philadelphia*, 437 U.S. at 624.

[122] *See Pike*, 397 U.S. 137.

[123] *Id.* at 142.

[124] *Id.*

[125] Sullivan, *supra* note 16, at 1335, 1349.

[126] *Id.*

[127] South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 104 S. Ct. 2237, 2240, 81 L. Ed. 2d 71, 76 (1984).

[128] Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810, 96 S. Ct. 2488, 2498, 49 L. Ed. 2d 220, 231 (1976) (court first recognized the market participant exception).

[129] *See* South-Central Timber Dev. Inc., 467 U.S. at 95–97 (stating that market participant doctrine provides exception to Dormant Commerce Clause's limitation imposed on states when state acts as participant in market and not merely regulator); Reeves, Inc. v. Stake, 447 U.S. 429, 436, 100 S. Ct. 2271, 2277 (1980) (upholding market participant exception because it "makes good sense and sound law"); *Hughes*, 426 U.S. at 810 (holding that purposes of the Commerce Clause are not implicated when state acts as participant in market); *see also* Day, *supra* note 3, at 279–80 n.41 (discussing development of "market participant" jurisprudence in discussing White).

[130] *Reeves*, 447 U.S. at 437.

[131] 460 U.S. 204, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983).

[132] *Id.* at 214.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] *Id.* at 211, n.7.

[137] *Id.*

[138] *Id.*

utilizing the market participant exception, the Court disposed of the Commerce Clause challenge to the City of Boston's local hire program by finding that it fell within the scope of the market participant exception espoused in *Hughes*.[139]

The impact of a local business preference or a local hire program on out-of-state residents "figures into the analysis only *after* it is decided the City is regulating the market rather than participating in it."[140] Thus when a local hire program is subject to a Commerce Clause challenge, the inquiry is whether the challenged "program constituted direct state participation in the market."[141] In other words, is the state or municipality acting as a market participant or regulator by enacting and imposing a local hire program?

State or Local Government Acting as a Market Participant or Regulator. In the following local preference cases, the Fourth and Seventh Circuit Courts of Appeals each held that a state or local municipality was acting as a market participant and therefore the preference law at issue was constitutional under the Commerce Clause.

In *J. F. Shea Co., Inc. v. City of Chicago*, an out-of-state contractor and its employee brought an action against the City of Chicago, challenging the City's award of a contract to a local contractor under its local business preference rule.[142] The preference gave local businesses a 2 percent advantage over the bids of non-local businesses.[143] The Seventh Circuit held that the City's application of its local business preference rule did not violate the Commerce Clause because the City was not regulating, it was merely being selective about the parties with whom it contracts.[144]

In *Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel*,[145] a North Carolina concrete pipe manufacturer who was the lowest bidder on a South Carolina government solicitation challenged the constitutionality of a statutory program under which South Carolina products and vendors were given preferences in the state procurement bidding process.[146] Smith Setzer & Sons argued that the State of South Carolina was acting as a market regulator in its purchasing scheme because of the "regulatory effect" it had on local governments.[147] The Fourth Circuit Court disagreed, holding that South Carolina was not acting as a market regulator in its local product and vendor preference schemes because the State entered the market to purchase a product for its own consumption.[148] Local governments retained the option of purchasing their own concrete pipe requirements under the State contracts awarded.[149] Additionally, the Court stated it did not see any analytical reason to treat state and local governments separately for Commerce Clause purposes.[150]

By contrast, in *W.C.M. Window Company v. Bernardi*, the Seventh Circuit declared an Illinois statute that required contractors working on state public works projects to employ only Illinois residents unconstitutional.[151] The Court of Appeals acknowledged that pursuant to *White* the State could bind itself to such a preference without violating the Commerce Clause if it had limited the preference law to construction projects financed, in whole or in part, or administered by the State.[152] However, the Seventh Circuit found the State preference statute went further, by binding every local government unit as well.[153] The Seventh Circuit believed that the State of Illinois was acting as a "regulator" by telling local government units, via its preference statute, that they must not give construction contracts to employers of nonresidents.[154] "When the project on which the state impresses a home-state preference is undertaken by a unit of local government without any state financial support or supervision, the state is not a participant in the project, but a regulator."[155] The Court went on to say "extending *Reeves* and *White* to cases where a state's relationship to its local agencies is purely regulatory could do great damage to the principles of free trade on which the negative commerce clause is based."[156]

A comparison of *South-Central Timber Development, Inc. v. Wunnicke* and *White v. Massachusetts Council of Constr. Employers, Inc.*, demonstrates the tension in distinguishing between market participant and regulator.[157] In *South-Central Timber Development*, the Court did not believe that the State of Alaska retained a proprietary interest in its timber that was sufficient to qualify as market participation. The Court held that the State of Alaska's local processing law constituted

[139] *Id.*; s*ee also Reeves*, 447 U.S. at 436; *Hughes*, 426 U.S. at 810.

[140] J.F. Shea Co., Inc. v. City of Chicago, 992 F.2d 745, 748 (7th Cir. 1993); *W.C.M. Window*, 730 F.2d at 494.

[141] *White*, 460 U.S. at 208, quoting *Reeves*, 447 U.S. at 436, n.7).

[142] 992 F.2d at 747.

[143] *Id.*

[144] *Id.* at 748.

[145] 20 F.3d 1311 (4th Cir. 1994).

[146] *Id.* at 1316.

[147] *Id.* at 1318.

[148] *Id.*

[149] *Id.*

[150] *Id.* at 1319; *see also* Big Country Foods, Inc. v Board of Educ., 952 F.2d 1173, 1179 (9th Cir. 1992); Trojan Technologies, Inc. v. Commonwealth of Pennsylvania, 916 F.2d 903, 911 (3d Cir. 1990) (While the Seventh Circuit seemed to draw a distinction between state and local governments, these subsequent cases all found that such a distinction did not make any sense and that there was no reason to treat the two separately for Commerce Clause purposes.).

[151] 730 F.2d at 495.

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.* at 496.

[156] *Id.*

[157] *South-Central Timber Dev., Inc.*, 467 U.S. at 82; White, 460 U.S. at 204.

"downstream" regulation or regulation beyond the market which Alaska participated.[158] However, in *White*, the Court allowed the City of Boston to exercise control beyond the point at which the City entered a contract.[159]

Both cases involved private parties making contracts with a public entity in which preferential use of local resources (workers in *White*, sawmills in *South-Central Timber Development*) was tied to the disposition of public property.[160] The City of Boston required that its dollars must end up in the pockets of Boston residents and the State of Alaska required that its timber must end up in the mills of Alaskan factories.[161] In *White*, whether a city is regulating or participating in the market seemed to depend on whether the city is spending public money.[162] In *White*, the City expended its own funds in entering into construction contracts for public projects, whereas in *South-Central Timber Development*, the state was not spending any of its own money.[163] Also, in *White* the Court reasoned that the City of Boston was not acting as a regulator because the private contractors' employees were essentially "working for the city."[164] However, in *South-Central Timber Development*, because Alaska itself was not engaged in processing timber, it was not a market participant and therefore violated the Commerce Clause when it imposed conditions on purchasers of the State's timber that required them to send their timber to in-state processors.[165]

While the market participant doctrine enables a public agency to enact a local hire program without running afoul of the Commerce Clause, jurisprudence in this area highlights that drawing a distinction between market participant and regulator is not so clear cut.

Summary Regarding Commerce Clause Challenges to Local Hire Programs. A Commerce Clause challenge to a local hire program is rooted in the argument that a preference for local residents over nonresidents places an undue burden on interstate commerce because it burdens the ability of workers to seek employment across state lines.[166] A state or local municipality may still be able to enact a local hire program under the judicially created "market participant" exception to the Dormant Commerce Clause. Thus, the primary issue with regard to a Commerce Clause challenge is whether the enacting governmental actor is operating as a market participant or regulator. When it comes to local hire programs it is critical that a public agency be able to show it is acting as a market participant to survive a Commerce Clause challenge.

C. Equal Protection Clause

The primary issues concerning local hire preferences and Equal Protection Clause challenges focus on 1) residential requirements and 2) requirements that a percentage of work be subcontracted or public contracts be preferentially awarded to minority-owned business enterprises (commonly referred to as MBEs) and women-owned business enterprises (commonly referred to as WBEs). The Equal Protection Clause of the Fourteenth Amendment provides, in part, "No state shall…deny to any person within its jurisdiction the equal protection of the law."[167] This provision prohibits the government from discriminating against citizens based on fundamental rights and protected classifications.[168]

1. Basis of an Equal Protection Clause Challenge

If a state or local government passes a law that distinguishes among groups on the basis of a suspect class or burdens the exercise of a fundamental right, the governmental entity must demonstrate that the regulation is necessary to further a compelling state or governmental interest and is the least drastic means available to further that interest.[169] This is the strict scrutiny test.

As previously noted, the Constitution does not guarantee a fundamental right to a government job.[170] Thus, a state or local government may make residency a condition of direct employment by the state or local municipality without violating the Equal Protection Clause so long as the challenged local hire program bears a reasonable relationship to a legitimate state interest.[171]

2. Residency Requirements

Many municipal governments and a few state governments have established residency requirements for eligibility of municipal employment. Residential requirements are often classified as durational or conditional.[172] Both types have been challenged under the Equal Protection Clause.

Durational Residency Requirements. Durational residency requirements condition eligibility for employment or other rights or benefits on an individual having resided in the jurisdiction for a minimum period

[158] *South-Central Timber Dev., Inc.*, 467 U.S. at 95.

[159] *White*, 460 U.S. at 211, n.7.

[160] Sullivan, *supra* note 16, at 1335, 1365.

[161] *See id.*

[162] *White*, 460 U.S. at 214.

[163] *Id.*; *South-Central Timber Dev., Inc.*, 467 U.S. at 84–85.

[164] *White*, 460 U.S. at 211, n.7.

[165] *South-Central Timber Dev., Inc.*, 467 U.S. at 98.

[166] *See White*, 460 U.S. 204 (1983) (Supreme Court granted certiorari to determine whether Commerce Clause prevents the City of Boston from giving effect to the Mayor's order.).

[167] U.S. CONST. amend. XIV, §1.

[168] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 342–43, 92 S. Ct. 995, 1003, 31 L. Ed. 2d 274, 284 (1972).

[169] *Id.*

[170] *Camden*, 465 U.S. at 219; *see also* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S. Ct. 2562, 2566, 49 L. Ed. 2d 504, 524 (1976) (per curium) (no fundamental right to government job under Equal Protection Clause).

[171] *See McCarthy*, 424 U.S. at 467.

[172] *Id.*

of time.[173] Such residential requirements have been held to implicate an individual's fundamental right to travel.

In *Dunn v. Blumstein*, the United States Supreme Court ruled that a durational residency requirement imposed as a condition of voting directly impinged upon the right to travel, a fundamental right, and was thus subject to the strict scrutiny test.[174] Moreover, in *Shapiro v. Thompson,*[175] the Supreme Court held that a 1-year durational residency requirement for eligibility for welfare benefits was unconstitutional because it denied equal protection and infringed upon the fundamental right to travel.[176] The Court stated that right to travel encompassed the right to "migrate, resettle, find a job, and start a new life."[177]

In *Hicklin v. Orbeck*, the Alaska Supreme Court considered whether a durational residency requirement contained in the state's local hire law violated the Equal Protection Clause.[178] Alaska law defined a resident as a person who had physically been present in the state for a period of 1 year immediately prior to the determination of his residency status.[179] The law was challenged by individuals who did not qualify as "residents" on the ground that the 1-year durational residency requirement violated the federal and state Equal Protection Clauses. *Hicklin* held that the local hire law's 1-year durational residency requirement was subject to strict scrutiny because it "penalizes those who have exercised their fundamental right of interstate migration."[180] The Court held that Alaska's local hire law violated the Equal Protection Clauses of the federal and state constitutions because it was not the least drastic means available to reduce Alaska's high unemployment rate.[181] The court noted that the State Legislature could have drafted the local hiring law in such a way that preference was given to current state residents that were unemployed and/or recent trainees.[182]

The lesson from these cases is that if a local hiring law or policy contains a durational residency requirement, it will likely be subject to strict scrutiny if challenged on Equal Protection grounds. As such, the government agency would be required to demonstrate that the law is necessary to further a compelling state interest and is the least drastic means available to achieve that interest.[183] Assuming that the state interest is that of combating local unemployment, there are usually less drastic means of achieving that end, such as limiting the application of the law to unemployed residents. Accordingly, durational residency requirements in local hire laws will probably not pass judicial muster.

Conditional Residency Requirements. Conditional residential requirements require residency within or near a specified government unit as a condition of obtaining or continuing employment.[184] Unlike durational residency requirements, continuing residency requirements have not been held to implicate the fundamental right to travel. In *McCarthy v. Philadelphia Civil Commission*, a firefighter was discharged because he moved his permanent residence from Philadelphia to New Jersey, in violation of Philadelphia's continuing residency ordinance.[185] The firefighter challenged the ordinance as unconstitutionally abridging the right to travel.[186] The Supreme Court rejected the claim, holding that continuing residency requirements do not implicate the fundamental right to travel.[187] The ordinance was thus evaluated under the rational basis standard.[188] So long as the ordinance was "appropriately defined and uniformly applied," it was constitutional.[189]

After *McCarthy*, hiring preferences for local residents directly employed by a state or local municipality have been upheld with regard to specific types of municipal positions and public professions such as teachers, police officers, and firefighters.[190] Lower court decisions have found numerous rational bases to uphold conditional residency requirements. For example, residency requirements for public school teachers and counselors have been upheld because residents have a

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[173] *See Dunn*, 405 U.S. at 334.

[174] 405 U.S. at 334–35, 338, 342

> Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote…. Obviously, durational residence laws single out the class of bona fide State and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly…. Absent a compelling State interest a State may not burden the right to travel in this way.

[175] 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969).

[176] *Id.* at 638.

[177] *Id.* at 629.

[178] 565 P.2d 159 (1977), reversed on other grounds by *Hicklin*, 437 U.S. 518 (1978).

[179] *See Hicklin*, 437 U.S. at 520.

[180] *Hicklin*, 565 P.2d at 162.

[181] *Id.* at 165.

[182] *Id.*

[183] *Dunn*, 405 U.S. at 342.

[184] *See McCarthy*, 424 U.S. at 646.

[185] *Id.* at 645.

[186] *Id.*

[187] *Id.* at 646–47.

[188] *Id.* at 646.

[189] *Id.* at 647.

[190] *See also* Cook County College Teachers Union v. Taylor, 432 F. Supp. 270 (N.D. Ill. 1977) (teachers who reside within city have greater commitment to an urban education system); Wardwell v. Bd. of Educ., 529 F.2d 625 (6th Cir. 1976) (residents are more likely to vote for district taxes and less likely to engage in illegal strikes); McClelland v. Paris Pub. Sch., 294 Ark. 292, 742 S.W.2d 907 (1988); Meyers v. Newport Consol. Joint Sch. Dist., 31 Wash. App. 145, 639 P.2d 853 (1982) (residents are more likely to be involved in school and community activities); Pittsburgh Fed'n of Teachers Local 400 v. Aaron, 417 F. Supp. 94 (W.D. Pa. 1976) (residents have a greater personal stake in the district and have reduced tardiness due to traffic delays); Mogle v. Sevier County Sch. Dist., 540 F.2d 478 (10th Cir. 1976) (residents have greater opportunity to become personally acquainted with students).

greater understanding of the urban problems faced by their students.[191] With regard to police officers and firefighters, courts have cited that such continued residency requirements enhanced performance due to greater personal knowledge of the city, created a greater personal stake in the city's progress, reduced tardiness and absenteeism, provided economic benefits to the city from local expenditure of salaries, increased availability in emergencies, and deterred crime due to the presence of off-duty police.[192]

While a conditional residential requirement contained in a local hire program may be challenged under the Equal Protection Clause, it most likely will withstand the challenge, as conditional residential requirements are subject to the more deferential rational basis standard of review. So long as the government agency shows that the continued resident requirement bears a reasonable relationship to a legitimate state interest, it will not be found to violate the Equal Protection Clause.

3. Suspect Classification

Residency status is not considered a suspect classification.[193] By contrast, local hire laws that express a preference for local residents or businesses on the basis of race, national origin, or gender may be challenged under the Equal Protection Clause if a governmental agency attempted to introduce such a preference as a clear proxy for race[194] or if they contained provisions that targeted certain individuals such as women in an effort to improve employment opportunities and enhance local economic development. Such a situation would arise, for example, where a local hire policy was enacted in a largely minority-populated city.

In analyzing challenges to ordinances or statutes that appear to give preference on the basis of race, ethnicity, or gender classification, the Court must first consider which standard of equal protection review applies to each classification. The choice of the appropriate standard of review turns on the nature of the classification.[195]

Race-Conscious Measures. The Supreme Court has stated "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."[196] In *City of Richmond v. J.A. Croson Co.*,[197] the Court held that municipalities may utilize racial classifications only to serve a compelling state interest, and then the method chosen must be narrowly tailored to serve that interest.[198] Thus, the constitutional standard applicable to federal, state, or local governmental programs creating preferences based on race and ethnicity is the strict scrutiny test.[199]

While imposing a substantial burden, the *Croson* Court stated that nothing from its decision "precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction…. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[200]

Compelling State Interest. To justify a race- or ethnicity-conscious measure, a governmental actor must "identify that discrimination, public or private, with some specificity,"[201] and must have a "'strong basis in evidence for its conclusion that remedial action [is] necessary.'"[202] One way a governmental entity can meet its evidentiary showing is by demonstrating gross statistical disparities between the proportion of minorities hired and the proportion of minorities willing to do the work.[203] Additionally, a government entity may estab-

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[191] *See supra* note 188.

[192] *See* Wright v. Jackson, 506 F.2d 900 (5th Cir. 1975); Marabuto v. Emeryville, 183 Cal. App. 2d 406, 6 Cal. Rptr. 690 (1960); Hattiesburg Firefighters Local 184 v. Hattiesburg, 263 So. 2d 767 (Miss. 1972).; Krzewinski v. Kugler, 338 F. Supp. 492 (D. N.J. 1972); Carofano v. Bridgeport, 196 Conn. 623, 495 A.2d 1011 (1985); Berg v. Minneapolis, 274 Minn. 277, 143 N.W.2d 200 (1966); Simien v. City of San Antonio, 809 F.2d 255 (5th Cir. 1987); Abrahams v. Civil Service Comm., 65 N.J. 61, 319 A.2d 483 (1974); Detroit Police Officers Ass'n v. Detroit, 385 Mich. 519, 522–23, 190 N.W.2d 97–98 (1971).

[193] As opposed to alienage or U.S. citizenship, which is protected as a suspect classification. *See* CHEMERINSKY, *supra* note 118.

[194] *See* Personnel Adm'r of Mass. v. Feeney 442 U.S. 256, 272, 99 S. Ct. 2282, 2292, 60 L. Ed. 2d 870, 883 (1979) ("A racial classification…is presumptively invalid and can be upheld only upon an extraordinary justification…. This rule applies as well as to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination.").

[195] *See* Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 999 (3d Cir. 1993).

[196] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 229, 115 S. Ct. 2097, 2113, 132 L. Ed. 2d 158, 183 (1995).

[197] 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) (the Court articulated race or ethnicity conscious affirmative action programs require a "searching judicial inquiry" into the justification for the preference, because without that kind of close analysis "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.").

[198] *Id.* at 490–91, 493–94.

[199] *Adarand Constructors, Inc.*, 515 U.S. at 235.

[200] *Croson*, 488 U.S. at 500; Eng'g Contractors Ass'n. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895, 906 (11th Cir. 1997) (referring to Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994) (In practice because the alleged support of racial preference is almost always the same—remedying past or present discrimination—the government's interest is widely accepted as compelling. Thus the true test of whether a race or ethnicity conscious program is permissible is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest.).

[201] *Croson*, 488 U.S. at 504.

[202] *Croson*, 488 U.S. at 500 (quoting Wygant v. Jackson Bd. of Educ. 476 U.S. 267, 277 (1986)); H.B. Rowe Co., Inc. v. Tippett, 615 F.3d 233, 241 (4th Cir. 2010).

[203] *Croson*, 488 U.S. at 509.

lish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination in a system of racial exclusion practiced by elements of a local industry.[204]

For example, two courts have upheld ordinances where the city and county presented statistical data showing minority contractors received a disproportionately low share of contracts given their representation in the total contractor population.[205] However, in *O'Donnell Construction Company. v. District of Columbia*, the court struck down a municipal race-based contract preference program because the District of Columbia presented conflicting statistics.[206] Many circuit courts have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority owned businesses.[207] Disparity indices have been held to be "highly probative evidence of discrimination because they ensure that the relevant statistical pool of minority contractors is considered."[208] Anecdotal evidence may also be used to document discrimination, if buttressed by relevant statistical evidence.[209]

Importantly, governmental actors need not conclusively prove the existence of past or present racial discrimination. However, it cannot insulate its local hire policies simply by claiming remedial motive. Once the government makes its *prima facie* showing, challengers of race or ethnicity-based remedial measures must "introduce credible, particularized evidence to rebut" the governmental entity's showing of a strong basis in evidence for the necessity of remedial action.[210] Mere speculation that the government entity's evidence is insufficient or methodologically flawed is insufficient to rebut a state's showing.[211]

Narrowly Tailored. Besides serving a compelling interest, race or ethnicity conscious remedies must be narrowly tailored to achieve that interest.[212] With regard to local hire laws that may incorporate provisions as to MBEs and WBEs, a court considers whether an ordinance or statute was "narrowly tailored" to the compelling government interest of eradicating racial or gender discrimination in the awarding of public contracts. This requirement ensures that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[213] "The essence of the 'narrowly tailored' inquiry is the notion that explicit racial preferences…must be only a 'last resort' option."[214]

Croson set forth four factors for determining whether a remedy that discriminated on the basis of race was narrowly tailored. The factors include 1) the utilization of race-neutral measures prior to the adoption of a race-conscious measure, 2) the basis offered for the percentage selected, 3) the presence of waivers and flexibility, and 4) whether the ordinance or statute is geographically tailored and not over-inclusive.[215] A court may make a finding that a remedy is not narrowly tailored on the basis of any one of these factors.

Consideration of race-neutral alternatives prior to the adoption of race-conscious measures is critical. In *Croson*, the Supreme Court held that because the City of Richmond failed to consider race-neutral alternatives such as simplifying its bidding procedures, relaxing bonding requirements, or providing training and financial aid to disadvantaged entrepreneurs prior to the adoption of its ordinance, the ordinance was not narrowly tailored.[216] In *Contractors Association of Eastern*

[204] *Id.* at 492.

[205] Cone Corp. v. Hillisborough County, Fla., 908 F.2d 908, 915 (11th Cir. 1990); Associated Gen. Contractors of California v. Coalition for Econ. Equity, 950 F.2d 1401, 1414 (9th Cir. 1991).

[206] O'Donnell Construction Co. v. District of Columbia, 963 F.2d 420, 426 (D.C. Circ. 1992); *see also* Associated Gen. Contractors of Connecticut v. New Haven, 791 F. Supp. 941, 946 (D. Conn. 1992) (striking down minority-owned contractor program where minority- and women-owned businesses received a share of contracts "in proportion to the numbers of firms in existence"); *Eng'g Contractors Ass'n of South Florida, Inc.*, 122 F.3d at 924.

[207] *See, e.g.*, *H.B. Rowe Co*., 615 F.3d at 243–44; *Concrete Works*, 321 F.3d at 962–63; *Eng'g Contractors Ass'n of South Florida*, 122 F.3d at 914; *Associated Gen. Contractors of Cal., Inc*., 950 F.2d at 1413–14.

[208] *Contractors Ass'n of Eastern Pennsylvania*, 6 F.3d at 1005.

[209] *Croson*, 488 U.S. at 509; *Cone Corp*., 908 F.2d at 916 (held anecdotal testimony "combined with the gross statistical disparities uncovered by the County studies, provides more than enough evidence on the question of prior discrimination and the need for racial classification…."); *see also Ensley Branch*, 31 F.3d 1548, 1565 (11th Cir. 1994) (recognized that "[a]necdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence."); *but see Contractors Ass'n of Eastern Pennsylvania*, 6 F.3d at 1003 (recognizing that the "combination of anecdotal evidence and statistical evidence is potent" and that anecdotal evidence, taken alone, could satisfy *Croson* only in the "exceptional" case, if at all); Coral Constr. Co., v. King County, 941 F.2d 910, 919 (9th Cir. 1991) (recognizing the value of anecdotal evidence when combined with a "proper statistical foundation," but stating that anecdotal evidence alone "rarely, if ever, can…show a systematic pattern of discrimination necessary for the adoption of an affirmative action plan.").

[210] *H.B. Rowe Co., Inc*., 615 F.3d at 242; *see Concrete Works*, 321 F.3d at 959.

[211] *H.B. Rowe Co., Inc.*, 615 F.3d at 242; *see Concrete Works*, 321 F.3d at 991.

[212] *Croson*, 488 U.S. at 493; *Adarand*, 515 U.S. at 235.

[213] *Croson*, 488 U.S. at 493.

[214] Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993); *see also Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he strict scrutiny standard…forbids the use even of narrowly drawn racial classifications except as a last resort.").

[215] *Croson*, 488 U.S. at 507–508.

[216] *Id.* at 509–510; *see Eng'g Contractors Ass'n of South Florida, Inc*., 122 F.3d at 929 (County merely pointed to legislative findings that provided a conclusory statement that "race neutral programs cannot address the above problems and do not focus limited County money, efforts and personnel on the prob-

Pennsylvania, Inc. v. City of Philadelphia, the City relied on affidavits from the City Council President and the former General Counsel of a local coalition group who testified as to the race-neutral precursors of the ordinance, such as a revolving loan fund, a technical assistance and training program, and bonding assistance.[217] The court found the information in the affidavits sufficient to establish the City's prior consideration of race-neutral programs.[218] In *H.B. Rowe Company, Inc. v. Tippett*, the court concluded that the State of North Carolina gave serious good faith consideration to race-neutral alternatives prior to adopting its statutory scheme that required a contractor to demonstrate "good faith efforts" to obtain a predesignated level of minority participation in a state-funded road construction project contract.[219] Despite engaging in these race-neutral alternatives, the State was able to show that statistical evidence demonstrated that disparities continued to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting.[220]

Another factor considered in whether a remedy is narrowly tailored is the basis offered for the preference percentage selected. In *Associated General Contractors of California v. City and County of San Francisco*,[221] the court found the statute to be narrowly tailored in part because the City's 5-percent bidding preference corresponded to the identified discrimination found with regard to the City's "old boys network" that created a competitive disadvantage for MBEs.[222] The bidding preference provided a modest "competitive plus" to offset the identified disadvantage and nothing more and was limited only to those qualifying MBEs that were economically disadvantaged.[223]

The flexibility and presence of waivers is another factor utilized in determining whether a statute or ordinance containing a race-conscious measure is narrowly tailored.[224] In *H.B. Rowe Company*, the court found the State's statute narrowly tailored in part because the State's program contemplated a waiver of project specific goals when prime contractors made good faith efforts to meet those goals.[225] "Good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities."[226] Specifically, the State's program did not require or expect contractors to accept a bid from an unqualified bidder or a bid that is not the lowest bid and allowed prime contractors to "bank any excess minority participation for use against future goals over the following two years."[227] The lenient standard and flexibility of the "good faith efforts" requirement were considered to be a significant indicator of the statute being narrowly tailored.[228]

Courts have found targeting mechanisms significant in concluding programs are narrowly tailored.[229] For example, in *Associated General Contractors of California*, the court highlighted that the City's remedy was narrowly tailored in that its reach was limited to MBEs in San Francisco, thus avoiding any extension of benefits to groups not shown to have been subject to discriminatory practices.[230] Likewise, in *H.B. Rowe Company*, the Court of Appeals found that the statutory scheme was not "overinclusive."[231] The court stated that in tailoring the remedy, the State legislature did not include groups that may have never suffered from discrimination in the construction industry.[232] In contrast, when a remedy's reach extends to groups for which there is no evidence supporting a finding of discrimination, it has not been found to be narrowly tailored.[233]

Other considerations that have played a role in a court's narrowly tailored determination include whether the remedy is limited to particular types of

lems caused by racial discrimination," thus the County's ordinance did not meet the narrowly tailored requirement. Furthermore, the records showed that the County opted to turn to a race- and ethnicity-conscious remedy as a first resort rather than give the slightest consideration to race-neutral alternatives.).

[217] 6 F.3d at 1008.

[218] *Id.*

[219] *H.B. Rowe Co., Inc.*, 615 F.3d at 252–53 (The State of North Carolina had set up a Small Business Program that favored small businesses for highway construction procurement contracts of $500,000 or less. The program also allowed a waiver to institutional barriers of bonding and licensing requirements on such contracts and sought to assist disadvantaged business enterprises with bookkeeping, accounting, marketing, bidding, and other aspects of entrepreneurial development.).

[220] *Id.*

[221] 748 F. Supp. 1443 (N.D. Cal. 1990).

[222] *Id.* at 1453–54.

[223] *Id.*

[224] *See also Contractors Ass'n of Eastern Pennsylvania, Inc.*, 6 F.3d at 1009 (Philadelphia ordinance provided several types of waivers of the 15-percent goal).

[225] *H.B. Rowe Co., Inc.*, 615 F.3d at 253.

[226] *Id.*

[227] *Id.* at 253–54.

[228] *Id.*

[229] *See Contractors Ass'n of Eastern Pennsylvania, Inc.*, 6 F.3d at 1009; *Cone Corp.*, 908 F.2d at 917.

[230] *Associated Gen. Contractors of California*, 748 F. Supp. at 1454.

[231] *H.B. Rowe Co., Inc.*, 615 F.3d at 254.

[232] *Id.*

[233] *See* Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 737 (6th Cir. 2000) ("By lumping together the groups of [African Americans], Native Americans, Hispanics, and [Asian Americans]…the [challenged statute] may well provide preference where there has been no discrimination."); *Monterey Mechanical Co.*, 125 F.3d, 702, 714 (9th Cir. 1997) (court found the program overinclusive and swept in groups highly unlikely to have been discriminated against in the California construction industry as it included people native to the western part of the Alaska peninsula and the Aleutian Islands, and the California State University System nor the State of California has never actively or passively discriminated against Aleuts in the award of construction contracts).

contracts and their duration.[234] In both *Associated Gen. Contractors of California* and *H.B. Rowe Company*, the courts found that because the ordinance was of a very limited duration or had a specific expiration date it was narrowly tailored because it was designed only to endure until the discriminatory impact had been eliminated.[235] In *H.B. Rowe Company*, the statute even required a new disparity study every 5 years.[236]

In the context of the awarding of public contracts, race-based measures, including preferences for MBEs or requirements that a certain percentage of work be subcontracted to minority-owned businesses, are subject to strict scrutiny. To successfully withstand this challenge a governmental actor must ensure it has sufficient evidentiary proof to support its need for remedial action and must attempt race-neutral alternatives prior to adopting a race-based measure. Moreover, the race-based remedy selected must not only be flexible but must be targeted to only those groups for which there is evidence of discrimination in the construction industry or in the awarding of public contracts.

4. Gender-Conscious Measures

Measures that classify on the basis of gender are evaluated under intermediate scrutiny.[237] Several federal courts have applied intermediate scrutiny to gender preferences contained in state and affirmative action contracting programs.[238] Thus, in order for a local hire law or program expressing a gender-based preference to survive an Equal Protection Clause challenge, a governmental entity must establish an "exceedingly persuasive justification" for those gender-based measures.[239] This burden can be met by demonstrating that the gender-based preferences "serve important governmental objectives" and are "substantially related to achievement of those objectives."[240] To meet its burden of demonstrating an important governmental interest, a governmental actor must show that the gender-based measure is based on "reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions."[241] Although it is clear that both race- and gender-conscious programs must be tested for evidentiary sufficiency, the measure of the evidence required is less clear in the gender context.[242]

5. Preferences for Minority- and Women-Owned Business Enterprises

The most common way for increasing opportunities for people of color and women in the construction industry is by setting up minority- and women-based business set-asides or participation goals.[243] Oftentimes, the provisions will require a contractor to provide good faith efforts to obtain a predesignated level of minority participation.[244] Another way of increasing opportunities for minority- and women-owned businesses is by providing a bidding award preference to minority- or women-owned firms in their bid forms.[245] In practice, contracting preferences for MBEs and WBEs can be provided for in ordinances or statutes, via an adopted agency policy, or incorporated into DAs or CBAs.[246]

However, as mentioned above, preferences for minority- and women-owned businesses, which have been prevalent as a means of addressing disproportionate representation and ensuring that minority- and women-owned businesses have the opportunity to participate in public contracts, have been challenged as creating a classification subject to equal protection analysis. Gender-based preferences are subject to intermediate scrutiny.[247] And by its rulings in *City of Richmond v. J.A. Croson* and *Adarand Constructors, Inc. v. Pena*, the Supreme Court subjects all city, state, and federal race-

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[234] *See Associated Gen. Contractors of Cal.*, 748 F. Supp. at 1454 (the bid preference was not applicable to Asian or Hispanic architectural or engineering firms or Black medical services firms).

[235] *Associated Gen. Contractors of Cal.*, 748 F. Supp. at 1454 (limited duration of 3 years); *H.B. Rowe Co., Inc.*, 615 F.3d at 253 (had a specific expiration date).

[236] *H.B. Rowe Co., Inc.*, 615 F.3d at 253.

[237] Craig v. Boren, 429 U.S. 190, 197, 97 S. Ct. 451, 457, 50 L. Ed. 2d 397, 407 (1976).

[238] *See* Coral Constr. Co. v. King County, 941 F.2d 910, 930 (9th Cir. 1991); Michigan Road Builders Ass'n, Inc. v. Miliken, 834 F.2d 583, 595 (6th Cir. 1997); Associated General Contractors of California v. City and County of San Francisco, 813 F.2d 922, 942 (9th Cir. 1987); Main Line Paving Co. v. Board of Educ., 725 F. Supp. 1349, 1362 (E.D. Pa. 1989).

[239] United States v. Virginia, 518 U.S. 515, 524, 116 S. Ct. 2264, 2271, 135 L. Ed. 2d 735, 746 (1996).

[240] *Id.*

[241] Miss. Univ. for Women v. Hogan, 458 U.S. 718, 726, 102 S. Ct. 3331, 3336, 73 L. Ed. 2d 1090, 1099 (1982); Thus, the evidentiary basis necessary to demonstrate a governmental entity's interest may be something less than the "strong basis in evidence" required to justify race-based remedial measures. *See* Eng'g Contractors Ass'n of South Florida, Inc., 122 F.3d at 909 ("Logically, a city must be able to rely on less evidence in enacting gender preferences than a racial preference because applying Croson's evidentiary standard to a gender preference would eviscerate the difference between strict and immediate scrutiny."); *Concrete Works*, 321 F.3d at 959-60; *Contractors Ass'n of Eastern Pennsylvania, Inc.*, 6 F.3d at 1010; *Coral Constr.*, 941 F.2d at 931–32.

[242] *See Eng'g Contractors Ass'n of South Florida, Inc.*, 122 F.3d at 909 ("The Supreme Court has not addressed the question explicitly, and there is a similar dearth of guidance in the reported decisions of other federal appellate courts."); *Contractors Ass'n of Eastern Pennsylvania, Inc.*, 6 F.3d at 1010 ("It is unclear whether statistical evidence as well as anecdotal evidence is required to establish discrimination necessary to satisfy intermediate scrutiny, and if so, how much evidence statistical evidence is necessary.")

[243] Policylink.org, *Minority Contracting—How to Use It?,* http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137651/k.86F9/How_to_Use_It.htm (last accessed Oct. 15, 2012).

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Craig*, 429 U.S. at 197.

based affirmative action programs to strict judicial scrutiny.[248] After *Croson*, local entities that had not empirically demonstrated past discrimination against MBEs were unable to implement such programs without running afoul of the Equal Protection Clause.[249]

While arguably local hire initiatives are not affirmative action programs, they often achieve the same results, generating job opportunities for communities of color and women.[250] Thus if a governmental entity's local hire program appears to contain provisions preferring or specifically targeting the hire or participation of local minorities or women, it may be susceptible to an equal protection challenge on the basis that such programs are race- and gender-conscious programs masquerading as racially-neutral programs.[251]

Summary Regarding Equal Protection Clause Challenges to Local Hire Programs. A local hire program that infringes upon a fundamental right or discriminates on the basis of a suspect classification would be subject to strict judicial scrutiny. The imposition of durational residential requirements has been found to violate an individual's fundamental right to travel.[252] By contrast, conditional residential requirements have been upheld under a rational basis test for a number of different municipal employees and public professionals.[253] Discrimination on the basis of residency does not qualify as a suspect classification, thus a local hire policy preferring residents to nonresidents is subject to the deferential rational basis standard under an Equal Protection challenge. However, race-based affirmative action programs have been subjected to strict scrutiny and gender-based affirmative actions to intermediate scrutiny.[254] Providing sufficient evidentiary support for such remedial action is critical to surviving an equal protection challenge.[255] While local hire programs are not affirmative action programs, they can often achieve the same result, helping women and people of color. If a public agency seeks to include targeted hiring goals on the basis of race or gender, it may be susceptible to an equal protection challenge.

III. ISSUES ASSOCIATED WITH FEDERAL FUNDING

The presence of federal funding may have an impact on the enforceability of local hire laws. As such, many states and municipalities have sought to limit the application of their local hire laws so that they do not conflict with federal laws.[256] One way of limiting the application of local hire preference laws is to exempt projects that are either wholly or partially supported by federal funds.[257] Another way is to clearly articulate in the ordinance or statute that the local hire preference is not to be applied where resident preference laws are prohibited by federal law.[258]

A. Federal Regulations Pertaining to Grants to State and Local Governments from the Department of Transportation

The U.S. Department of Transportation, like other federal agencies, has adopted 49 C.F.R § 18.36, known as the Common Rule, to "establish uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments."[259] "This general rule of governance implements federalism principles by allowing States to expend and account for grant funds in large part according to their own laws and procedures."[260] While the Common Rule enables states to spend federal funds using the same procurement rules applicable to expenditures of their own funds, it does not operate to exempt states or local governments from complying with federal law, simply because they do something differently.[261] Thus, if a subgrantee proceeds in a manner that violates federal law, its grant cannot be saved by relying on the Common Rule.

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[248] 488 U.S. 469 (1989); 515 U.S. 200 (1995).

[249] *See, e.g.*, *Eng'g Contractors Association of South Florida, Inc.*, 122 F.3d at 929; Hi-Voltage Wire Works Inc. v. City of San Jose, 24 Cal. 4th 537, 569, 12 P.3d 1068, 1088, 101 Cal. Rptr. 2d 653, 676 (2000); Sullivan, *supra* note 16, at 1335, 1340–41,

> (Accordingly, cities that previously looked to minority hiring and contracting requirements as a means to increase employment of local people of color will now find these goals difficult or impossible to meet directly. Cities with a high proportion of residents who are people of color may be able to meet these same goals through the use of local preference requirements. While local preference plans are not a substitute for affirmative action plans that directly target women and people of color, cities in the post-affirmative action world may look to resident preferences to bear a larger proportion of their economic development needs.).

[250] Sullivan, *supra* note 16, at 1335, 1340.

[251] Gross, LeRoy & Janis-Aparicio, *supra* note 5. (Targeted hiring programs implemented via a CBA, a legally enforceable agreement between community groups and the developer, do not run into the same equal protection obstacles if the local government is not closely involved in its negotiations.)

[252] *Dunn*, 405 U.S. at 334–35, 338, 342.

[253] *See McCarthy*, 424 U.S. at 646; *Detroit Police Officers Ass'n*, 385 Mich. at 522–23.

[254] *Croson*, 488 U.S. at 493–94; *Adarand*, 515 U.S. at 235; *Craig*, 429 U.S. at 197.

[255] *See Croson*, 488 U.S. at 500; *Hogan*, 418 U.S. at 728.

[256] *Hirsch*, *supra* note 4.

[257] *Id.* (referencing how the state of Arkansas makes an exception for projects funded by the U.S. Department of Labor).

[258] *Id.* (referencing how an Idaho statute explicitly states the local hire law is to be applied so it does not conflict with federal statutes if the project uses federal funds).

[259] 49 C.F.R. § 18.1 (2012); City of Cleveland v. Ohio, 508 F.3d 827, 848 (6th Cir. 2007).

[260] *City of Cleveland*, 508 F.3d at 848; Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Government, 53 Fed. Reg. 8034, 8034-35 (March 11, 1998).

[261] 49 C.F.R. § 18.37(a)(2) (2012); *City of Cleveland*, 508 F.3d at 848.

While none of the regulations adopted by the Department of Transportation expressly prohibit the use and implementation of local hire programs, if such a program was deemed contrary to federal law or regulations, it may be susceptible to a legal challenge.[262] Thus, even if a local hire preference program is consistent with state law, it may not be automatically applicable to federally funded projects. If it is contrary to federal law or regulations, it may be within the discretion of the dispensing federal agency to withdraw its financial support.[263]

B. *City of Cleveland v. Ohio*

The Sixth Circuit's decision in *City of Cleveland v. Ohio* highlights a situation where federal funds were removed from a city-initiated public works project because of the inclusion of local hire requirements in the project contract. In support of its decision to remove federal funding from the project, the Federal Highway Administration (FHWA), an agency within the U.S. Department of Transportation, argued that the City of Cleveland's local hire mandate violated several federal laws and regulations.[264]

In *Cleveland*, the Sixth Circuit upheld the FHWA's determination that the City of Cleveland's local hire law violated the FHWA's contracting statute and regulation.[265] The City obtained most of the funds necessary to complete the project through the Federal-Aid Highway Program, which is based on the Federal-Aid Highway Act and is administered by FHWA. The FHWA delegated significant responsibility to the Ohio Department of Transportation, but remained ultimately accountable for ensuring that the Federal-Aid Highway Program be delivered consistent with established requirements.

In preparing a bid package for the Kinsman Road project, the City of Cleveland included reference to its Lewis Law, which requires 20 percent of the work on the project to be performed by city residents.[266] Upon reviewing the bid package, the Ohio Department of Transportation advised the City that if it did not remove the Lewis Law language it would withdraw federal funds, as the City's local hire preference requirement violated certain federal laws. The City altered the bid package by removing reference to the Lewis Law. However, the City's subsequent contractual agreement with the contractor incorporated the Lewis Law's requirements. As a result, the Ohio Department of Transportation withdrew its federal funding.[267] While the Sixth Circuit agreed with the City of Cleveland that the substance of its local hire preference (known as the Lewis Law) did not itself violate federal law, the Court found that the withdrawal of federal funds was authorized under the discretion conferred to the federal agency and by 23 U.S.C. § 112(b), which prohibits contract requirements that are not expressly set forth in the advertised bid specification.[268]

The FHWA supported its decision to withdraw federal funds on the basis that the Lewis Law violated several federal laws.[269] The Sixth Circuit held that provisions set forth at 23 U.S.C. § 112(b) provided FHWA with discretionary authority to effectuate the Federal-Aid Highway Act's purposes, including determining whether all contract requirements were set forth in the advertised specifications.[270] While the Court rejected the FHWA's interpretation that 23 U.S.C. § 112(b)'s competitive bidding language prohibited a contracting requirement for local hiring preferences, it upheld the FHWA's decision that the City's contract violated the statute because Cleveland's local hire requirement was inserted after the contract had been advertised and bid, despite the fact that it had not been included in the advertised specification.[271]

The Sixth Circuit also rejected the argument that Cleveland's local hiring preference violated the FHWA's regulation at 23 C.F.R. § 635.110(b) as a noncompetitive contract provision.[272] The Court stated that the Lewis Law's requirement that a fixed percentage of hours must be worked by Cleveland residents is not a requirement for "bonding, insurance, prequalification, qualification, or licensing of contractors."[273] However, the Court upheld the agency's determination that the ordinance violated 23 C.F.R. § 635.110(b) as reasonable because the bond penalty provision of the local hiring preference "could discourage" contractors who had once failed to meet the local hiring preference "from submitting subsequent bids because they uniquely would be required to provide a twenty percent bond."[274]

The FHWA also maintained that its decision to withdraw federal funding was proper because the Lewis Law violated 23 C.F.R. § 635.112(d), which states "nondiscriminatory bidding procedures shall be afforded to all qualified bidders regardless of National, State or local boundaries and without regard to race, color, religion, sex, national origin, age, or handicap."[275] The Sixth Circuit held that the Cleveland ordinance did not violate this federal regulation because 23 C.F.R. § 635.112(d) dealt only with bidding procedures, and the ordinance was not a bidding procedure.[276] The Court noted that

> [a]lthough the FHWA has discretionary authority to decline to approve contracts that might not reflect the effi-

[262] *City of Cleveland*, 508 F.3d at 843.
[263] *Id.* at 850.
[264] *Id.* at 843.
[265] *Id.* at 850.
[266] *Id.* at 832.
[267] *Id.* at 833–34.
[268] *Id.* at 850.
[269] *Id.*
[270] *Id.* at 850.
[271] *Id.* at 843.
[272] *Id.* at 850.
[273] *Id.* at 845.
[274] *Id.*
[275] *Id.*
[276] *Id.* at 850.

> cient use of federal dollars, the FHWA has not demonstrated that local hiring preference styled in the manner of the [Cleveland hiring preference] are impermissible *per se* due to their conflict with federal law.[277]

And lastly, the Sixth Circuit rejected the agency's argument that 23 C.F.R. § 635.117(b) prohibits local hiring preferences such as the Cleveland ordinance, because the exact wording of the regulation only prohibited discrimination against out-of-state workers, not the in-state, non-Cleveland, Ohio, residents targeted in this case.[278] Cleveland's local hire 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."[279] The Lewis Law

> mandates contractors to ensure that 20 percent of the construction hours worked on a project performed by Ohio residents are worked by Cleveland residents. By excluding from the definition of "construction worker hours" all work performed "by non-Ohio residents,"…Cleveland has limited the impact of the Lewis Law to Ohio residents alone."[280]

Thus, if a contractor wishes to employ any Ohio construction workers, 20 percent of the hours performed by those Ohio workers must be performed by Cleveland residents.[281] But if a contractor wishes to employ all out-of-state labor, it can do so without employing any Cleveland residents.[282] While the Lewis Law might disadvantage Ohio-based labor, it has no effect on the employment of labor from any other state.[283]

Ultimately, the Sixth Circuit upheld the FHWA's decision that the City of Cleveland's local hiring preference violated 23 U.S.C. § 112(b) and 23 C.F.R. § 635.110(b), and so violated the federal regulation provisions that state subgrants must not violate federal statutes and regulations.[284] Thus, despite disagreeing with various arguments set forth by FHWA to support their decision, the Sixth Circuit upheld the federal agency's decision to withdraw federal funding from the Kinsman Road project.

The Sixth Circuit's *City of Cleveland* decision highlights how the presence of federal funding can impact the viability of local hire preference statutes. The decision made clear that while a city may mandate a certain percentage of city residents as workers on a road improvement project that is partially funded by federal money, such a mandate is permissible so long as the city's ordinance does not violate federal law or regulations.[285] The City of Cleveland's Lewis Law was drafted specifically in a manner as to avoid conflict with the Privileges and Immunities Clause by restricting its reach to Ohio residents only.[286] Despite the care the City took in drafting its ordinance, the Sixth Circuit found the ordinance's bond penalty provision and the City's inclusion of contract requirements that had not been expressly set forth in the advertised bid specification to violate federal law and regulations.[287] The *City of Cleveland* decision suggests that a court is likely to give deference to a decision made by a federal agency, provided that the decision is not arbitrary or capricious.

It is worth noting that, according to the decision, local hiring preferences are not per se contrary to federal regulation and law. However, the decision cautions that when federal funds are involved on a local project, municipalities must be careful when attempting to institute local preferences. Even if a local ordinance does not violate state law, if a project receives federal funding and its contract provisions violate federal law or regulations, federal funding may be withdrawn and a project runs the risk of being jeopardized.

C. Privileges and Immunities Concerns Not Implicated by Federal Funding

Public works construction projects often involve a mixture of state and federal funding. While local hire programs are not per se contrary to federal law and regulations, federal spending programs may impose requirements for grants to state and local governments that limit the use of local hire statutes. When a local government accepts federal grants with such limitations, federal law and regulations take precedence.[288]

But in situations where federal funding grants are silent on the issue or are given without any express limitations on the use of local hire programs, the presence of federal funding can have an impact on the constitutional analysis of local hire preference programs.[289] If Congress allocates money and approves the state law or if a state is a market participant, then the presence of federal funding does not violate the dormant Commerce Clause.[290] However, in contrast, congressional approval does not excuse a law that violates the Privileges and Immunities clause.[291]

Should There Be a Market Participant Exception to the Privileges and Immunities Clause? In the note, *In Defense of Resident Hiring Preferences: A Public Spending Exception to the Privileges and Immunities Clause*, legal commentator Patrick Sullivan set forth an argument for a public spending–based exception to the

[277] *Id.* at 846.

[278] *Id.* at 848.

[279] 23 C.F.R. § 635.117(b) (2012); *City of Cleveland*, 508 F.3d at 847.

[280] *City of Cleveland*, 508 F.3d at 848.

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] 49 C.F.R. § 18.36 (2012); 49 C.F.R. § 18.37 (2012); *City of Cleveland*, 508 F.3d. at 850.

[285] *City of Cleveland*, 508 F.3d at 850.

[286] *Id.* at 833.

[287] *Id.* at 850.

[288] *Id.* at 848–49.

[289] Sullivan, *supra* note 16, at 1369–70.

[290] CHEMERINSKY, *supra* note 118; *White*, 460 U.S. at 208, 215.

[291] CHEMERINSKY, *supra* note 118.

Privileges and Immunities Clause, similar to the market participant exception existing under the Commerce Clause.[292] Sullivan asserts that the public spending exception would "operate at the first level of the *Toomer* test" in a Privileges and Immunities analysis, when the court asks whether a fundamental federal right has been implicated.[293] Accordingly, Sullivan states that a court would hold that individuals do not have a fundamental Privileges and Immunities right to public funds, such as federal funding, that are not their own.[294]

Sullivan notes that the presence of federal funding is relevant beyond just determining whether a local city is acting as a proprietor.[295] In some state cases, courts held "a high percentage of federal funding among a city's total public contracting expenditures rendered local discrimination more suspect because the federal funds took the project out of the city's proprietary realm."[296] While the proprietor/regulator distinction is critical to the traditional market participant exception, Sullivan argues that the Privileges and Immunities Clause "does not rely so heavily on the character and form of city action."[297]

The focus of the Privileges and Immunities Clause is individual rights.[298] With regard to public contracting, the Privilege and Immunities Clause protects rights fundamental to national unity, particularly the right to pursue a common calling.[299] As such, Sullivan contends the proper question when undertaking a Privileges and Immunities analysis of local hire program is whether "federal spending implicates a right protected by the Clause" or in other words, "do all U.S. citizens have a Privileges and Immunities right to federal…spending?"[300] The article claims that it does not seem a worker could assert that he or she has the right to federal funds that a city has denied him or her because there is no clear source of that right.[301] The Privileges and Immunities Clause "provides a remedy against discrimination against other States rather than insures U.S. residents' access to federal funds."[302] The note asserts that "the right to pursue a common calling under the Privileges and Immunities Clause does not necessarily extend to jobs created by public funds," like federal money.[303] The article concludes that while the presence of federal funding might "signal the failure of the market participant exception in the Dormant Commerce Clause context, it need not similarly doom the exception under the Privileges and Immunities Clause."[304] While this argument has not been adopted by the courts, it highlights that the use and presence of federal funding is an important issue that ought to be considered when discussing the enactment and the enforceability of a local hire program.

IV. CURRENT PRACTICES AND CASE STUDIES

The current practices and tools utilized by governmental entities and communities to implement and increase local employment opportunities can be grouped into four different categories: state and local legislation, contract award preferences, purchasing and procurement preferences, and contract-based tools. A description and explanation of each of these various tools along with case study examples follow.

A. State and Local Legislation

1. State Legislation

Some states have sought to increase the employment of state residents through the adoption of state statutes that require a certain percentage of employees hired for work on a public works contract must reside within the state. Unlike municipal ordinances that seek to increase the employment of local residents of a particular community, state resident preference statutes speak to a broader scale, requiring a preference for those individuals who are classified as state residents. Such preferences are typically motivated by a state legislature's attempt to alleviate its unemployment problem.[305]

State resident preference statutes sometimes include an exception for projects that receive federal funding. One example of a statewide local hire statute is Alaska's local hire law, which was struck down in *Hicklin v. Orbeck*.[306]

2. Local/Municipal Ordinances

Local hire ordinances seek to benefit residents who may contribute through taxes to the funding of public improvements.[307] These ordinances include mandates, such as requiring local hiring for a given number of

[292] Sullivan, *supra* note 16, at 1335.

[293] *Id.* at 1369.

[294] *Id.*

[295] *Id.* at 1372.

[296] *Id.* at 1371; *see Neshaminy Constr., Inc*., 437 A.2d at 737 (the 80-percent federal funding of state construction contracts made the state interest too attenuated to take the contracts out of the purview of the Privileges and Immunities Clause); *Laborers Local Union No. 374*, 654 P.2d at 71 (the 75-percent federal funding on a state project left the State with insufficient justification for its discrimination against nonresidents); *Salla*, 399 N.E.2d at 914–15 (squarely rejected any notion that a public ownership exception existed under the Privileges and Immunities Clause and held that 75-percent federal funding on the state projects at issue lessened any proprietary interest that might have weighed in favor of the constitutionality of state discrimination).

[297] Sullivan, *supra* note 16, at 1335, 1372.

[298] *Id.*

[299] *Id.*

[300] *Id.* at 1372–73.

[301] *Id.* at 1374.

[302] *Id.*

[303] *Id.* at 1376.

[304] *Id.* at 1372.

[305] *Id.* at 526.

[306] 437 U.S. 518 (1978).

[307] Sullivan, *supra* note 16, at 1335, 1336.

hours, establishing the threshold for project participation, or specifying the kinds of jobs that are subject to such preference requirements.[308] Local hire preference ordinances have the advantage of being applicable to a broader range of projects that those that are addressed in DAs, PLAs, or CBAs.[309] However, their broad reach can also be a disadvantage, as it is difficult for a general ordinance to address the particular opportunities and constraints of individual developments and projects.[310] Also, because local or municipal ordinances have been one of the most prominent tools used to institute a local hire preference, they have been one of the mechanisms most confronted with legal challenges.[311]

Sources of Local Municipal Power to Pass and Institute Local Hire Programs. State laws mandating that certain contracts be awarded to the lowest responsive and responsible bidder pose a potential threat to local hire statutes and ordinances. Courts have struck down municipal preference ordinances when they have been found to violate state competitive bidding statutes.[312]

However, local governments may not be absolutely prevented from implementing local hire policies that prefer local resident bidders over the lowest responsive and responsible bidder. Local governments can be organized under the general laws of a state or may be organized under a charter.[313] Some states allow for "home rule," a principle that that involves the ability of local governments to control and finance local affairs without undue influence by the state legislature.[314] Thus, when it comes to public contracting, depending on the nature of the project, a home-rule charter city may not be bound by general state law bidding requirements if such general law requirements have been expressly exempted in the city charter and if the subject matter of the bid relates to a purely municipal affair. However, a local hire ordinance that directly conflicts with a city charter may be found void under state law if the ordinance does not fall within any express exceptions set forth in the city charter that permit a contract to be awarded to a bidder other than the lowest responsive, responsible bidder.[315] Thus, a municipal ordinance may be subject not only to federal constitutional challenges as discussed in Section II, but it may also be found to violate state and locally adopted competitive bidding objectives.

The following case studies are examples of local municipalities at various stages of implementing local hire preferences—some in the process of considering the adoption of a local hire ordinance, others reconsidering their enactment of a local hire ordinance, and those with local hire ordinances currently in effect.

Somerville, Massachusetts. In November 2011, officials reviewed changes to a proposed ordinance that would have required city-subsidized construction projects to consider hiring local workers.[316] Changes were considered after a federal appeals court struck down a similar law in the neighboring city of Fall River, Massachusetts, in October 2011 because it was deemed discriminatory toward out-of-state workers. Without the changes, the Somerville ordinance would require contractors who receive subsidies from the City of Somerville to hire a workforce composed of 30 percent local residents. The ordinance's specified minimum percentage of resident employees was of primary concern to local officials.[317]

Detroit, Michigan. In 2007, the City of Detroit adopted a policy directing city departments and agencies to implement specific residency requirements on all construction projects funded, in whole or in part, by the City.[318] The policy is applicable to those projects funded by state or federal funds to the extent permitted by law. The city's policy specifically directs that project con-

[308] Policylink.org, *Local Hiring Strategies, supra* note 7.

[309] *Id.*; Edel, *supra* note 20, at 9.

[310] Policylink.org, *Local Hiring Strategies, supra* note 7.

[311] *See Camden*, 465 U.S. at 210 (municipal ordinance requiring at least 40 percent of the labor force of contractors and subcontractors working on city construction projects be city residents was challenged); *Salla*, 399 N.E.2d at 913–15 (absent from the record is evidence that an influx of nonresidents is the major cause of unemployment).

[312] *See, e.g.*, Associates Builders & Contractors, Inc. v. City of Rochester, 67 N.Y.2d 854, 501 N.Y.S.2d 653, 492 N.E.2d 781 (1986) (without statutory authorization, public agencies are not at liberty to prefer the low bids of resident contractors merely because of their local residency); In Koester Contracting v. Bd. of Comm'rs of Warrick County, 619 N.E.2d 587 (Ind. Ct. App. 1st Dist. 1993) (lack of statutory authorization for recognizing a preference resulted in invalidation of a road paving contract awarded by a county board to a resident contractor whose bid was 3 percent higher than the low bidder. Although the county board reasoned that the resident contractor should receive the contract because it employed county residents and paid county taxes, the court ruled that the contract award was illegal because the competitive bidding statute granted no preferences and required the award to be made simply to the lowest responsible and responsive bidder.).

[313] City of Lockhart v. United States, 460 U.S. 125, 127, 103 S. Ct. 998, 1000, 74 L. Ed. 2d 863, 868 (1983); *see* Eileen R. Youens, *Local Preferences in Public Contracting, Part 3*, Oct. 20, 2010, COATES' CANONS: NC LOCAL GOVERNMENT LAW BLOG, http://sogweb.sog.unc.edu/blogs/localgovt/?p=3413 (last accessed Oct. 15, 2012).

[314] *City of Lockhart*, 460 U.S. at 127 (in contrast to a general law city whose powers include only those expressly conferred upon it by the state legislature, a home rule city has constitutional authority to do whatever is not specifically prohibited by state legislation).

[315] *See, e.g.*, Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987).

[316] Matt Byrne, *Battle Over Hiring Locally Continues in Somerville*, Boston.com, Nov. 21, 2011, http://www.boston.com/yourtown/news/somerville/2011/11/battle_over_hiring_locally_con.html (last accessed Oct. 15, 2012).

[317] *Id.*

[318] Exec. Order No. 2007-1, City of Detroit, Sept. 10, 2007, http://www.dwsd.org/downloads_n/projects_procurements/city_ordinances/executive_order_no_2007-1.pdf.

struction contracts shall provide that at least 51 percent of the workforce must be bonafide Detroit residents. In addition, Detroit residents shall perform 51 percent of the hours worked on the project. Failure to meet the Detroit resident workforce requirement, including project hours, results in monthly financial penalties. Pursuant to its local hiring policy, the City of Detroit retains the option to bar any developer, general contractor, prime contractor, subcontractor, or lower-tier contractor that is deficient in the utilization of Detroit residents from doing business with the City of Detroit for 1 year. The City also reserves the right to rebid the contract, in whole, or in part, and/or hire its own workforce to complete the work.[319]

St. Louis, Missouri. In 2009, the City of St. Louis passed an ordinance establishing apprenticeship training, workforce diversity, and city resident programs for City-funded public works contracts.[320] It also established a community jobs board.[321] The ordinance specified that on each public works contract with an estimated base value of $1 million or more, the St. Louis Agency for Training and Employment shall set a goal that 20 percent of all labor hours are to be performed by persons who reside in the City of St. Louis.[322]

San Francisco, California. The City and County of San Francisco updated its local hiring policy in 2011.[323] It establishes mandatory local hiring requirements for certain City public works or improvement projects, including City projects constructed in whole or in part within the boundary of San Mateo County.[324] In the first year of implementation, the policy requires a mandatory participation level of 20 percent of all project work hours within each trade to be performed by residents domiciled in San Francisco and no less than 10 percent of the work hours to be performed by disadvantaged workers.[325] Disadvantaged workers include residents from communities with unemployment in excess of 150 percent of the city average, as well as single parents, those receiving public benefits, and those without a General Education Degree.[326]

Contractors who fail to meet these requirements face financial penalties,[327] but they also receive financial incentives for exceeding the local hiring requirement.[328]

Hartford, Connecticut. The City of Hartford, Connecticut, passed an ordinance in 1986 that applies local hiring policies to all publicly assisted projects of 40,000 sq ft or more.[329] For such projects, the ordinance requires that 40 percent of all trade project hours must be performed by city residents, 25 percent of all trade project hours must be performed by minorities, and 6.9 percent of all trade project hours must be performed by women. Also, 20 percent of the workers must be apprentices, 50 percent of whom must be city residents. Moreover, 25 percent of city work is set aside for small business and minority contractors. Projects are eligible for reimbursement of their permitting fee if 50 percent of the workers are residents and if at least 25 percent of the supplies come from Hartford businesses. The City also requires that the permanent workforce after construction must be composed of at least 50 percent resident and 45 percent minority. The City's requirement that the permanent, nonconstruction workforce maintain high levels of resident workers was adopted to ensure a long-term, beneficial impact for the community.[330]

Baltimore, Maryland. In May 2011, council members introduced a council resolution concerning an investigative hearing on local hire preference programs.[331] The resolution sought an investigation into the efficacy of adopting a policy that would require resident preference hiring by certain entities contracting to supply goods or services to the City of Baltimore.[332] There has yet to be an ordinance formally adopted.

B. Contract Award Preferences

In an effort to increase the employment opportunities for in-state businesses, some states and local entities have enacted local preferences in the awarding of contracts. Such preferences give state or local residential bidders or proposers an advantage in the award of public contracts.[333] Some state appellate courts have upheld the constitutionality of these local preferences.[334]

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[319] *Id.*

[320] St. Louis, Mo., Ordinance 68412 (May 21, 2009), http://www.slpl.lib.mo.us/cco/ords/data/ord8412.htm.

[321] *Id.*

[322] *Id.* § 4.

[323] SAN FRANCISCO, CAL., ADMINISTRATIVE CODE § 6.22(G) (2011).

[324] *Id.*

[325] § 6.22(G)(4)(a)(i).

[326] § 6.22(G)(2)(g).

[327] § 6.22(G)(7).

[328] § 6.22(G)(5).

[329] Policylink.org, *Local Hiring Strategies—Case Studies*, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137641/k.7ADF/Case_Studies.htm (last visited Oct. 15, 2012), hereinafter cited as "Policylink.org, *Local Hiring Strategies—Case Studies*."

[330] *Id.*

[331] Letter from Ashlea H. Brown, Assistant Solicitor, City of Baltimore, to President and City Council Members (June 22, 2011), http://legistar.baltimorecitycouncil.com/attachments/7649.pdf.

[332] *Id.*

[333] Eileen R. Youens, *Local Preferences in Public Contracting, Part 1*, Sept. 22, 2010, COATES' CANONS: NC LOCAL GOVERNMENT LAW BLOG, http://canons.sog.unc.edu/?p=3202 (last accessed Oct. 15, 2012).

[334] For example, a Wyoming statute granted residents (defined as residing or being incorporated in Wyoming for 1 year prior to the date of bid opening) a 5-percent bid preference. The constitutionality of the statute was upheld by the Supreme Court of Wyoming in Galesburg Constr. Co., Inc., of Wyoming v. Board of Trustees of Mem'l Hosp. of Converse County, 641 P.2d 745 (Wyo. 1982), where the court ruled that the state had

There are generally four variations in contract award preferences.[335] In one variation, the awarding governmental entity applies a straightforward preference, or specific percentage price increase or decrease to bids from non-local bidders. Because many bids are awarded based on price alone, this has the effect of giving in-state bidders a better chance of winning contracts, even if their initial bids are higher than their out-of-state competitors.

Wyoming Statutes Annotated Section 16-6-102. Wyoming's statute sets forth a preference for a state resident bid in public works contracts if it is not more than 5 percent higher than that of the lowest nonresident bid.[336]

A second variation is bid price matching, where the awarding body is required to give state bidders the opportunity to match the lowest bid if the lowest bidder is a nonlocal bidder.[337]

Proposed North Carolina Legislation. During its 2009 session, the North Carolina General Assembly proposed a bill, which was ultimately voted down by the legislature, that would have allowed North Carolina chartered construction contractors to match bids from out-of-state contractors.[338] The proposed bill was part of the State's effort to further a policy to buy locally and support North Carolina residents and businesses.[339]

Another type of preference is reciprocal, whereby the awarding government applies a percentage increase to an out-of-state bidder's bid only if the out-of-state bidder's jurisdiction applies such a percentage increase to its out-of-state bidders.[340] For example, if one state applies a percentage increase to out-of-state bids, the awarding state will apply that same percentage increase to that out-of-state's bids on its projects.

Louisiana Revised Statutes Annotated Section 38:2225. Under this Louisiana statute, if a nonresident contractor bidding on a public work in the State of Louisiana is domiciled in a state that provides a percentage preference in favor of contractors domiciled in that state over Louisiana resident contractors for the same type of work, then every Louisiana resident contractor is granted the same preference over contractors domiciled in the other state.[341] Thus, this statute favors contractors domiciled in Louisiana whenever the nonresident contractor bids on public work in Louisiana.

The fourth variation of a contract award preference is a tie-bid preference, where the awarding government awards a state bidder when the state bidder's bid and out-of-state bidder's bid are equal in price and quality.[342]

South Carolina Code Annotated Section 11-35-1520(9)(a). This statute articulates a tie-bid preference for an in-state resident bidder. With regard to competitive sealed bidding for contracts over $50,000, if two or more bidders are tied in price while otherwise meeting all of the required conditions, the award is automatically made to the South Carolina firm if there is a South Carolina firm tied with an out-of-state firm.[343]

These contract award preferences have also been used at the local level.

Philadelphia, Pennsylvania. The City of Philadelphia employs a 5 percent bid preference for certified local vendors.[344] As part of a bid evaluation to determine the lowest bidder, the City reduces local vendors' bids by 5 percent. If the local vendor receives the contract as a result of the 5 percent preference, the vendor will still receive the stated price on the vendor's bid document.[345]

To qualify for local preference in a bid submission, a bidder must be a certified Local Business Entity.[346] To obtain certification, an entity must possess a valid Business Privilege License, have filed a Business Privilege Tax return within the past 12 months, and have continuously occupied an office within the City of Philadelphia where the company's business has been conducted for the past 6 months. Also, the business must satisfy one of the following requirements: 1) more than half of the business's full-time employees work in the City at least 60 percent of the time, 2) more than 50 of the business's full time employees work in the City at least 60 percent of the time, 3) more than half of the business's officers work in the City at least 60 percent of the time, or 4) the principal place of business is located in the City of Philadelphia.[347]

C. Purchasing and Procurement Preferences

Purchasing and procurement preferences are a type of local preference statute that allows an awarding governmental entity, at either the state or local level, to favor local businesses and vendors.[348] For example, in Tennessee, the state legislature has provided a preference for Tennessee products.[349] Tennessee Code Anno-

a legitimate interest in encouraging local industry, and that the bid preference statute advanced that interest.

[335] Youens, *supra* note 333.

[336] WYO. STAT. ANN. § 16-6-102 (2012).

[337] Youens, *supra* note 333.

[338] John I. Mabe, Jr. & Ada K. Wilson, *Public Construction Bid Price-Matching*, Oct. 18, 2010, North Carolina Bar Association—Construction Law Section, http://constructionlaw.ncbar.org/newsletters/changeorderoctober2010/pricebidmatching.aspx (last accessed Oct. 15, 2012).

[339] *Id.*

[340] Youens, *supra* note 333.

[341] LA. REV. STAT. ANN. § 38:2225 (2012).

[342] Youens, *supra* note 333.

[343] S.C. CODE ANN. § 11-35-1520(9)(a) (2012).

[344] City of Philadelphia Business Service Center, Local Business Entity Certification, https://business.phila.gov/Pages/LocalBusinessEntityCertification.aspx (last accessed on Oct. 15, 2012).

[345] *Id.*

[346] *Id.*

[347] *Id.*

[348] Youens, *supra* note 333.

[349] TENN. CODE ANN. § 12-4-121 (2012).

tated Section 12-4-121 gives a preference to Tennessee bidders if cost and quality are equal for purchases of goods. Preference is given to Tennessee bidders for procuring services if services meet state quality and cost requirements.[350] At the local levels, examples include the following:

Houston, Texas. Ordinance No. 2011-766 added Chapter 15, Article XI, "Hire Houston First," to the City's Municipal Code.[351] Section 15-178 provides that in the purchasing of services, including construction services, the contracting department shall grant a preference to a local business as long as the local business is within 5 percent of the lowest bidder for contracts under $100,000 or 3 percent of the lowest bidder for contracts of $100,000 or more.[352] Section 15-179 of the ordinance provides that when procuring goods or services valued at less than $50,000 that are not the subject of a blanket purchase order or contract, the City shall select vendors and service providers with a principal place of business in the local area, provided that any such vendor's bid is no more than 5 percent greater than the lowest bid.[353]

Milledgeville, Georgia. The Milledgeville City Council approved Ordinance 0-1102-001 on February 22, 2011, which amended the purchasing policies and procedures and added a section entitled "Local Vendor Preference Provisions."[354] The ordinance gives local vendors an advantage when competing for city contracts. To be considered for the preference given by this ordinance, a vendor must have had a city of Milledgeville business license for at least 1 year prior to the bid award date and possess a current business license. The local vendor must also be able to match the qualified, low, nonlocal vendor's bid within 7 percent.[355]

D. Contract-Based Tools

While state statutes and local ordinances have historically been the prominent means by which local hire programs have been implemented, legal hurdles and federal funding concerns have led to the increased use of contract-based tools as a means of instituting and establishing local hire requirements. The following section highlights how local hire requirements have been incorporated into a wide variety of contract-based tools, including first source hiring agreements, PLAs, DAs, and CBAs.

1. First Source Hiring Programs and Agreements

First source hiring programs and agreements require new businesses, new construction or remodeling, or expanding businesses to hire local residents for both the construction and permanent jobs associated with the developments.[356] These programs and agreements seek to help a city reduce its unemployment rate by keeping jobs for local residents.[357]

First source programs seek to provide employment opportunities to targeted populations by requiring or encouraging the use of a particular source for job applicants, such as job training organizations or hiring agencies, on a development or public works project.[358] Businesses that participate in such programs are required to first give notice of job openings to the first source program.[359] In practice, this means businesses are required to post all job openings to a central clearinghouse (either run by the city or a nonprofit) for a designated amount of time before opening up the position to the public.[360] The clearinghouse screens and keeps records of local residents and refers applicants with relevant and appropriate experience.[361]

These types of agreements may appear in two forms: in local ordinances or in contractual agreements with developers and community organizations that are applied on a case-by-case basis.[362] First source programs that are incorporated through local ordinances tend to be broader in scope as they focus on tying city-regulated development to local residents.[363] They seek to leverage a city's spending on contracts and projects to create more jobs for residents. Examples of local projects that may be subject to such agreements include those receiving city subsidies, projects requiring rezoning, and city contracts. Some cities monitor all development projects and require projects over a certain number of square feet or over a certain budget amount to participate in first source hiring.[364] Regardless, first source hiring agreements instituted via city ordinances result in consistent requirements for all developers.[365]

These agreements have also been incorporated into private agreements between developers and community organizations.[366] Due to their case-by-case nature, instituting first source hiring programs via PLAs, CBAs, or DAs not only allows a local government or community to put forth a more directed response to a developer's needs, but also allows for the ability to negotiate more

[350] TENN. CODE ANN. § 12-4-121 (2012).

[351] HOUSTON, TEX., CONTRACTS CODE art. XI (2011).

[352] CONTRACTS CODE art. XI, § 15-178.

[353] CONTRACTS CODE art. XI, § 15-179.

[354] Rebecca Burns, *City Promotes Local Vendor Use*, THE COLONNADE, Mar. 10, 2011, http://www.gcsunade.com/2011/03/10/city-promotes-local-vendor-use/ (last accessed Oct. 15, 2012).

[355] *Id.*

[356] Edel, *supra* note 20, at 6.

[357] *Id.* at 7.

[358] Gross, LeRoy & Janis-Aparicio, *supra* note 5.

[359] Policylink.org, *Local Hiring Strategies, supra* note 7.

[360] *Id.*

[361] *Id.*

[362] Edel, *supra* note 20, at 8.

[363] *Id.* at 9.

[364] Policylink.org, *Local Hiring Strategies, supra* note 7.

[365] Edel, *supra* note 20, at 9.

[366] *Id.*

specific terms for a particular project than may be politically possible for a citywide ordinance.

Regardless of the form in which first source hiring programs are instituted, all agreements delineate a requirement to hire local residents for either construction or permanent jobs associated with the project, new development, or both.[367] Thus, the most successful first source hiring agreements are those tailored to a locality's particular needs and situation.

As a tool to increase the hiring of local residents, this type of agreement is designed with the intention of bringing economic benefits of revitalization efforts in struggling communities to local residents.[368] Oftentimes, first source agreements use zip codes, city boundaries, or county boundaries to stipulate which residents qualify as local residents versus those who fall outside the targeted area. The goal of specifying local residential areas is to target residents close to the development efforts who are likely to benefit from a first source hiring program. First source programs provide a way for municipalities and communities to increase residents' short- and long-term employment and earning potential. Such programs have the added benefit of addressing diversity without affirmative action.[369]

While first source programs serve as a tool for municipalities and community organizations to keep jobs for local residents and help reduce local unemployment, they also face several challenges. Success is due in large part to compliance and adherence to its requirements, which in turn necessitates sufficient monitoring and enforcement. The challenge presented is that monitoring and enforcement efforts of such programs need to act not only as incentives, but also to hold developers accountable without being overly expensive to implement. First source hiring agreements range from mandatory to "friendly" programs that rely on good faith compliance.[370]

Defining and monitoring a developer's good faith effort is dictated by the agreement.[371] Definitions of good faith may include having a developer submit regularly scheduled reports of their job hires to an agreed-upon monitoring body, periodic site visits by an enforcement agency, or provisions to insure that job announcements related to the development are made available to community organizations responsible for providing employees to developers.[372]

Whether a first source program institutes mandatory or good faith compliance provisions, monitoring and enforcement serve as incentives for compliance.[373] In some city ordinance programs, local governments or regulatory agencies monitor compliance and levy penalties for noncompliance. However, sometimes ensuring compliance can be an administrative burden on local governments or organizations and they are unable to sufficiently monitor the agreements.[374]

First source programs may also face resistance from surrounding communities who are excluded by the program and fear first source hiring agreements may affect their job security and employment opportunities.[375] Labor unions may also oppose first source hiring agreements.[376]

And lastly, like other spending projects, first source hiring programs tend to flourish during economically robust periods and struggle during economic downturns.[377] Particularly, short-term construction jobs associated with first source hiring agreements may decrease or disappear when the economy is weak and residents need employment most.[378]

Job Training Programs. One issue that has a significant impact on the success of first source hiring programs is whether the applicants being referred are sufficiently trained and capable of meeting the employer's or developer's employment needs.[379] One commentator noted that a way of minimizing the enforcement problem confronting first source hire programs is to spend resources to properly train and screen residents before referring them to employers.[380] By providing prescreened employees, the designated enforcement agency does not have to spend as many resources on enforcement because employers are generally happy to comply with the program.[381]

Job training can be provided by organizations or can be achieved through on-the-job training programs such as preapprenticeship and apprenticeship programs. For example, the City of Oakland, California, acknowledges that apprenticeship "is an essential pathway to a productive career in the construction trades."[382] Its apprenticeship program is a job training system that combines on-the-job training with classroom instruction. Apprentices are considered paid employees, who earn while they are receiving instruction and training. Additionally, the City has a 15 percent Apprenticeship Program that ensures participation of Oakland apprentices on public works construction projects. The City of Oakland also offers a preapprenticeship program for those who

[367] *Id.* at 6.

[368] *Id.*

[369] *Id.* at 7.

[370] *Id.*

[371] *Id.* at 11.

[372] *Id.*

[373] *Id.*

[374] Policy Brief: *Reforming First Source: Strengthening the Link Between Economic Development and Jobs* 2 (2010), http://www.dcfpi.org/wp-content/uploads/2011/03/032311-workforce-intermediary-report3.pdf.

[375] Edel, *supra* note 20, at 12.

[376] *Id.*

[377] *Id.*

[378] *Id.* at 12.

[379] Policy Brief: *Reforming First Source: Strengthening the Link Between Economic Development and Jobs*, *supra* note 374.

[380] Edel, *supra* note 20, at 11.

[381] *Id.*

[382] City of Oakland, Local Employment Program, http://www2.oaklandnet.com/Government/o/CityAdministration/d/CP/s/LocalEmploymentApprenticeshipPrograms/index.htm (last accessed on Oct. 15, 2012).

are unsure which apprenticeship trade they would like to pursue. This program provides an overview of the skilled trades and also provides hands-on training and instruction.[383]

Portland, Oregon. In 1978, the City of Portland adopted the first citywide effort to tie economic development incentives to preferential hiring of city residents.[384] The first source program, called JobNet, targeted the residents of Portland's largely low-income communities of color. JobNet required firms wishing to take advantage of economic incentives to sign a first source agreement. Some of the common requirements in the agreement included making information on "covered positions" available exclusively to JobNet, considering job applicants from the pool of candidates referred by JobNet, and providing JobNet with quarterly summaries of its activities. The first source hiring program requirements were not overly burdensome and achieved successful results. If good faith efforts were not exercised, penalties included potential sanctions by repealing tax abatements, recalling loans, or fining the noncompliant firm $25,000 for every worker hired without a good faith effort. The program had reciprocal accountability, meaning firms could terminate a contract if JobNet failed to fulfill its end. Starting 1989, the Portland Development Commission served as the central operating agency for JobNet. The program has since consolidated into state-operated, one-stop centers.[385]

Pasadena, California. The City of Pasadena adopted an ordinance establishing a first source hire program with regard to construction projects that receive City financial assistance.[386] The ordinance requires developers receiving financial assistance to participate in the first source hiring program and enter into a first source hiring agreement with the City of Pasadena.[387] The local hiring requirement is determined on a case-by-case basis and takes into account the nature of the project, duration of the construction, and level of City financial assistance.[388]

Compliance with the first source agreement requires a minimum percentage of construction-related payroll or equivalent must be accomplished with resident employee hours either during the construction project or as part of ongoing, nontemporary employment following the completion of construction; adherence to certain procedures and schedules; recordkeeping and documentation for demonstrating compliance with the first source hiring agreement; and any other matters that the city manager may deem appropriate to include in the first source hiring agreement.[389] If a developer breaches its agreement, the City cancels its financial assistance.[390] The City's first source hire program only applies to private construction projects on a voluntary basis.[391]

Berkeley, California. In 1988, the City of Berkeley adopted its first source hiring ordinance.[392] It requires public works projects greater than $100,000 and private development of more than 7,500 sq ft to sign a first source agreement and participate in a first source hiring program. Despite these enumerated requirements, the ordinance only mandates that a good faith effort to hire locally be made. The requirements are not tied to specific numeric goals. The first source program office holds weekly orientations for Berkeley residents seeking employment. At these orientations, reading and math skills tests are offered along with help in creating a resume. In addition to these efforts, the first source office relies on referral and training services by local nonprofit and other agencies. Another unique feature of Berkeley's first source program is its emphasis on nonconstruction work. Any business that opens in a covered development, whether a restaurant or travel agent, is required to participate in the first source hiring program.[393]

2. Project Labor Agreements

In the construction industry, a PLA is a contractual agreement ensuring labor peace for a construction project by establishing key terms of hiring procedures and working conditions ahead of time.[394] The U.S. Supreme Court upheld the use of PLAs in *Building & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.* (commonly referred to as "*Boston Harbor*").[395] PLAs are generally made with reference to terms of local collective bargaining agreements in various trades.[396] While PLAs may be viewed as being at loggerheads with local hire because they are not true local hire agreements, local governments have utilized them when the focus of a local hiring program is construction jobs.[397]

PLAs can offer communities an opportunity to gain access to jobs for local residents and almost always in-

[383] *Id.*

[384] Policylink.org, *Local Hiring Strategies—Case Studies, supra* note 329.

[385] *Id.*

[386] PASADENA, CAL., BUILDING AND CONSTRUCTION, ch. 14.80.020 (2004).

[387] *Id*., ch. 14.80.040(A).

[388] *Id*., ch. 14.80.040(A).

[389] *Id*., ch. 14.80.040(B).

[390] *Id*., ch. 14.80.040(C).

[391] *Id*., ch. 14.80.050.

[392] Policylink.org, *Local Hiring Strategies—Case Studies, supra* note 329.

[393] *Id.*

[394] Community Benefits Legal Dictionary, *supra* note 3.

[395] 507 U.S. 218, 229, 232 (1993).

[396] Community Benefits Legal Dictionary, *supra* note 3.

[397] Policylink.org, *Local Hiring Strategies—Challenges*, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137633/k.1FAC/Challenges.htm (last visited Oct. 15, 2012) hereinafter cited as "Policylink.org, *Local Hiring Strategies—Challenges*."

clude a preference for local workers.[398] At a minimum, PLAs usually require contractors to use local union hiring halls to recruit workers.[399] Moreover, PLAs usually require the dispatch of resident union members who are residents of the designated targeted area. While the use of local hiring halls does not guarantee that local workers will be hired first, local hiring hall lists are comprised mostly of local labor.[400] Thus, PLAs present the advantage of guaranteeing union members work on a project in return for helping a public entity fulfill local hiring goals.[401]

However, PLAs can limit the employment opportunities for those who have been less represented in organized labor, like women and people of color.[402] Also, in smaller communities with a limited number of residents in the construction trade, a PLA may limit competition among contractors and contractors may find it difficult to fill skilled positions with qualified workers.[403]

While PLAs may not be traditional mechanisms for local hire, the case studies below showcase that some communities have used them in ways that support local hiring.

Los Angeles, California. The City of Los Angeles has entered into several PLAs.[404] Generally the terms and conditions of the PLA apply to all work performed on a specific project.[405] The PLA requires all contractors and subcontractors to be bound to the agreement, whether they are union or nonunion.[406] The agreement establishes standard work rules, prevailing wage guarantees, hours and fringe benefits payment, and dispute resolution procedures.[407] Moreover, the agreement prohibits labor strikes, work stoppages, and lockouts.[408] A key component of these PLAs is that they promote workforce development by establishing local hiring and disadvantaged worker employment opportunities.[409] The City of Los Angeles's PLAs commit signatories to exert their best effort to identify job applicants residing within the City's targeted neighborhoods.[410]

Bridgeport, Connecticut. The construction of a baseball stadium in Bridgeport, Connecticut, was governed by a PLA that required 35 percent local minority hiring.[411]

Oakland, California. The PLA governing the $1.2 billion modernization of the Port of Oakland required that a percentage of the project work hours be performed by local residents.[412] The Port of Oakland, the general contractor, and signatory unions of the Building Trades Council signed the agreement and began implementation.[413] Through 2007, a total of 3,144,954 hours had been worked, of which 31 percent was completed by local residents and 6.2 percent was completed by local resident apprentices.[414] The PLA governing the modernization of the Port of Oakland had a broad definition of local impact area.[415] However, all accounts suggest that the agreement made profound progress in getting low-income local residents into construction jobs.[416]

3. Development Agreements

DAs, also referred to as disposition and development agreements, are contracts negotiated between developers and a governmental entity.[417] They may contain detailed information about the developer's plans for a project, information regarding land use, development criteria, terms and conditions of a development project's approval, or the subsidies that the local government will provide to the project.[418] Requirements of a CBA can be included in a DA.[419] However, community benefits that include provisions for which there are clear restrictions on local governmental action, such as affirmative action programs, should not become part of

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[398] LIAM GARLAND & SUSIE SUAFAI, GETTING TO THE TABLE: A PROJECT LABOR AGREEMENT PRIMER 5 (National Economic Development and Law Center, 2002), available at http://www.policyarchive.org/handle/10207/bitstreams/5744.pdf.

[399] *Id.*

[400] *Id.*

[401] *Id.*

[402] Policylink.org, *Local Hiring Strategies—Challenges*, *supra* note 397.

[403] GARLAND & SUAFAI, *supra* note 398.

[404] *See* PLA Los Angeles Fire Station 64, http://bca.lacity.org/site/pdf/hiring/Fire Station 64 PLA.pdf (2006); PLA Harbor Replacement Station & Jail, http://bca.lacity.org/site/pdf/hiring/Harbor Signed PLA.pdf (2006); PLA ATSAC, http://bca.lacity.org/site/pdf/hiring/PLA ATSAC.pdf (2008); PLA Metro Detention Center, http://bca.lacity.org/site/pdf/hiring/Metro Detention Signed PLA.pdf (2006); PLA Police Administration Building, http://bca.lacity.org/site/pdf/hiring/PAB Signed PLA.pdf (2006); PLA Harbor Repl; PLA Avenue 45, http://bca.lacity.org/site/pdf/hiring/Avenue 45 PLA.pdf (2007).

[405] City of Los Angeles, Bureau of Contract Administration, http://bca.lacity.org/index.cfm?nxt_body=local_hiring.cfm (last accessed Oct. 15, 2012).

[406] *Id.*

[407] *Id.*

[408] *Id.*

[409] *Id.*

[410] *See* PLA Los Angeles Fire Station 64, http://bca.lacity.org/site/pdf/hiring/Fire Station 64 PLA.pdf 20 (2006).

[411] GARLAND & SUAFAI, *supra* note 398.

[412] Kathleen Mulligan-Hansel, *Making Development Work for Local Residents: Local Hire Programs and Implementation Strategies That Serve Low-Income Communities* 54 (The Partnership for Working Families, 2008), http://www.forworkingfamilies.org/sites/pwf/files/publications/0708-MakingDevelopmentWorkForLocalResidents.pdf (last accessed Feb. 7, 2013).

[413] Jason Parkin, *Constructing Meaningful Access To Work: Lessons From the Port of Oakland Project Labor Agreement*, 35 COLUM. HUM. RTS. L. REV. 375, 390 (2004).

[414] Mulligan-Hansel, *supra* note 412.

[415] *Id.* at 24.

[416] *Id.*

[417] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 9.

[418] *Id.*; Community Benefits Legal Dictionary, *supra* note 3.

[419] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 72.

the DA.[420] Both governmental entities and community groups have utilized DAs as a means of creating employment opportunities benefiting local residents.

Hollywood and Highland Project. Los Angeles's Hollywood and Highland development, a retail/theater space that is also the venue of the Academy Awards, required construction and permanent local hire programs as part of its DA.[421] The agreement between the developer and the Los Angeles Community Redevelopment Agency required the developer to use its best efforts to create 323 full-time-equivalent employment opportunities relating to the theater that was to be built.[422] Additionally the developer agreed to exert its best efforts to assure that 165 of the jobs would be available to low- and moderate-income persons. By the time the implementation period was over, 655.8 full-time-equivalent positions had been created, with 234.8 having been filled by low- and moderate-income workers.[423] The policy language dictating this DA did not specify process, just outcome requirements.[424]

4. Community Benefits Agreements

A CBA is a legally-binding contract between a coalition of community-based organizations and a developer in which community members pledge support for a development in return for benefits such as local hiring agreements, living wage jobs, and affordable housing.[425] Given the legal hurdles and federal funding issues local hire ordinances are confronted with, there has been a shift towards an increased use of CBAs as a means of instituting local hire programs and policies.

CBAs tend to be project-specific and stem primarily from the individual characteristics of the development projects to which they are attached and from the type of community coalitions involved in their negotiation.[426] The negotiation and use of CBAs first emerged in Los Angeles, California, in the late 1990s.[427] CBAs may stipulate a range of community benefits, but employment-related provisions sit at the center of these agreements.[428] Community organizations look to CBAs as a mechanism for employing residents. In negotiating CBAs, community organizations seek the inclusion of provisions stipulating job training and targeted hiring as a means of achieving these goals.

One of the most distinctive employment provisions of a CBA concerns targeted hiring.[429] Referral, recruitment, and hiring often are not announced or advertised.[430] Workers lack information about available jobs, and employers lack information about available workers.[431] Without incentives to utilize information about a community's labor supply, development employers often look beyond the impacted community for workers.[432]

Targeted hiring seeks to address such labor disconnects by providing concrete steps that ensure workers in the community are hired into development jobs.[433] For example, first source hiring provisions incorporated into a CBA can mandate that a developer and other employers associated with the project must interview job applicants referred from specified "first sources" such as community training programs.[434]

CBAs present a holistic and flexible approach to dealing with a local community's specific needs and concerns.[435] By resting on private negotiations with employers and developers rather than on public regulation, the CBA negotiation process provides a mechanism of inclusiveness by ensuring that community concerns are heard and addressed.[436]

As legally-binding contracts, CBAs ensure that the developer's promises regarding community benefits are legally enforceable by committing developers in writing to promises they make regarding their projects.[437] This aids enforcement and provides a sense of transparency, which helps the public, community groups, government officials, and the news media monitor a project's outcome. CBAs also clarify and quantify outcomes. By allowing local governments to see how many jobs were created from a development project and how many local residents benefited as a result of the agreement, CBAs provide local governments with information that demonstrates successful delivery of promised benefits.[438]

While there are many beneficial aspects to utilizing CBAs, their ability to be an effective tool for increasing local hiring can be limited. The success of a CBA can be hindered by the presence of coalition politics and how well different community coalitions work together.[439]

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[420] *Id.*

[421] Mulligan-Hansel, *supra* note 412, at 18.

[422] *Id.* at 34.

[423] *Id.* at 35.

[424] *Id.* at 23.

[425] Community Benefits Legal Dictionary, *supra* note 3; Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic and Strategy of the New Accountable Development Movement* 3 (2009), http://www.changecenter.org/research-publications/articles-from-the-diversity-conference/The Politics and Practice of Economic Justice.pdf/; Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 9.

[426] Parks & Warren, *supra* note 425, at 5.

[427] *Id.* at 6.

[428] *Id.* at 8.

[429] *Id.* at 9; Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 43.

[430] Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 9.

[431] *Id.*

[432] *Id.*

[433] *Id.*; Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 44.

[434] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 46.

[435] Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 1; Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 21.

[436] Gross, LeRoy & Janis-Aparicio, *supra* note 5.

[437] *Id.*

[438] *Id.* at 21–22.

[439] *Id.* at 22, 25.

Also, to a certain degree, negotiations cannot be effective without a certain amount of leverage or working political capital.[440] Additionally, such agreements often benefit from the negotiating community coalitions being well-financed and having the financial resources to retain attorneys and experts to assist in the negotiating process with the developer.[441] CBAs also tend to rest on politics rather than on law to monitor and enforce implementation, which can be burdensome for community organizations.[442]

Like most contracts tied to development, CBAs generally flourish under conditions of economic and urban growth.[443] They depend upon the political leverage afforded to community residents through the planning process.[444] Thus, community actors can hold up this process, but only before the development is constructed.[445] Therefore, in the context of divestment and economic decline, CBAs are likely not as effective or viable.

Los Angeles Sports and Entertainment District (Staples) Community Benefits Agreement. The landmark Staples CBA was negotiated in 2001.[446] It covered a development project adjacent to the downtown Los Angeles Staples Center Arena and contained unprecedented community benefits, ranging from living wage jobs to affordable housing to recreational parks and residential parking.[447] It specifically required mandatory participation in a first source referral system for employers in the anticipated 4 million sq ft of entertainment, hotel, service, and retail development.[448] More than 30 community organizations, unions, and affected individuals were involved in the organizing efforts in support of the Staples CBA.[449] This particular CBA is considered the first full-fledged CBA that is a stand-alone, private agreement.[450]

Los Angeles Airport (LAX) Community Benefits Agreement. The 2004 LAX CBA is significant because it was the first CBA to be negotiated with a governmental entity.[451] Additionally, at the time it was negotiated it was the largest CBA ever negotiated in terms of the benefits and resources committed to realizing those benefits.[452] The benefits obtained through this CBA campaign have been valued at half a billion dollars.[453] A coalition of 22 coalition groups negotiated this CBA with the Los Angeles World Airports, an independent government entity that operates the Los Angeles International Airport as part of its proposed modernization plan.[454] The CBA included employment benefits, including $15 million for job training, as well as environmental protections for the largely low-income communities of color that reside nearby.[455]

Because the developer was a public rather than private governmental entity, community groups pledged not to file lawsuits challenging the modernization project.[456] The agreement covers a wide array of jobs at the airport, including approximately 300 retail and food service vendors, airline employees, service contractors, baggage handlers, and other jobs on the tarmac.[457] Local hire requirements are incorporated into all new lease and contract agreements and are supposed to be applied to renewals when existing agreements expire.[458] Language of the CBA requires airport employers to attempt to fill every position by first engaging with the first source referral system.[459]

V. RECOMMENDED STEPS FOR IMPLEMENTING A LOCAL HIRE PROGRAM

A. Privileges and Immunities Clause Concerns and Recommendations

To survive a Privileges and Immunities challenge, a public agency seeking to adopt a local hire program must show that out-of-state workers or nonresidents are the cause of a discrete, identifiable problem, such as unemployment.[460] The public agency must also show that the local hire preference is directed at remedying those problems.[461]

Prior to enacting a local hire policy or program, a public entity should engage in a thorough assessment and documentation of economic development in the community.[462] A disparity or disadvantage study should be commissioned to provide evidence justifying a public

[440] *Id.* at 23.

[441] *Id.*

[442] Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 20–21.

[443] *Id.* at 21.

[444] *Id.*

[445] *Id.* at 21–22.

[446] Community Benefits Legal Dictionary, *supra* note 3, at 3; Parks & Warren, *supra* note 425, at 7; Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 14.

[447] *Id.*

[448] Mulligan-Hansel, *supra* note 412, at 41.

[449] Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 7; Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 14.

[450] Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 7.

[451] *Id.*

[452] *Id.*

[453] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 15.

[454] *Id.*; Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 7.

[455] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 16; Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 7.

[456] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 18; Community Benefits Legal Dictionary, *supra* note 3; Parks & Warren, *supra* note 425, at 7.

[457] Mulligan-Hansel, *supra* note 412, at 5.

[458] *Id.*

[459] *Id.* at 46.

[460] *Toomer*, 334 U.S. at 396.

[461] *Id.*

[462] Policylink.org, *Local Hiring Strategies, supra* note 7.

agency's discrimination against nonresidents. The local hiring goal or percent set-aside should be based on the data and assessment carried out.[463] Satisfying the high evidentiary burden may require that a significant amount of public resources be spent on gathering data. Moreover, because conditions change, and nonresidents may eventually stop posing a threat to the employment opportunities of local residents, a local hire policy or program should set up some procedural step or mechanism that would monitor later conditions, should they change.[464] Thus, public agencies ought to include sunset provisions or provisions that require subsequent re-evaluation of the need for a local hire program.

In addition to compiling sufficient evidentiary support and documentation, a public agency must also ensure that the local hire program's discrimination against nonresidents bears a close relation to the public agency's goal of decreasing local unemployment.[465] To this end, the local hire program should be limited to those residents who are unemployed and whose unemployment was caused primarily by the employment of nonresidents and not by other conditions in the state or in the nation.[466] Thus a local hire preference program should target qualified, unemployed resident workers, such as workers who have signed up for unemployment assistance, rather than targeting all residents, regardless of their qualifications or employment status.

To further ensure a local hire preference is closely related to remedying unemployment, it should establish a goal rather than a quota.[467] Quotas may bear no relation to the degree to which nonresidents constitute the "peculiar source of evil" of the unemployment that the preference seeks to remedy.[468]

The Sixth Circuit's *City of Cleveland v. Ohio*[469] decision highlighted a method by which a municipality might be able to insulate a local hiring measure against a Privileges and Immunities Clause challenge.[470] The City of Cleveland's Lewis Law mandated contractors to ensure that 20 percent of the construction project's work hours performed by Ohio residents be worked by Cleveland residents.[471] By excluding all work performed by non-Ohio residents from the definition of construction work hours, the City limited the impact of its local hire law to Ohio residents only.[472] Thus if a contractor wished to employ Ohio residents, 20 percent of the hours had to be performed by Cleveland residents.[473] However, if a contractor wished to employ all out-of-state labor, it could do so without employing any Cleveland residents.[474] In reaching its decision as to other issues, the Sixth Circuit asserted that the Lewis Law did not operate to discriminate against the employment of labor from another state.[475] Thus, when drafting a municipal local hire measure, a public agency may want to look to the City of Cleveland as an example of a successful narrowly tailored local hire law.

B. Commerce Clause Concerns and Recommendations

When states or local municipalities buy their own goods or services in the marketplace, they are deemed "market participants" rather than regulators.[476] A state or local municipality may still be able to enact a local hire program under the judicially created "market participant" exception to the Dormant Commerce Clause.[477] If a governmental actor limits its local preference policy to projects in which it is acting as a proprietor, the preference will likely withstand legal challenge on Commerce Clause grounds.

C. Equal Protection Clause Concerns and Recommendations

As there is no fundamental right to a government job, hiring preferences are generally permissible as long as there is a rational relationship between the preference policy and the harm sought to be remedied by the policy.[478] However, local hire programs should not contain a durational residency requirement, since they have been held unconstitutional under the Equal Protection Clause.[479]

Contract award preferences or requirements for the use of local MBEs or WBEs have been challenged as violating the Equal Protection Clause. In largely minority-populated cities, racially-neutral local hire programs may be susceptible to the argument that geographically targeted hiring violates the Equal Protection Clause on the basis that it serves as a proxy for race. Race-based preferences may only be used to serve a compelling state interest and the method chosen must be narrowly tailored to serve that interest.[480] To ensure that a public agency has a strong basis in evidence to support its race-based remedy against past discrimination, the local hire measure must be supported by specific and tailored statistical evidence, such as a disparity index that determines the statistical disparities in the utilization of minority-owned businesses or minority residents in an industry.[481] Pertinent anecdotal evidentiary support

[463] *Id.*

[464] Day, *supra* note 3, at 271, 293; *Hicklin*, 437 U.S. at 528.

[465] *Toomer*, 334 U.S. at 396.

[466] Day, *supra* note 3, at 271, 293; *Hicklin*, 437 U.S. at 526–27.

[467] *Id.* at 292.

[468] *Id.*

[469] 508 F.3d 827 (6th Cir. 2007).

[470] *Id.* at 848.

[471] *Id.*

[472] *Id.*

[473] *Id.*

[474] *Id.*

[475] *Id.*

[476] *See South-Central Timber Dev. Inc.*, 467 U.S. at 95–97.

[477] *See Reeves*, 447 U.S. at 437.

[478] *See McCarthy*, 424 U.S. at 647.

[479] *Dunn*, 405 U.S. at 334–35, 338, 342.

[480] *Croson*, 488 U.S. at 490–91, 493–94.

[481] *Id.* at 509.

may also be used to supplement the government's showing but is insufficient by itself to justify a racial preference.[482] A local hire program that is without substantial evidentiary support is unlikely to survive an Equal Protection Clause challenge.

In addition to evidentiary support, a race-based preference must be narrowly tailored.[483] Race-neutral alternatives should be considered and found ineffective prior to the implementation of a race-based preference.[484] The preference should provide for flexibility in terms of providing waivers of the race-based preference if good faith efforts are exerted, or it should include other means of affording individualized treatment to contractors.[485] The race-conscious preference should only include racial groups in that particular geographic area that have actually suffered discrimination in the context of a particular industry, like construction.[486]

In contrast, gender-based preferences can withstand an Equal Protection Clause challenge by establishing an "exceedingly persuasive justification" for the preference.[487] A public agency should ensure it can support its preference on the basis of statistical and anecdotal evidence. In addition to evidentiary support, gender-based preferences for local women-owned businesses must be substantially related to the public agency's goal, though the agency need not show that the preference is the least restrictive means or last resort.[488]

D. Concerns and Recommendations Pertaining to Local Hire Programs Applied to Projects Receiving Federal Funding

The Sixth Circuit's *City of Cleveland* decision made clear that while a city may mandate a certain percentage of city residents as workers on a project receiving federal money funds, such a mandate is only permissible so long as the local hire provisions do not violate federal law or regulations.[489] Given the issue federal funding may pose to the viability of a local hire program, it is recommended that a state or governmental agency consult with the funding federal agency and work together to draft bid documents that comply with federal requirements. Alternatively, for projects that are either wholly or partially funded by federal funds, public agencies may want to include an exemption that local hire programs will not be applied where such resident preferences are prohibited by federal law.[490]

[482] *Id.*

[483] *Id.* at 493–94.

[484] *Id.* at 507–08.

[485] *Id.*; *H.B. Rowe Co*., 615 F.3d at 253.

[486] *Contractors Ass'n of Eastern Pennsylvania, Inc*., 6 F.3d at 009; *Cone Corp*., 908 F.2d at 917; *H.B. Rowe Co., Inc.*, 615 F.3d at 254.

[487] *Virginia*, 518 U.S. at 524.

[488] *See Craig*, 429 U.S. at 197.

[489] 508 F.3d at 848–49.

[490] Hirsch, *supra* note 4, at 1, 10.

E. Considerations and Recommendations When Utilizing Contract-Based Tools to Implement Local Hire Programs

The needs and resources of communities and public entities vary. Regardless of which contract-based tool is utilized by a public agency or community group, there are five general recommendations that should be considered and followed to help ensure public agencies or community groups implement a local hire program that successfully channels employment opportunities to local residents.

1. General Recommendations

Tailor to Community. It is important to assess the job skills, employment history, and educational attainment of local residents and to document local needs. Assessment and documentation allow policymakers to have a realistic understanding of the number of un- and under-employed residents who are in need of employment assistance. Without a proper assessment unrealistic goals may be set and not met, which can frustrate both community members and program participants. Furthermore, an initial assessment provides public agencies and communities with the ability to craft local hire programs that target areas with the most demonstrated need and obtain evidence to support that decision. Implementing a local hire program or policy that simply states city residents must be hired may be insufficient to ensure that jobs go to those who most need employment or to withstand constitutional challenge.[491]

Build Partnerships and Consensus. In deciding which tool to pursue, there are many different considerations to take into account, such as consistency, flexibility, enforcement, long-term impact, political will, and community involvement. Ultimately, the decision rests on a community's needs and its organizing capacity.[492]

With regard to consistency, an ordinance allows companies to know and understand local hiring requirements ahead of time. Threshold requirements are applied consistently and there is no need to engage in a new campaign for each development. However, as discussed above, contract-based tools, such as DAs and CBAs, may provide for greater flexibility because they are negotiated on a case-by-case basis. As to long-term impact, ordinances are effective indefinitely, whereas contract-based tools are limited to the life of the project for which they were negotiated. However, contract-based tools do seek to incorporate provisions that speak to residential employment after construction is complete.[493]

[491] Policylink.org, *Local Hiring Strategies, supra* note 7.

[492] *Id.*

[493] *See* Mulligan-Hansel, *supra* note 412, at 41. (The Staples CBA specifically required mandatory participation in a first source referral system for employers in the anticipated 4 million sq ft of entertainment, hotel, service, and retail development.)

Additionally political will and support behind the particular tool can be critical to whether a local hire initiative succeeds. Lastly, community involvement plays an integral role in negotiating contract-based tools. In contrast, garnering community support and involvement behind ordinances may be more difficult, as they may be initially more abstract to differing community groups.[494]

Negotiate Carefully. Whatever contract-based tool is used to implement a local hire program, it must be carefully structured to make sure its requirements are clear and achievable. Some basic components of most local hire initiatives include: percent set-asides, a designated target area, thresholds, a definition of compliance, and monitoring and enforcement protocols.[495]

Percent set-asides are the percentage of total hours worked or total employees hired that must be residents of the target area. The percent set-aside should match the needs determined in the assessment process. Goals that reflect documented community need are more likely to garner support and have a better chance of withstanding lawsuits. A target area is defined as the area whose residents qualify as local hires to fulfill the set-aside. Usually it will be the city or local municipality, but it can also be a smaller area, a defined subset of a city, or a radius around a development. Thresholds are criteria used to determine which development projects will be required to participate in a local hire program. For example, thresholds can be set for the size of a development, requiring projects of a certain size or greater to participate in a city's local hire initiative, or they can be set for a particular amount a developer receives in subsidy. Thus a particular level of public financing could trigger participation in a local hire program. Sometimes particular types of public contracts or public contracts exceeding a certain amount are required to hire locally. Also, targeted hiring may be required of companies receiving certain financial incentives, such as tax abatements or deferments.[496]

Implementation. The contract should contain provisions pertaining to how the local hire program is to be implemented and its goals achieved, such as through outreach programs, job training, referral systems, or preemployment screening and services.[497]

Monitoring Compliance and Enforcement. There are generally two ways of defining whether a business is complying with a set-aside requirement. One way is if a local hire initiative mandates a firm set-aside requirement, then those who do not meet the hiring percentage lose their contract or subsidy from the public agency or suffer financial penalties. In contrast, if the set-asides are designated as a goal and compliance includes making a "good faith effort," then those that do not hire the suggested percentage of local residents may be subject to scrutiny, but will not necessarily lose their contract. Thus, those that do not meet the prescribed goals can still be found to be in compliance with the policy if they have maintained good faith efforts and followed all other requirements.[498]

Effective enforcement requires a plan for monitoring business activities. Programs may require businesses to submit weekly or monthly reports of the firm's job hires, allow for periodic site visits by the enforcement agency, or provide access to all the job announcements released by the firm. At a minimum, contractors and businesses should be required to submit payroll records and tallies of employee work hours, broken down by employee residency. Some enforcement mechanisms that can be considered to punish those who have failed to make a good effort or are not in compliance include fining a contractor or developer for every day it is out of compliance, revoking financial incentives, or revoking the contract.[499]

Even if a program has a good enforcement mechanism, public agencies and community advocates should continue to monitor the effectiveness of the program to ensure it is meeting its goals and suggest changes if improvements are necessary.[500]

2. First Source Hiring Agreement Considerations and Recommendations

When designing a first source hiring program, issues that should be addressed include assessing employment opportunities in the designated target area, assessing the local population, securing partnerships with preemployment service providers, securing partnerships with work support providers, assessing partner capacity, setting thresholds, defining compliance, determining a reasonable enforcement policy, and creating a recruitment plan.[501]

Because first source hiring agreements are tied to development and to residents affected by development in their communities, it is important to assess current and future development plans as they affect economic opportunities.[502] It is important for a public entity or community organizers to determine how many residents in the targeted area need training, how many are job-ready, and how many will likely not pass employers' preemployment screening tests.[503] Additionally, securing partnerships with preemployment service providers may be necessary because of a public agency's limited capacity or resources to train residents for first source hiring jobs. Preemployment services, such as preemployment screening, are a key component of first source hiring agreements. It is more difficult for an employer

[494] Policylink.org, *Local Hiring Strategies, supra* note 7.

[495] *Id.*

[496] *Id.*

[497] Edel, *supra* note 20, at 17–19.

[498] Policylink.org, *Local Hiring Strategies, supra* note 7.

[499] *Id.*

[500] *Id.*

[501] Edel, *supra* note 20.

[502] *Id.* at 15.

[503] *Id.* at 17.

to deny employment to well-screened applicants and still demonstrate a good faith effort.[504]

It is also recommended that public agencies and community groups looking to implement a first source hiring agreement or program consider securing partnerships with labor unions that play an active role in the referral process, outreach programs, and work support providers—those who offer both preemployment and post-employment services like resume preparation, interviewing skills and conflict resolution classes, childcare, job coaching, budget management, and advancement strategies. These services can bolster resident job retention and employability.[505]

Another important component of a successful first source hiring agreement is setting thresholds. Thresholds are criteria used to determine which development projects will be required to participate in a local hire program. For example, thresholds can be set for the size of a development, a type of project, or a project that is over a certain financial amount. Thresholds should be based on employment opportunities, resident needs and skills, and partnership capacities to refer trained and screened employees.[506] A public agency may consider the size of the development, the amount of subsidy, the type or size of a contract, or receipt of certain incentives when it comes to setting a threshold.[507]

Two of the most important components of a first source hiring agreement that need to be clearly articulated and defined are compliance and enforcement. A public agency or community group must decide between implementing a mandatory or good faith effort policy.[508] If resources are tight, and a public agency or partnership organizations lack sufficient staff to monitor compliance, a first source program based on good faith efforts by employers might be a better fit. If a public agency or community decides to utilize a good faith program, it should clearly specify what constitutes a good faith effort.[509] With regard to deciding on a monitoring and enforcement plan, local resources must be considered. Fewer resources may mean less frequent spot compliance checks.[510]

Lastly, when a public agency or community opts to utilize or implement a first source agreement or program, it should devise a recruitment plan that will be able to reach local residents and ready them for first source hiring jobs.[511] A strong recruitment plan will help residents learn of new jobs and employers learn of potential employees.

[504] *Id.*

[505] *Id.* at 18.

[506] *Id.*

[507] *Id.*; Policylink.org, *Local Hiring Strategies, supra* note 7.

[508] Edel, *supra* note 20, at 18; Policylink.org, *Local Hiring Strategies, supra* note 7.

[509] Edel, *supra* note 20, at 18.

[510] *Id.* at 19.

[511] *Id.*

3. Project Labor Agreement Considerations and Recommendations

The negotiation process is critical to ensuring a successful PLA.[512] Local hire provisions are typically written in one of two ways in a PLA. Either the parties agree that a specific number of skilled workers will be hired from the project's local area or that the project will provide significant employment opportunities for qualified residents of the project area.[513]

Whether a PLA results in benefiting the community depends on turning the words in the agreement into actual deeds.[514] The best way to ensure that the targeted low-income residents identified in the PLA enter into appropriate job training and then get project jobs is to have effective outreach and referral. To this end, a PLA should attempt to identify the use of a centralized system for conducting outreach and referral.[515] Labor unions play an active role in the referral and outreach process. Also, provisions that speak to the creation and use of job training programs such as apprenticeship programs may be something public agencies and community representatives should consider.

Also important to helping PLAs achieve local hire goals is making sure the signatories to the PLA are held accountable through an appropriate monitoring system as discussed above.[516] Thus, explicit language on sanctions for failing to attain local employment goals should be written into the PLA.

4. Development Agreement Considerations and Recommendations

Unlike a CBA, which can be enforced by the signatory community organizations, a DA relies on the public agency to hold a developer accountable.[517] As mentioned above, to be a successful mechanism for increasing local residential employment, the agreement should be tailored to local community needs. Entities and community groups utilizing DAs should be aware of who they are contracting with as local governments are limited in some respects. For example, because there are clear restrictions on local governmental action with regard to affirmative action programs, community benefits that potentially implicate such policies should not be included if contracting with a local governmental entity.[518]

5. Community Benefits Agreement Considerations and Recommendations

As with other contract-based tools, a CBA that is closely tailored to the needs of the local residents and

[512] GARLAND & SUAFAI, *supra* note 398, at 12.

[513] *Id.*

[514] *Id.* at 13.

[515] *Id.*

[516] *Id.*

[517] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 9, 72.

[518] *Id.* at 72.

community is more likely to be successful. First, given the variety of different community groups and coalitions working together to negotiate a CBA with a developer, it is recommended that these groups have adequate issue trainings so that each of the groups can become aware of the other's various priorities.[519] This helps limit coalition politics from taking over the negotiation process and allows for a more united front. Second, it is recommended that advisors be allowed to sit in during the negotiation process as observers who can advise and educate those negotiating on behalf of the community groups on technical issues.[520]

Given that successful CBAs generally result from carefully crafted organizing campaigns, it is important that the community groups involved be well organized.[521] Inadequate organizing could set poor precedents.[522] Additionally, community benefits negotiations cannot be effective without a certain amount of leverage or political capital.[523] Lastly, community groups should employ the services of an attorney to go over the fine print of the finalized CBA.

F. Enforcement

To ensure compliance with a local hire program, enforcement mechanisms must be incorporated into the program.

Financial Damages and Penalties as a Means of Achieving Compliance. The imposition of financial penalties has been a common way of seeking compliance with local hire requirements.

For example, the City of Detroit's Executive Order No. 2007-1 sets forth numerous remedies available to the City if a contractor fails to comply with its local resident workforce requirement. One remedy includes a monthly financial penalty scheme for failure to meet the Detroit resident workforce requirement, including project hours.[524] Given the percentage range of project hours worked by Detroit residents, the monthly recruitment fee assessed by the City varies. For example, if 0 percent to 29 percent of the project hours are completed by Detroit residents, a 15 percent monthly recruitment fee is assessed on the contractor. Whereas if Detroit residents account for 40 percent to 44 percent of the project work hours, then a monthly recruitment fee of 7 percent is assessed. The Executive Order also provided that the failure to meet residential workforce requirements constitutes a breach of contract and may result in the immediate termination of the contract. In addition to financial penalties, the City of Detroit's Executive Order provides that the City retains the option to bar any developer, general contractor, prime contractor, subcontractor, or lower-tier contractor that is deficient in the utilization of Detroit residents from doing business with the City of Detroit for 1 year. The Executive Order also reserves the City's right to re-bid the contract, in whole, or in part, or hire its own workforce to complete the work.[525]

The City of San Francisco's ordinance establishing its Local Hiring Policy for Construction provides the awarding department and the Office of Economic Workforce and Development the authority to assess penalties, assess damages for other violations of the terms of the Local Hire Policy, and/or to seek penalties including the debarment of the violating contractor or subcontractor.[526] With regard to penalty amounts, the ordinance specifies:

> Any contractor or subcontractor who fails to satisfy local hiring requirements of this Policy applicable to project hours performed by local residents, shall forfeit; and in, the case of any subcontractor so failing, the contractor and subcontractor shall jointly and severally forfeit to the City an amount equal to the journeyman or apprentice prevailing rate…for the primary trade used by the contractor or subcontractor on the covered project for each hour by which the contractor or subcontractor fell short of the local hiring requirement.[527]

With respect to its first source hiring program, the City of Pasadena included language in its ordinance stating that upon a developer's default or breach of its first source hiring agreement with the City, the City's "financial assistance will be cancelled."[528]

In a Buffalo, New York, PLA, failure to meet local hire employment goals resulted in contractors not receiving their "draw-down payments," which are early payments given to a contractor before the jobsite is completed.[529] As to the LAX CBA, which negotiated local hire commitments as part of the LAX modernization project, certain sections of the agreement are subject to liquidated damages, and the Los Angeles Worldwide Airport is allowed to enforce such liquidated damages provisions in cases of noncompliance.[530]

In contrast, the Port of Oakland Maritime and Aviation PLA highlights a situation where the imposition of financial sanctions depends on whether the local hire program requires mandatory compliance or good faith efforts.[531] The PLA articulated a goal that apprentices

[519] *Id.* at 26.

[520] *Id.*

[521] *Id.* at 22; Parks & Warren, *supra* note 425, at 4.

[522] Gross, LeRoy & Janis-Aparicio, *supra* note 5, at 22.

[523] *Id.* at 23.

[524] Exec. Order No. 2007-1, City of Detroit, Sept. 10, 2007.

[525] *Id.*

[526] SAN FRANCISCO, CAL., ADMINISTRATIVE CODE § 6.22(G)(7)(f)(i) (2011).

[527] *Id*., § 6.22(G)(7)(f)(ii).

[528] PASADENA, CAL., BUILDING AND CONSTRUCTION, ch. 14.80.040(C) (2004).

[529] GARLAND & SUAFAI, *supra* note 398, at 15; Each jurisdiction should ensure that the sanction chosen does not conflict with prompt payment statutes.

[530] Community Benefits Agreement: LAX Master Plan Program 33–34 (2004), http://communitybenefits.org/downloads/LAX Community Benefits Agreement.pdf (last accessed Oct. 15, 2012).

[531] Port of Oakland Maritime and Aviation Project Labor Agreement 30–31 (2004), http://www.portofoakland.com/pdf/busi_maplaAgreement.pdf (last accessed Oct. 15, 2012).

would perform up to 20 percent of the total craft work but merely states that sanctions may be imposed for failure to meet the goal or demonstrate "good faith" effort to do so.[532]

Flexibility as Means of Achieving Compliance. Utilizing a progressive penalty scheme may facilitate greater compliance as opposed to other remedies, like the termination of a contract, which makes compliance impossible.

For example, the City of Oakland's Local Employment Program establishes a 50 percent goal of the work hours for work performed by Oakland residents on public works projects.[533] This goal and the remedies available to the City in situations of noncompliance are not only incorporated in awarded contract specifications, but also in DAs signed with the City for subsidized projects.[534] When a contractor fails to comply with its local employment program requirements, the City engages in a progressive penalty system. In situations of noncompliance, the City assesses factors such as the degree of failure, the efforts undertaken to achieve the goals, and the presence or absence of repeated failure to achieve the goals in determining what level of penalty would be appropriate.[535]

When a contractor finishes a contract without meeting the Local Employment Program local hire requirements and a penalty is warranted, language written into the policy provides that the City will withhold from final payment up to 150 percent of the wages for the deficient hours of the noncomplying contractor's contract. The contractor is given 1 year to work off the hours owed by working Oakland residents on non-City projects. If at the end of 1 year all the deficient hours have not been eliminated, the contractor forfeits 150 percent of the wages for any remaining deficient hours to the City as a fine for noncompliance. If there is repeated failure to comply with the City's Local Employment Policy, the contractor may be debarred under the City's contracting policies.[536]

VI. CONCLUSION

The use of local hire programs that require the contractors working on public construction projects to hire local residents or use local businesses has garnered the interest of many public agencies and community groups seeking to increase local employment opportunities, especially during times of economic decline. However, as highlighted by this digest, the use and implementation of local hire preference laws may run afoul of constitutional provisions, specifically the Privileges and Immunities Clause, Commerce Clause, and Equal Protection Clause. In addition to constitutional concerns, the presence of federal funding on state or municipal public works projects may affect the use and enforceability of local hire laws and programs. While traditional local hire statutes, local ordinances, and regulations have been subject to successful legal challenges, they are not the only tools that may be utilized to achieve the goal of increasing the hire of local residents and boosting local employment opportunities.

This digest highlights a variety of different local hire tools, including the use of contract-based tools, such as first source hiring agreements and programs, PLAs, DAs, and CBAs. These contract-based tools are negotiated on a case-by-case basis, allowing for flexibility and the ability for local hire programs to be more narrowly tailored to the needs of a particular community. Given the many tools available and challenges they may face, this digest sets forth advisable steps and recommendations that public agencies and community groups ought to consider and take into account to ensure that their local hire program or policy is not only effective, but that it will pass judicial scrutiny.

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[532] *Id.*

[533] City of Oakland, Office of the City Administrator, 20 (2003) http://www.oaklandnet.com/government/ceda/revised/pdf/9_Attachment_I_L_SLBE.pdf (last accessed Oct. 15, 2012).

[534] *Id.* at 21.

[535] *Id.* at 23.

[536] *Id.*

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